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# The Steward's Legislative Role in Workplace Government: A Proposal for Immunity from Employer Discipline

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# The Steward's Legislative Role in Workplace Government: A Proposal for Immunity from Employer Discipline

John Nivala†

*The author develops the model of collective bargaining relationships as a form of workplace government. In light of this model, he discusses the representational and legislative role of the steward within the workplace and reviews in some depth the problems involved in balancing the steward's responsibilities against the rights of the employer. Finally, he proposes a new standard for achieving that balance patterned after a legislative immunity model.*

Even those who wish it were otherwise agree that the national collective bargaining model is workplace government.<sup>1</sup> Ideally, employers and employees in a collective bargaining relationship decide how their particular workplace unit will be governed.<sup>2</sup> The parties, through their representatives, propose, enact, apply and adapt workplace directives and rules.<sup>3</sup>

Reality, however, often falls short of the ideal when the employees' most immediate representative—the steward—confronts the employer in efforts to protect employee interests and present employee complaints.

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1. Commentators frequently refer to the model as "industrial democracy." See *infra* notes 23-58 and accompanying text. Some dispute the accuracy of this. See, e.g., Willborn, *Industrial Democracy and the National Labor Relations Act: A Preliminary Inquiry*, 25 B.C.L. REV. 725 (1984), where the author argues that "[d]espite an illustrious history, industrial democracy under the National Labor Relations Act is largely a myth" and that "[i]ndustrial democracy is not a phrase that accurately describes the NLRA model." *Id.* at 726, 742.

This article focuses on representational activity occurring under a collective bargaining agreement which the Supreme Court labels "an effort to erect a system of industrial self-government." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). The term "workplace government" implies a broader range of employment relationships than does "industrial self-government." See Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 454, 460 (1981).

2. See *infra* notes 23-58 and accompanying text.

3. *Id.*

As representatives in workplace government, stewards are expected to independently and vigorously defend employees and employee rights. However, they are subject to employer disciplinary reprisal with, at best, an uncertain prospect that the National Labor Relations Board will eventually vindicate their activity.

If collective bargaining relationships are analyzed in terms of the workplace government model, the stewards' role should be characterized as legislative and their representational activity afforded legislative immunity. That is what this article will propose. The first section sketches the workplace government model. The second section discusses the steward's important representational role and reviews the problems involved in balancing the steward's responsibilities with the employer's rights.<sup>4</sup> The final section proposes a new standard for making that balance.

## I

### THE WORKPLACE GOVERNMENT MODEL

Conflict is a fact of workplace life.<sup>5</sup> Employers and employees often have contrary goals.<sup>6</sup> The federal policy is to confine the conflict<sup>7</sup> by encouraging the parties to establish their own system for governing the workplace.<sup>8</sup> This system includes procedures for peacefully resolving

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4. See Snow & Abramson, *The Dual Role of the Union Steward: A Problem in Labor-Management Relations*, 33 SYRACUSE L. REV. 795, 800 (1982):

[T]he steward plays a uniquely dual role in the workplace. When presenting a grievance on behalf of other employees, the steward enjoys a special exemption from discipline for conduct that is technically in violation of the work rules. By the same token, however, when a steward is acting in his own interest, rather than in a representational capacity, he is regarded as an employee and not as a union official. . . . Underlying the distinction between the dual roles of a steward is the notion that management has a legitimate interest in maintaining an efficient and cooperative work force. As a member of that work force, the steward owes a duty to his or her employer. . . .

5. "The entire process of collective bargaining is structured and regulated on the assumption that '[t]he parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.'" *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 704 (1983) (quoting *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 394 (1982) (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960)). See Comment, *Selective Discipline of Union Officials After Metropolitan Edison Co. v. NLRB*, 63 B.U.L. REV. 473, 500-01 (1983).

6. Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 27 (1958).

7. Klare, *supra* note 1, at 452. See also Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 75-76 (Kairys ed. 1982) [hereinafter cited as Klare, *Critical Theory*].

8. Comment, *The Radical Potential of the Wagner Act: The Duty to Bargain Collectively*, 129 U. PA. L. REV. 1392, 1401-05 (1981). In 29 U.S.C. § 151 (1982), Congress declared that: protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

disputes.<sup>9</sup>

The National Labor Relations Act promotes workplace peace and stability through collective bargaining<sup>10</sup> which is, in part, “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement, or any question arising thereunder. . . .”<sup>11</sup> The Act encourages collective bargaining and protects the employees’ “full freedom” to choose their own representatives to settle and enforce the terms and conditions under which they will work.<sup>12</sup>

The parties are responsible for the substance of collective bargaining.<sup>13</sup> The Act brings them together and insures that they deal with each other in good faith. Within the legal limits, the parties are expected to negotiate and apply their own agreement.<sup>14</sup>

9. See notes 23-58 and accompanying text. See also Klare, *Critical Theory*, *supra* note 7, at 70.

10. *Warrior & Gulf*, 363 U.S. at 578.

11. 29 U.S.C. § 158(d) (1982).

12. 29 U.S.C. § 151 (1982).

13. The Supreme Court said the Act “is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions.” *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S. Ct. 2380, 2396 (1985). See also Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1545 (1981):

Central to the industrial pluralist view of NLRA . . . is the proposition that labor and management jointly determine workplace conditions by negotiating a collective bargaining agreement. Through private negotiations, labor and capital compromise their own self interest and arrive at mutually agreeable terms for their services. Government intervention is limited to facilitating the negotiations; it does not dictate the terms that result.

Ms. Stone does not agree with this view. See *infra* note 52. Some ascribe a less valuable role to collective bargaining:

[T]he value of participation can easily be exaggerated. For example, it is hard to take the following claims literally.

. . . [C]ollective bargaining is the most significant occasion upon which most of these workers ever participate in making social decisions about matters that are salient to their daily lives. . . . [C]ollective bargaining is intrinsically valuable as an experience in self-government. It is the mode in which employees participate in setting the terms and conditions of employment rather than simply accepting what their employer chooses to give them. . . .

The participation of the average rank and file union member is hardly the momentous occasion these claims suggests. Consequently, skepticism about the value of collective bargaining is reasonable.

Bayles, *Introduction: Labour, Law and Society*, 19 VAL. U.L. REV. 1, 8-9 (1984) (citation omitted).

14. Willborn, *supra* note 1, at 728-29:

Collective bargaining in the workplace as a self-contained representative democracy is the central metaphor of the model as articulated by the post-war liberals. Representatives of management and labor meet to negotiate a collective bargaining agreement which becomes the basic statute governing the conduct of industrial relations within the plant. . . . To ensure the proper functioning of this mini-democracy, the processes of the state—primarily the courts, but also to a lesser extent the legislature—should not intervene; the workplace as representative democracy is “an island of self-rule whose self-regulating mechanisms must not be disrupted by judicial intervention or other scrutiny by outsiders.”

See also, Klare, *supra* note 1, at 467:

The collective bargaining agreement is the cornerstone of workplace government.<sup>15</sup> It is more than a wage contract; it establishes a system by which the workplace unit is governed.<sup>16</sup> Employer and employee representatives create "a business compact, a code of relations and a treaty of peace."<sup>17</sup> The agreement is a general code governing many problems which cannot be wholly anticipated.<sup>18</sup>

The collective bargaining agreement is basic legislation, establishing a framework for governing the workplace.<sup>19</sup> It does not address every contingency; it requires "substantial implication."<sup>20</sup> It is given content by application which creates a common law of the workplace.<sup>21</sup> The

Now, within the legislative analogy, the collective bargaining contract represents a legislative compromise among legitimately conflicting interests. . . . In the collective bargaining situation it is understood that management and labor, the opposed groups from whose strategies and relative bargaining strength the "legislative compromise" results, are *private* interests. In recognition of the fact that formulation of the "legislative compromise" is a "private matter," government is supposed to play a minimal role in regulating the negotiation process as such.

15. Cox, *supra* note 6, at 30:

[T]he collective bargaining agreement, unlike most other contracts, is an instrument of government because it regulates diverse affairs of many people with conflicting interests over a substantial period of time.

16. *Id.* at 22:

[T]he collective bargaining agreement . . . is an instrument of government as well as an instrument of exchange. . . .

. . . [T]he collective agreement governs complex, many-sided relations between large numbers of people in a going concern for very substantial periods of time. "The trade agreement thus becomes, as it were, the industrial constitution of the enterprise setting forth the broad general principles upon which the relationship of employer and employee is to be conducted." (citation omitted).

17. Katz, *Minimizing Disputes Through the Adjustment of Grievances*, 12 LAW & CONTEMP. PROBS. 249, 257 (1947).

18. *Warrior & Gulf*, 363 U.S. at 578. See also Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 294 n.90 (1978):

It has been persuasively argued that the distinctive features of the collective bargaining contract have been so far elaborated that it may appropriately be said that it is not a contract at all in the traditional sense, but a "charter" or "code" establishing a system of private law for governing, and an adjudicatory mechanism for resolving disputes within the workplace; that is, that the "contractual" analysis of the collective bargaining agreement must now be superseded by a "governmental function" conception.

19. *Warrior & Gulf*, 363 U.S. at 580-81:

A collective bargaining agreement is an effort to erect a system of industrial selfgovernment. . . . Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators.

20. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 748 (1973):

The very nature of the agreement and the complex organization which it governs often require substantial implication, if only because of the impossibility of setting out in words all of the understandings and practices which the parties necessarily assume in executing it.

21. *Warrior & Gulf*, 363 U.S. at 579-80:

The collective bargaining agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.

agreement is not a static document; it is constantly applied and adapted.<sup>22</sup>

In broad strokes, that is the traditional view of the collective bargaining relationship.<sup>23</sup> Dean Shulman described collective bargaining as "the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."<sup>24</sup> The employer and employee representatives negotiate the rules and criteria governing their relationship. In doing so, they confront predicaments similar to "those encountered whenever attempt is made to legislate for the future in highly complex affairs."<sup>25</sup>

Not all problems can be anticipated or resolved during bargaining.<sup>26</sup> To deal with future problems, the parties generally establish a method, a grievance procedure, by which questions can be raised and resolved during the life of the agreement.<sup>27</sup> The agreement establishes an "autonomous rule of law" under which the parties may settle disputes over meaning or application peacefully, reasonably and in a manner consistent with the overall thrust of the agreement.<sup>28</sup> If a dispute goes to a neutral party for adjustment, his or her only function is "to administer the rule of law" established by the agreement.<sup>29</sup>

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The Court quoted the following from Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1499 (1959):

Within the sphere of collective-bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.

22. Katz, *supra* note 17, at 258:

The narrow view that a complaint need not be considered unless it involves the interpretation or application of the provisions of the agreement is the least desirable approach to the objective of adjusting grievances. . . . [I]t proceeds on the erroneous assumption that the relation is capable of precise definition in the contract. It predicates a static relationship in which every point of contact between the contracting parties can be fully reflected in words. Though this may be true of commercial relationships . . . it is not true of the dynamic relation between management and labor. . . . This community is . . . a dynamic field of adversary and co-operative group relations. The contingencies in such a relationship can no more be set forth in a contract than can the contingencies of the marital relationship. Both defy definition.

23. See Willborn, *supra* note 1, at 728-29; Stone, *supra* note 13, at 1545.

24. Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1002 (1955).

25. *Id.* at 1003.

26. *Id.* at 1003-05.

27. *Id.* at 1007.

28. *Id.*

29. *Id.* at 1016. See also Willborn, *supra* note 1, at 732 n.54 ("Labor arbitration is the process for applying rules to particular situations"); Stone, *supra* note 13, at 1559:

[A]n arbitrator, unlike a judge, is purely a creature of the parties' agreement. The "law" to be applied to a dispute is the set of rules that the parties have negotiated. . . . The arbitrator has no basis for bringing in any other rules than those provided by the parties' own agreement.

Archibald Cox compared collective bargaining to drafting a statute.<sup>30</sup> He described the resulting agreement as “basic legislation governing” employees’ workplace lives,<sup>31</sup> as “an instrument of government,” and as an “industrial constitution” establishing general standards for governing the workplace relationship.<sup>32</sup>

The agreement, or “statute” produced by collective bargaining is not complete in itself. It has “gaps and deliberate ambiguities” producing “distinctive problems of interpretation.”<sup>33</sup> Because the agreement cannot anticipate all future problems,<sup>34</sup> it requires “continual rule making” through the use of a grievance procedure.<sup>35</sup>

The grievance procedure has a law-making aspect.<sup>36</sup> The grievance, framed in reference to past events, presents the more important question of what rule should govern in the future.<sup>37</sup> The procedure allows the parties to work out the daily problems and questions occasioned by the administration of their “statute,”<sup>38</sup> creating a workplace common law.<sup>39</sup> Through their representatives, the employees participate in determining workplace conditions and workplace law. For Professor Cox, the “gov-

30. Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1 (1947):

In annual conferences, the employer and the union representing the employees, in addition to fixing wage rates, write a basic statute for the government of an industry or plant, under which they work out together through grievance procedures and arbitration the day-to-day problems of administration. By this “collective bargaining” the employee shares through his chosen representatives in fixing the conditions under which he works, and a rule of law is substituted for absolute authority.

31. Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 606 (1956).

32. Cox, *supra* note 6, at 22, 30.

33. *Id.* at 3.

34. *Id.* at 32.

35. Cox, *supra* note 31, at 606:

The collective bargaining agreement changed from a wage scale into basic legislation governing the lives of workers in the plant. Many provisions do little but establish the framework for further bargaining. Others have a generality which obviously looks to joint labor-management particularization. Deliberate ambiguities, inadvertent omissions and unforeseen contingencies require continual rule-making which, passing in the guise of interpretation, parallels the law-making of courts and administrative agencies. The claim of an individual worker, based on past events, may have wide repercussions. . . .

Professor Cox then illustrated “the extent to which the ‘law of the plant’ is created by the processing of grievances. . . .”

36. *Id.* at 615.

37. *Id.* at 625.

38. *Id.* at 653. See also Cox, *supra* note 30.

39. Cox, *supra* note 21, at 1499. Not everyone agrees with Professor Cox’s analysis. See Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483, 492 n.62 (1981), where the author commented:

[T]he union negotiates the collective bargaining agreement on behalf of its members not only in periodic contract negotiations, but also in processing individual grievances. . . . Thereby, according to Cox, the union creates a “common law” of the shop which supplements the statutory law of the collective bargaining agreement. . . . I believe this metaphor to be altogether inappropriate. The common law grows by uncoordinated litigation, initiated and controlled by individual plaintiffs. Cox turns the common law on its head in using it to argue for central coordination by the union of all grievance settlements.

ernmental nature” of the agreement “should have predominant influence in its interpretation.”<sup>40</sup> Construing an agreement is akin to interpreting and applying legislation.<sup>41</sup>

David Feller argued in his analysis of collective bargaining that its “larger significance . . . is the creation of a system of private law to govern the employer-employee relationship.”<sup>42</sup> Collective bargaining permits employees to participate in drafting and applying workplace directives rather than being subject to an employer autocracy.<sup>43</sup> The grievance procedure, which Professor Feller considers to be the “essence” of the agreement,<sup>44</sup> provides a means for adjudicating complaints that the employer has not adhered to the agreement.<sup>45</sup> The procedure restrains the employer’s authority and balances the otherwise uneven distribution of power in the workplace.<sup>46</sup>

Particularly at its initial stages, the grievance procedure is an integral part of the ongoing collective bargaining process<sup>47</sup> involving not only a resolution of the individual complaint “but also interstitial rule making” in a setting where there are “an enormous number of interstices.”<sup>48</sup> For Professor Feller, a grievance is not merely an isolated litigative episode but is a vital component of the continuous management of

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40. Cox, *supra* note 6, at 25.

41. *Id.* Professor Cox later commented:

Within the area put under the regime of collective bargaining . . . it is hardly practicable to make the contract the exclusive source of rights, remedies and duties. There are too many people, too many problems, too many unforeseeable contingencies, too many variations. . . . The logic of the governmental nature of the process of collective bargaining therefore creates a strong presumption that within the sphere of collective bargaining the parties, if they had thought about it, would have acknowledged the need and therefore the existence of a common law of the shop which furnishes the context of, and also implements, the agreement. Interpretation should give effect to this presumption arising from the very nature of a collective agreement unless the agreement states a contrary rule in pretty plain language.

*Id.* at 32.

42. Feller, *supra* note 20, at 721. See also *id.* at 737-40. For a critical analysis of Professor Feller’s article, see Stone, *supra* note 13, at 1555-57.

43. Feller, *supra* note 20, at 724. See also *id.* at 737 (“The industrial agreement serves as a device by which at least some of the rules which would otherwise be established unilaterally by management are jointly established.”).

44. *Id.* at 742.

45. *Id.* See also *id.* at 741:

Effective limitation on the arbitrary exercise of managerial power requires . . . a method by which the worker who considers himself improperly treated has recourse to an enforcement mechanism which can cause a reversal of the management action which allegedly violated the rules.

46. *Id.*

47. *Id.* at 744:

The rules established by the collective agreement are necessarily incomplete. . . . And even where the rules seem to be clear it is necessary to have play in the joints, flexibility to cope with particular situations, sometimes even contrary to rule, when unanticipated or unusual circumstances develop. . . . Finally, the parties are often unable to agree upon an enforceable standard or have left the standards indefinite as to matters of critical importance. . . .

48. *Id.* at 745.

the workplace.<sup>49</sup>

Even the new critics of American labor law acknowledge the tenacity of the workplace government model. Katherine Stone labels the model “industrial pluralism,” which “is the view that collective bargaining is self-government by management and labor.”<sup>50</sup> In this government, the parties act as a legislature, debating, compromising and enacting the standards and directives for governing the workplace.<sup>51</sup> Through their representatives, employees decide with the employer what working conditions will be.<sup>52</sup> The resulting rules are “called a statute or a constitution – the basic industrial pluralist metaphors for the collective bargaining agreement.”<sup>53</sup>

Professor Klare, another critic of the traditional model, identified six statutory goals of the first National Labor Relations Act: industrial peace, collective bargaining (for “its presumed ‘mediating’ or ‘therapeutic’ impact on industrial conflict”), bargaining power, free choice (“of workers to associate amongst themselves and to select representatives of their own choosing for collective bargaining”), underconsumption, and industrial democracy (“the most elusive aspect of the legislative purpose”).<sup>54</sup> The industrial democracy concept is “embedded in” or is an articulated goal of the Act.<sup>55</sup>

To Professor Klare, “a fundamental ambiguity” in the workplace government model was whether the employees were to participate directly in the government or indirectly through their representatives.<sup>56</sup> He concluded that the model developed in such a way as to channel employee participation in workplace government through their representatives.<sup>57</sup> The workplace was not to be governed on a town meeting basis. Instead, the employees are “a political constituency” afforded the right

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49. *Id.* at 755.

50. Stone, *supra* note 13, at 1511. For a response to Ms. Stone’s article, see Carney, *In Defense of Industrial Pluralism*, 87 DICK. L. REV. 253 (1983).

51. Stone, *supra* note 13, at 1511.

52. *Id.* at 1525. Ms. Stone does not accept the theory. She examined “the central premises of industrial pluralism” and found them “to be untenable.” *Id.* at 1566.

53. *Id.* at 1511.

54. Klare, *supra* note 18, at 281-85. Industrial peace was to be achieved “[b]y encouraging collective bargaining” which would “subdue ‘strikes and other forms of industrial strife or unrest.’” Bargaining power was to be promoted “by redressing the unequal balance of bargaining power between employers and employees.” Underconsumption was to be corrected “by increasing the earnings and purchasing power of workers.” For a critical analysis of Professor Klare’s article, see Comment, *supra* note 8.

55. Klare, *supra* note 18, at 284. See also Willborn, *supra* note 1, at 725:

Industrial democracy is a central promise of the [NLRA]. The Act, drawing from lessons learned in the political sphere, provides a quasi-democratic procedure for governance of the workplace. Representatives are elected. Rules are established by the representatives. Disputes are adjudicated according to the rules.

56. Klare, *supra* note 18, at 285 n.61.

57. *Id.*

to decide whether and by whom they wish to be represented. Having made those decisions, the employees thereafter relinquish their opportunity to directly participate in workplace government.<sup>58</sup>

This article will not try to decide whether the old school or the new school (or neither) has correctly determined how matters should be. Both schools do agree that matters are now characterized by the workplace government model.<sup>59</sup> Within that model, which describes "a special bilateral form of industrial government,"<sup>60</sup> employees, through their representatives, establish, apply and adapt a workplace code.

This article is concerned with the application and adaptation of the workplace code at the level where the employees' most immediate representative—the steward—acts on their behalf in investigating, presenting and adjusting grievances. Under the workplace government model, the grievance procedure provides "a system of *daily* industrial government"<sup>61</sup> and, as such, must be durable, stable, and adaptable.<sup>62</sup> The procedure is the heart of workplace government;<sup>63</sup> it is the means legislated by the parties for resolving problems of interpretation or administration which necessarily arise during the course of their relationship. It is the means by which the parties, acting through their representatives, share authority in the workplace.<sup>64</sup> Ideally, the collective bargaining agreement creates a government system under which daily problems are aired and resolved, contrary views expressed and accommodated, goals and needs explained and appreciated, discipline enforced and accepted.<sup>65</sup>

Although it can be argued that this model is not accurate,<sup>66</sup> it is, at least, the currently accepted one.<sup>67</sup> Within it, stewards play a vital role.

58. *Id.* at 289.

59. *See* Willborn, *supra* note 1, at 742; Stone, *supra* note 13, at 1515-16.

60. Katz, *supra* note 17, at 252.

61. *Id.*

62. *Id.* at 255.

63. *Id.* at 252.

64. *Id.* ("The process of adjusting grievances is daily confirmation of the right of workers to participate in directing the course of their lives. . . . The mere establishment of the grievance procedure is concrete and tangible evidence to the worker that management is sharing power and control with him through the union.").

65. *Id.* at 257. *See also* Willborn, *supra* note 1, at 731. ("The NLRA model of industrial democracy, in sum, was based on republicanism. Representatives of capital and labor establish rules that govern the workplace.").

66. Klare, *supra* note 7, at 82:

"Industrial democracy" in liberal collective bargaining law is a system for strengthening unnecessary hierarchy in work and for confiscating and denying the expressive, developmental potentialities of work. Rather than enhancing workers' capacity for democratic self-government, collective bargaining law seeks to reconcile workers to their own domination and to unfettered management prerogative respecting the purposes, organization and products of labor.

*See also* Beatty, *Industrial Democracy: A Liberal Law of Labour Relations*, 19 VAL. U.L. REV. 37, 58-68 (1984).

67. *Warrior & Gulf*, 363 U.S. at 581:

However, protection for their conduct is subject to the National Labor Relation Board's uncertain tests. The following section illustrates both points. The final section proposes that stewards be given more protection—in effect, be given legislative immunity—while legitimately acting as the employees' representative.

## II

### STEWARD REPRESENTATION AND EMPLOYER DISCIPLINE

Under the National Labor Relations Act, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" exercising rights protected by the Act.<sup>68</sup> These include the rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing."<sup>69</sup> It is also an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."<sup>70</sup> It is a violation of both sections to discriminate against employees for performing steward duties.<sup>71</sup>

The Supreme Court says that "otherwise legitimate" employer conduct may be an unfair labor practice if the employer is motivated by hostility to union activity.<sup>72</sup> If the motive is difficult to identify, the Court divides employer conduct into two classes:

Some conduct is so "inherently destructive of employee interests" that it carries with it a strong inference of impermissible motive. In such a situation, even if an employer comes forward with a nondiscriminatory explanation for its actions, the Board "may nevertheless draw an infer-

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[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

The analysis retains its currency. *See Allis Chalmers Corp. v. Lueck*, 105 S. Ct. 1904, 1915 (1985).

68. 29 U.S.C. § 158(a)(1) (1982).

69. 29 U.S.C. § 157 (1982). The employees' protected rights are "to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all of such activities. . . ."

70. 29 U.S.C. § 158(a)(3) (1982). *See also Cox, The "Realism" of Erie Resistor: A Response to Jackson and Heller and a Comment on the Supreme Court's View of Section 8(a)(3) of the Labor Act in the 1982 Term*, 48 ALB. L. REV. 312, 313 (1984).

71. *See, e.g., Chrysler Corporation*, 228 N.L.R.B. 486, 490 (1977). The Administrative Law Judge found that the employee "acting in his capacity as chief steward, by pressing the grievance . . . was engaged in both union and protected concerted activities" and the employer "by giving him a 30-day disciplinary layoff . . . for engaging in such conduct thereby violated Section 8(a)(1) and (3) of the Act." *See also Orleans International Inc.*, 274 N.L.R.B. No. 169 (1985) (p.3 of slip op.).

72. *Metropolitan Edison Co.*, 460 U.S. 693 (1983).

ence of improper motive from the conduct itself. . . . On the other hand, if the adverse effect of the discriminatory conduct on employee rights is “‘comparatively slight,’ an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.”<sup>73</sup>

The holding of union office is an activity protected by the Act.<sup>74</sup> An employer’s unilateral discipline of union officials would have the unwanted effect of inhibiting employees from accepting or effectively performing union office.<sup>75</sup> The Board is therefore responsible for reviewing the circumstances and making the proper adjustment between the employer’s asserted justifications for discipline and the subsequent infringement on rights protected by the Act.<sup>76</sup>

The employer in *Metropolitan Edison* disciplined union officials for failing to act in a manner which the employer felt was proper under the collective bargaining agreement.<sup>77</sup> The Board said this violated the Act; the Court agreed:

If . . . an employer could define unilaterally the actions that a union official is required to take, it would give the employer considerable leverage over the manner in which the official performs his union duties. Failure to comply with the employer’s directions would place the official’s job in jeopardy. But compliance might cause him to take actions that would diminish the respect and authority necessary to perform his job as a union official. This is the dilemma Congress sought to avoid.<sup>78</sup>

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73. *Id.* at 701-02 (citations omitted) (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967)).

74. *Id.* at 702. *See also* *United Aircraft Corp.*, 180 N.L.R.B. 278 (1969), *enforced* 440 F.2d 85 (2d Cir. 1971); *United Aircraft Corp.*, 188 N.L.R.B. 633 (1971).

75. *Metropolitan Edison*, 460 U.S. at 703. *See also* Comment, *supra* note 5, at 481 (“An employee’s right to hold union office under section 8(a)(3) would be rendered meaningless without the corresponding right to be free of selective discipline based solely on union office.”). For Board expression of this principle, *see, e.g.*, *Smith Wood Prod. Inc.*, 16 N.L.R.B. 613 (1939); *Pacific Gas Radiator Co.*, 21 N.L.R.B. 630 (1940).

76. *Metropolitan Edison*, 460 U.S. at 703. *See also* Snow & Abramson, *supra* note 4, at 833: Because the union steward serves as an important liaison between the employees and management and therefore has a dual loyalty, decision makers must ultimately engage in a balancing of policies, with a myriad of factors influencing the outcome. But, at the heart of every case . . . is the need to facilitate an essential feature of the collective bargaining process while at the same time acknowledging the right of management to establish and maintain minimum standards of employee conduct.

77. *Metropolitan Edison*, 460 U.S. at 701. *See also* Rummage, *Union Officers and Wildcat Strikes: Freedom from Discriminatory Discipline*, 4 INDUS. REL. L.J. 258 (1981); Comment, *Harsher Discipline for Union Stewards Than Rank-and-File for Participation in Illegal Strike Activity*, 56 CHI.-[ ]KENT L. REV. 1175 (1980); Comment, *Disparate Treatment of Union Stewards: The Notion of Higher Responsibilities to the Employment Contract*, 43 OHIO ST. L.J. 379 (1982); Comment, *supra* note 5.

78. *Metropolitan Edison*, 460 U.S. at 705. In an accompanying footnote, the Court said “‘no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust.’” Employers and employees are each “‘entitled to loyal representatives in the plants.’” *Id.* at n.9.

*See also* Cox, *supra* note 70, at 340; Rummage, *supra* note 77, at 284-85:

The Board affords stewards substantial protection in discharging their duties. They may not be disciplined for energetically performing steward duties.<sup>79</sup> They may not be disciplined for refusing to accede to certain employer requests.<sup>80</sup> They may not be disciplined for filing grievances<sup>81</sup> even if eventually settled or dismissed.<sup>82</sup> Stewards may not be given more onerous work or a burdensome schedule or an unwanted transfer because they are stewards.<sup>83</sup>

Stewards may represent employees.<sup>84</sup> They may even counsel employees not to follow an employer directive if the counseling occurs while the steward is representing the employees<sup>85</sup> or presenting a grievance.<sup>86</sup>

In the day-to-day conduct of their jobs, union officers cannot be said to feel a greater duty to their employers by virtue of their status. After all, they owe their offices to the union and its members; their duty and loyalty extend to those people. . . . The law long imposed upon the agent "a duty to his principal to act *solely* for the benefit of the principal in all matters connected with his agency." In short, the special duties of union officers are owed to the union, not the employer.

79. See, e.g., *Firestone Tire & Rubber Co.*, 219 N.L.R.B. 492 (1975), *enf. denied*, 539 F.2d 1335 (4th Cir. 1976) (where the steward discharged for falsifying his employment application by failing to list two previous employers: one had fired him for poor attendance, the other let him resign before being fired for falsifying medical records). The union refused to take the steward's grievance over the discharge to arbitration. However, the Board majority found that the steward's discharge was due to his steward activities and that his falsification of his employment application was but a pretext to conceal the true reason. *Id.* at 501. See also *American Bldg. Components Co.*, 203 N.L.R.B. 811, 816 (1973); *State Mechanical Constr. Inc.*, 191 N.L.R.B. 393, 396 (1971); *United Lumber Co.*, 173 N.L.R.B. 1475, 1478 (1969); *Star Expansion Indus. Corp.*, 164 N.L.R.B. 563, 566 (1967), *enforced*, 409 F.2d 150 (D.C. Cir. 1969); *Monsanto Chem. Co.*, 130 N.L.R.B. 1097, 1104 (1961).

80. See, e.g., *Morrison-Knudsen Co.*, 213 N.L.R.B. 280, 291 (1974), *enforced*, 90 L.R.R.M. (BNA) 3074 (8th Cir. 1975); *H.E. Wiese Inc.*, 169 N.L.R.B. 1042, 1045 (1968); *Restonaire Bedding Co.*, 164 N.L.R.B. 729, 730-31 (1967).

81. See, e.g., *Boston Mutual Life Ins. Co.*, 259 N.L.R.B. 1270, 1281 (1982), *enforced*, 692 F.2d 169 (1st Cir. 1982); *Davis Co.*, 249 N.L.R.B. 488, 493 (1980); *Melones Contractors*, 241 N.L.R.B. 14, 20 (1979); *Great Falls White Truck Co.*, 183 N.L.R.B. 539, 542 (1970); *Assonet Trucking Co.*, 156 N.L.R.B. 350, 370 (1965); *Elco Corp.*, 155 N.L.R.B. 796, 802 (1965), *enforced*, 378 F.2d 62 (9th Cir. 1967).

82. See, e.g., *Socony Mobil Oil Co.*, 153 N.L.R.B. 1244, 1247-48 (1965), *modified*, 357 F.2d 622 (2d Cir. 1966); *Top Notch Mfg. Co.*, 145 N.L.R.B. 429, 432 (1963).

83. See, e.g., *Metropolitan Life Ins. Co.*, 258 N.L.R.B. 61, 65 (1981); *Pullman Trailmobile*, 249 N.L.R.B. 430, 431 (1980); *Illinois Inst. of Technology*, 201 N.L.R.B. 941, 942 (1973); *Bert's Foodland Inc.*, 201 N.L.R.B. 43, 45 (1973); *Tan-Tar-A Resort*, 198 N.L.R.B. 1104, 1110 (1972); *Hyster Co.*, 195 N.L.R.B. 84, 92 (1972), *enforced*, 83 L.R.R.M. (BNA) 2091 (7th Cir. 1973); *Lenkurt Elec. Co.*, 182 N.L.R.B. 510, 512 (1970), *enforced*, 459 F.2d 635 (9th Cir. 1972).

84. See, e.g., *Northwest Drayage Co.*, 201 N.L.R.B. 749, 759 (1973), *enforced*, 85 L.R.R.M. (BNA) 2303 (8th Cir. 1973).

85. See, e.g., *Illinois Bell Tel. Co.*, 255 N.L.R.B. 380 (1981); *Jones Dairy Farm*, 245 N.L.R.B. 1109, 1122 (1979). In the former case, the steward and another union official protested a change in the overtime policy by preparing and distributing leaflets telling employees "You do not have to work overtime that is not on the schedule. . . . Many people are refusing [overtime]. We think they are right . . . . If management asks you to work overtime you have the right to refuse." *Illinois Bell*, 255 N.L.R.B. at 381. The Board said "There is no doubt that [the employees] had a protected right to protest [the employer's] alleged change in overtime policies." *Id.* It said:

[The leaflets] basically protested [the employer's] alleged change in overtime policy as contrary to past practice and the contract. Whether or not the protesters were correct in their

Stewards may meet with employees even if the meeting arguably violates a no-strike clause.<sup>87</sup>

Stewards are not required to conform to the employer's model of behavior.<sup>88</sup> The steward in *Howard Foundry Co.*<sup>89</sup> was discharged for allegedly creating a disturbance among employees and threatening a foreman. The discharge raised "the question of the limits of propriety within which a senior shop steward may function without engaging in . . . unwarranted interference with the operational functions of management. . . ."<sup>90</sup> It also raised a question of whether he created unprotected unrest among employees "by indulging in inflammatory and abusive statements directed to individuals in management. . . ."<sup>91</sup>

Noting that the steward was "neither a polished speaker nor a trained negotiator," the Board said his conduct could not "be measured by the same standards of surface niceties that are applied to officials of management in general. . . ."<sup>92</sup> What the steward did, in his own style, was "insist on fair adherence to the pay standards of the contract, fair treatment of the workers in general, maintenance of reasonable conditions in which to work and the avoidance of abnormal and unnecessary occupational hazards for all the workers. . . ."<sup>93</sup>

The steward was "zealous and forthright."<sup>94</sup> Although he verbally abused the plant superintendent, his language was "in the venacular of

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opinion is not relevant; the activity is protected. Although the leaflet states in one part that [the union officials] believed that employees who refused overtime were right, any implication that they encouraged employees to refuse mandatory overtime is dispelled by the unequivocal statement that employees who are ordered to work overtime should demand to see their union representatives.

*Id.*

86. See, e.g., *Pacific Coast Utils. Serv., Inc.*, 238 N.L.R.B. 599, 608 (1978), *enforced*, 638 F.2d 73 (9th Cir. 1980); *General Motors Corp.*, 233 N.L.R.B. 47 (1977), *enforced*, 616 F.2d 967 (6th Cir. 1980). In the latter case, the employer curtailed a grievance meeting and asked the steward to order the grieving employee back to work. The steward refused and was suspended. The Board concluded that under the circumstances:

[The steward] was acting reasonably in processing [the employee's] grievance and in refusing to direct him back to work before he had finished. It was not [the steward's] role or responsibility to order [the employee] to return to work—that responsibility must remain with management. [The steward] had no affirmative obligations in this regard. His only obligation was to refrain from any action which would be in direct contravention of [the employer's] orders to [the employee].

*Id.* at 48.

87. See, e.g., *Lustrelon, Inc.*, 242 N.L.R.B. 561, 570 (1979); *Metal Blast, Inc.*, 139 N.L.R.B. 540, 545 (1962), *enforced*, 324 F.2d 602 (6th Cir. 1963).

88. See, e.g., *Artley Inc.*, 260 N.L.R.B. 833, 839 (1982), *enforced*, 112 L.R.R.M. (BNA) 2752 (3d Cir. 1983); *Star Expansion Indus. Corp.*, 164 N.L.R.B. 563, 565 (1967), *enforced*, 409 F.2d 150 (D.C. Cir. 1969).

89. 59 N.L.R.B. 60 (1944).

90. *Id.* at 72.

91. *Id.*

92. *Id.* at 72-73.

93. *Id.* at 73.

94. *Id.*

the foundry” used by supervisors as well as employees.<sup>95</sup> While not condoning “slanderous, abusive, intemperate of [sic] inflammatory statements,” the Board measured them “by the circumstances, and the nature of the speaker and his audience.”<sup>96</sup>

A concurring opinion focused on the broader implications: Square dealing and considerateness assume in these days ever increasing significance. Let resentment and resistance, especially on the part of first line supervision, commonly the first level of grievance adjustment, obstruct the peaceful machinery set up by agreement and the whole purpose of collective bargaining is likely to fail.<sup>97</sup>

The concurrence said the employer’s attitude “made impossible the achievement of mutual respect and cooperation between employee and management. . . .”<sup>98</sup>

Concerns about “resentment and resistance” were also present in *Crown Central Petroleum Co.*,<sup>99</sup> involving two stewards disciplined for remarks made to a supervisor during a grievance meeting. The employer said the remarks undercut the supervisor’s authority over employees.

The Board said that “the master-servant relationship does not carry over into a grievance meeting. . . .”<sup>100</sup> The meeting involves “only company advocates . . . and union advocates . . . engaged as opposing parties in litigation.”<sup>101</sup> Under these circumstances the supervisor “was subject to the same free exchange of remarks as any other company representative, and his supervisory authority was not involved.”<sup>102</sup> A contrary holding “would improperly interfere with such a free exchange. . . .”<sup>103</sup>

However, a steward is not completely insulated from employer control.<sup>104</sup> In *Wilson & Co.*,<sup>105</sup> the Board upheld the discharge of an employee for insubordination while performing steward duties. The steward’s conduct “exceeded all necessary, reasonable and proper bounds.”<sup>106</sup> The totality of his conduct “constituted persistent and extensive insubordination,” unprotected by the Act.<sup>107</sup> The steward “as-

95. *Id.*

96. *Id.*

97. *Id.* at 62.

98. *Id.*

99. 177 N.L.R.B. 322 (1969).

100. *Id.* at 323 n.4.

101. *Id.*

102. *Id.*

103. *Id.* See also *Hawaiian Hauling Serv. Ltd.*, 219 N.L.R.B. 765, 765-66 (1975), *enforced*, 545 F.2d 674 (9th Cir. 1976).

104. See, e.g., *Hydra-Tool Co.*, 222 N.L.R.B. 1113, 1121 (1976) (“When he became shop steward, [the employee] was not thereby relieved of the normal requirements of discipline and productivity applicable to other employees. But on the other hand [the employer] may not use the circumstance of his stewardship to impose discrimination upon him.”).

105. 43 N.L.R.B. 804 (1942).

106. *Id.* at 820.

107. *Id.*

sumed a loud and defiant attitude, at times gave vent to abusive remarks, flouted [supervisory] authority, refused to return to work when ordered, and without permission and contrary to instructions left the shop during working hours. . . ."<sup>108</sup>

Stewards, like legislators, represent a constituency. Whether elected or appointed, they represent the employees and the union.<sup>109</sup> An employer cannot unilaterally interfere with the employees'<sup>110</sup> or union's right to select their representatives,<sup>111</sup> even if the employer believes it has a business justification for acting.

The employer in *Cameron Iron Works, Inc.*<sup>112</sup> required a steward to either resign his office or be demoted claiming that the steward duties interfered with the employee's work. The Board, noting that the employer had not tried less drastic means of accommodating the steward, ordered reinstatement of the steward.<sup>113</sup> While the employer had "a legitimate interest in the effective utilization of working time," the employees had "a legitimate statutory interest in the designation of their representatives for purposes of collective bargaining."<sup>114</sup>

The Board highly values the latter interest. The employees' rights cannot be diminished unless there is "compelling evidence that other considerations require such limitations."<sup>115</sup> Even if limits are required, only those which "appear to be reasonable and necessary to accommodate those considerations can be permitted."<sup>116</sup> When the facts show that "much less restrictive measures could have preserved the freedom of employees and their Union to designate a steward," those measures must be used.<sup>117</sup>

The "less restrictive measures" standard has also been applied in determining when stewards can investigate or present grievances.<sup>118</sup>

108. *Id.* at 819. Compare *Marmon Transmotive*, 219 N.L.R.B. 492 (1975), *modified*, 551 F.2d 733 (6th Cir. 1977); *Pate Mfg. Co.*, 197 N.L.R.B. 793 (1972).

109. See *Rummage*, *supra* note 77, at 262, 284-85, and Comment, *Selective Discipline*, *supra* note 5, at 500-01.

110. See, e.g., *Columbus Foundries Inc.*, 229 N.L.R.B. 34 (1977), *enforced*, 106 L.R.R.M. (BNA) 2603 (5th Cir. 1978); *Will & Baumer Candle Co.*, 206 N.L.R.B. 772 n.1 (1973) ("[The employer] was not privileged to dictate its employees' choice of a spokesman."); *National Can Corp.*, 200 N.L.R.B. 1116 (1972).

111. See, e.g., *Kay Fries Inc.*, 265 N.L.R.B. 1077 (1982), *enforced*, 115 L.R.R.M. (BNA) 2904 (3d Cir. 1983); *Chicago Magnesium Castings Co.*, 240 N.L.R.B. 400 (1979), *enforced*, 612 F.2d 1028 (7th Cir. 1980); *Illinois Concrete Pipe Co.*, 203 N.L.R.B. 223 (1973), *enforced*, 87 L.R.R.M. (BNA) 3276 (7th Cir. 1974).

112. 194 N.L.R.B. 168 (1971), *enforced*, 464 F.2d 609 (5th Cir. 1972). See also *Freezer Queen Foods Inc.*, 215 N.L.R.B. 638 (1974).

113. See, e.g., 194 N.L.R.B. at 168.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. An employer cannot use complaints about a steward's use of working time as a pretext for

Early on, the Board said stewards did not have a right under the Act to perform union duties during working time. Such a right had to be found in the collective bargaining agreement.<sup>119</sup> The Board later allowed an employer to make and enforce reasonable rules restricting steward grievance activity during working time.<sup>120</sup> If the agreement did not provide opportunities to investigate or present grievances during working time, the employer was free on its own to limit the activity.<sup>121</sup>

The employer in *Market Basket*<sup>122</sup> attempted to stop a steward from conducting "witch hunts" on company time and from holding meetings in the parking lot at any time. By trying to dictate the manner in which the steward performed his duties, the employer interfered with protected activity.<sup>123</sup> However the employer could limit the steward's activity during working time.<sup>124</sup> The Board considered the limitation "presumptively valid" unless the employer was unlawfully motivated.<sup>125</sup>

Despite his supervisor's contrary instructions, the steward in *Northside Electric Co.*<sup>126</sup> felt free to leave his work at any time to handle union business. He was discharged for neglecting his work. In upholding the discharge, the Board said "only by consent of the employer may an employee perform the duties of shop steward on company time if it interferes with duties to be performed for such employer."<sup>127</sup> The employer could "restrict the activities being performed on behalf of the union during working hours . . . unless such restrictions are imposed to discourage membership in a labor organization."<sup>128</sup>

In *Cameron Iron Works*,<sup>129</sup> the Board retreated from this position, applying it only when the agreement specifically limited the time which could be spent on union activity.<sup>130</sup> Without such a limit and without

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discipline if the underlying motive is retaliation for engaging in protected activity. See, e.g., *Schiavone Constr. Co.*, 229 N.L.R.B. 515 (1977); *United Aircraft Corp.*, 179 N.L.R.B. 935 (1969), *enforced*, 440 F.2d 85 (2d Cir. 1971).

119. *Borg-Warner Corp.*, 102 N.L.R.B. 1223 (1953). See also *Cameron Iron Works*, 194 N.L.R.B. 168 (1971) (Member Kennedy, dissenting), *enforced*, 464 F.2d 609 (5th Cir. 1972).

120. *Russell Packing Co.*, 133 N.L.R.B. 194 (1961).

121. *Id.* at 196.

122. 144 N.L.R.B. 1462 (1963).

123. *Id.* at 1463.

124. *Id.*

125. *Id.* at n.2.

126. 151 N.L.R.B. 34, *enforced sub nom.* *Poindexter v. NLRB*, 353 F.2d 524 (4th Cir. 1965), *cert. denied*, 385 U.S. 857 (1966). The Fourth Circuit said the steward "treated his union position as a justification for neglecting his work" and engaged in "persistent neglect of his duty to the employer." 353 F.2d at 525-26.

127. *Id.* at 42.

128. *Id.*

129. 194 N.L.R.B. 168 (1971), *enforced*, 464 F.2d 609 (5th Cir. 1972).

130. *Id.* See also *L & L Painting Co., Inc.*, 174 N.L.R.B. 911 (1969), where the Board said:

[I]t was the custom and practice for job stewards to police the job during working hours . . . and [the steward] was instructed to this extent by an official of [the local union]. . . . Considering the expanse of the . . . project and the type of violations engaged in by the

trying to accommodate the union, the employer "could not arbitrarily restrict the right of employees and their Union to be represented by the man they desire to have represent them."<sup>131</sup> If the facts "indicate that much less restrictive measures could have preserved the freedom of employees and their union to designate a steward," the employer is required to explore them with the union.<sup>132</sup>

The collective bargaining agreement in *Northeast Constructors*<sup>133</sup> required stewards to work in addition to performing union business. The employer refused to rehire a union steward in retaliation for the time he had spent on steward duties during working hours.<sup>134</sup> The agreement did not specifically limit the working time stewards were allowed in carrying out their duties.<sup>135</sup> As in *Cameron*, the Board felt there was room for accommodating the employer's interests and the steward's responsibilities.<sup>136</sup> The employer was obligated to discuss the problem with the union in an effort to reach an accommodation on the use of working time for steward duties.<sup>137</sup>

An employer cannot discipline stewards because it believes they have not properly performed union duties as opposed to workplace duties.<sup>138</sup> Stewards are the employees' "immediate contact with their statutory representative and for many purposes . . . [are] the Union *vis-a-vis* the employees as well as the employer, both within or without a collec-

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[employer], it would have been patently futile for [the steward] to have inspected the job at any time other than during working hours. Accordingly we find that [the steward] was not prohibited, either specifically or inferentially, by the contract from performing these aspects of his job steward's duties on the [employer's] time.

131. 194 N.L.R.B. at 168.

132. *Id.*

133. 198 N.L.R.B. 846 (1972).

134. *Id.* at 847-50. See also *Moore's Cafeteria Servs. Inc.*, 271 N.L.R.B. No. 42 (1984); *Southwestern Bell Tel. Co.*, 239 N.L.R.B. 419 (1978). Compare *Rappaport Exhibits Inc.*, 224 N.L.R.B. 1558 (1976).

135. 198 N.L.R.B. at 851.

136. *Id.*

137. *Id.* at 846 n.1. See *Snow & Abramson*, *supra* note 4, at 817:

[T]he decision-maker must balance the legitimate need of management for an efficient employee against the steward's right to engage in protected activity. The cases suggest that no right is absolute, even when specified in the bargaining agreement. Stewards do not have any special privilege to ignore work, or to perform at substandard levels, simply because they are union officials. Nevertheless, they cannot be disciplined for spending too much time on permitted grievance activity.

Compare *Max Factor & Co.*, 239 N.L.R.B. 804 (1978), *enforced*, 640 F.2d 197 (9th Cir. 1980); *Wright, Schuchart, Harbor/Boecon/Bovee, Crail/Genri*, 236 N.L.R.B. 780 (1978); *Lenkurt Elec. Co.*, 182 N.L.R.B. 510, *enforced*, 459 F.2d 635 (9th Cir. 1972), with *Columbus Coated Fabrics*, 202 N.L.R.B. 932 (1973); *F.J. Buckner Corp.*, 163 N.L.R.B. 81 (1967), *enforced*, 401 F.2d 910 (9th Cir. 1968).

138. See, e.g., *Hamilton Die Cast Co. Inc.*, 254 N.L.R.B. 949 (1981); *General Motors Corp., Delco Air Conditioning Div.*, 244 N.L.R.B. 729 (1979), *enforcement denied*, 649 F.2d 390 (6th Cir. 1981); *Wilson Freight Co.*, 234 N.L.R.B. 844 (1978), *enforcement denied*, 604 F.2d 712 (1st Cir. 1979).

tive bargaining agreement.”<sup>139</sup> The steward “is the statutory bargaining representative on front line labor relations and as such his very office embodies the essence of protected concerted activity.”<sup>140</sup> Being a steward is also a function of union membership. If employers could discipline stewards for improperly performing their duties, employees would be discouraged from holding the office or performing its duties.<sup>141</sup>

The merits of a grievance do not affect the steward’s protection.<sup>142</sup> The employer in *Boespflug Construction Co.* terminated a steward for filing what it considered to be an excessive number of petty grievances.<sup>143</sup> Even if the grievances were petty, the Board said that alone would not establish that the steward had been improperly fulfilling the duties of his office.<sup>144</sup> The employer could not “lawfully discharge a steward solely because he files petty grievances.”<sup>145</sup>

The steward in *Nissan Motor Corp.* was suspended in part for being “disrespectful” and for filing grievances.<sup>146</sup> The Board said the employer’s action was “punitive in nature and petulant in origin.”<sup>147</sup> The employer “arrogated to itself the presumed authority to judge the validity of grievance content and to retaliate against the individual most associated with those it found dismaying.”<sup>148</sup> The “disrespectful” allegation was based on no more than “routine conversational bruising.”<sup>149</sup>

The Board goes far to protect stewards who engage in “heated confrontations” during grievance processing.<sup>150</sup> While it does not “condone

139. *General Motors Corp.*, 218 N.L.R.B. 472, 477 (1975), enforced without opinion, 535 F.2d 1246 (3d Cir. 1976). See also Comment, *Selective Discipline*, supra note 5, at 494:

Often, the goals of union leadership and employers are more congruent than divergent: both are fulfilled by preserving industrial peace and achieving institutional goals. Individual employees, however, have more personal and immediate concerns. Union officials closest to the employees, usually the shop steward, must try to bridge the gap between the union hierarchy and the employees. . . .

140. 218 N.L.R.B. at 477.

141. *Id.* See also *United States Postal Serv. (Boston, MA)*, 258 N.L.R.B. 1414 (1981):

[The employer] was addressing [the employee] as union steward and was issuing orders to [the employee] concerning [the employee’s] functioning in that capacity. . . . [I]t is not within the purview of the authority of an employer to dictate the manner in which a union carries out its duties. . . . [B]y . . . threatening [the employee’s] employment status in connection with his performance as a union steward, [the employer] coerced . . . and interfered with his section 7 rights to engage or not engage in union activities as a steward.

See also *Robins Eng’rs & Constructors*, 271 N.L.R.B. 915 (1984).

142. See cases cited supra note 82.

143. 113 N.L.R.B. 330, 336 (1955).

144. *Id.*

145. *Id.*

146. 226 N.L.R.B. 397, 399 (1976).

147. *Id.* at 401.

148. *Id.*

149. *Id.*

150. See, e.g., *Kay Fries Inc.*, 265 N.L.R.B. 1077 (1982), enforced without opinion, 722 F.2d 732 (3d Cir. 1983); *Detroit Edison Co.*, 241 N.L.R.B. 1086 (1979). See also *Snow & Abramson*, supra note 4, at 823:

In as much as it is possible to summarize the Board’s approach to steward discipline cases,

slanderous, abusive, intemperate or inflammatory statements," the Board evaluates "such statements . . . by the circumstances and the nature of the speaker and his audience."<sup>151</sup> It is the employer's "responsibility . . . to appraise such conduct in its true setting."<sup>152</sup>

The circumstances may protect language which would otherwise be legitimate grounds for discipline. The steward in *Thor Power Tool Co.*<sup>153</sup> was informally discussing a grievance with the plant superintendent when the latter's "hostile attitude" caused the meeting to break up. As he left, the steward called the superintendent a "horse's ass."<sup>154</sup> He was immediately discharged.

The steward's "characterization of [the superintendent] was protected activity because it was part of the *res gestae* of the grievance discussion."<sup>155</sup> The "final explosion which resulted in [the steward's] discharge was the culmination and product of the grievance discussion rather than the result of [the steward's] comment."<sup>156</sup> The superintendent's action was "part and parcel of [his] anger" caused by the steward's "vigorous participation in the grievance proceeding" which is "clearly a protected activity."<sup>157</sup>

During a grievance meeting, the two disciplined stewards in *Crown Central Petroleum* accused their supervisor "of lying . . . or at least intimidated as much."<sup>158</sup> The Board would not impose its own standards to determine whether the statements were proper or defensible.<sup>159</sup> The issue was "whether these statements were so opprobrious as to remove them from the otherwise protected nature of the grievance meeting."<sup>160</sup>

The Board applied a standard established in *Bettcher Manufacturing Corp.*<sup>161</sup> During a collective bargaining session, an employee "intimated that his employer was a 'liar' and 'juggled' his books to convey a false picture of the company's financial status."<sup>162</sup> In finding that the employee was engaged in protected activity, the Board said:

A frank, and not always complimentary, exchange of views must be

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one can conclude that the Board will strive to vindicate the steward's conduct as long as it is somehow related to "protected concerted activity." Moreover, . . . the NLRB cases appear to be the most liberal in protecting the conduct of the union steward.

151. *Howard Foundry Co.*, 59 N.L.R.B. 60, 73 (1944). *See, e.g., Davis Co.*, 249 N.L.R.B. 488 (1980).

152. 59 N.L.R.B. at 73.

153. 148 N.L.R.B. 1379 (1964), *enforced*, 351 F.2d 584 (7th Cir. 1965).

154. *Id.* at 1380.

155. *Id.*

156. *Id.* at 1380-81.

157. *Id.* at 1381. The Board noted that the steward "was provoked by [the superintendent's] unjustified language during the grievance discussion." *Id.* at n.2.

158. 177 N.L.R.B. 322 (1969).

159. *Id.* at 322.

160. *Id.*

161. 76 N.L.R.B. 526 (1948).

162. *Id.* at 533.

expected and permitted the negotiators if collective bargaining is to be natural rather than stilted. The negotiators must be free not only to put forth demands and counterdemands, but also to debate and challenge the statements of one another without censorship, even if, in the course of debate, the veracity of one of the participants occasionally is brought into question.

If an employer were free to discharge an individual employee because he resented a statement made by the employee during a bargaining conference, either one of two undesirable results would follow: collective bargaining would cease to be between equals (an employee having no parallel method of retaliation) or employees would hesitate ever to participate personally in bargaining negotiations, leaving such matters entirely to their representatives.<sup>163</sup>

The *Crown Central* Board applied these comments to grievance meetings involving employer and employee representatives.<sup>164</sup>

The Board seeks to secure a full measure of steward freedom in the presentation of grievances.<sup>165</sup> The employer in *Red Top, Inc.*<sup>166</sup> discharged three stewards for insubordination, disrespect and disloyalty. The trial examiner found that the stewards called the supervisor a liar, threatened to hit him, banged on his desk, and wrote to the supervisor's superiors about their grievances.<sup>167</sup>

Even if the employees acted inappropriately, the Board did not believe their conduct was necessarily unprotected.<sup>168</sup> In support, it quoted this *Bettcher* language:

A line exists beyond which an employee may not with impunity go, but that line must be drawn "between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance . . . or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service."<sup>169</sup>

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163. *Id.* at 527. Compare *E.A. Laboratories Inc.*, 88 N.L.R.B. 673, 674-75 (1950), where the "verbal attacks" were not made in "a bargaining conference, or on a picket line where lower standards of etiquette generally prevail" and were not "the result of any particular provocative acts on the [employer's] part."

164. 177 N.L.R.B. at 323.

165. See *Snow & Abramson*, *supra* note 4, at 819:

A grievance discussion is, for the most part, inherently antagonistic. As a zealous advocate for fellow employees, the union steward is naturally prone to excited outbursts. Profane or threatening language made in the heat of anger must be attributed to the intensity of the confrontation. Any insubordinate conduct on the part of the steward is usually temporary and occurs in the pursuit of permissible grievance activity. Nevertheless a steward cannot exceed the bounds of acceptable advocacy.

See, e.g., *Will & Baumer Candle Co.*, 206 N.L.R.B. 772 (1973); *May Dept. Stores Co.*, 220 N.L.R.B. 1096 (1975), *enforced*, 555 F.2d 1338 (6th Cir. 1977).

166. 185 N.L.R.B. 989 (1970).

167. *Id.* at 994-95 (these facts were disputed at trial).

168. *Id.* at 990.

169. *Id.* at 989-90 (quoting *NLRB v. Illinois Tool Works*, 153 F.2d 811, 815 (7th Cir. 1946)). See, e.g., *Union Fork and Hoe Co.*, 241 N.L.R.B. 907, 908 (1979).

The "flagrant cases" are the ones where the employee's rights "may be subordinated to the employer's right to maintain appropriate order and discipline. However, an employer [cannot] sit in absolute judgment on the propriety of all remarks made by his employees in the course of protected activity."<sup>170</sup> This would make employees "hesitate to play an active role in union activity or negotiations."<sup>171</sup> If the alleged "improper conduct is closely intertwined with protected activity, the protection is not lost unless the impropriety is egregious."<sup>172</sup>

The "alleged misconduct" of the three *Red Top* stewards "was of a minor nature, and was the result of understandable anger in the course of disagreements over matters under discussion. . . . [T]he incidents were an integral part of the protected concerted activity and hence not valid reason for lawful discharge."<sup>173</sup>

The "improper conduct" at issue in *Socony Mobil Oil Co.*<sup>174</sup> involved a "wrongful" accusation processed in an "improper manner" with an insolent attitude.<sup>175</sup> The steward was a seaman on the employer's ship. While the Board acknowledged that "long established maritime practice may require certain amenities of a seaman toward his superiors . . . these requirements . . . must be balanced against" the steward's rights while presenting a grievance.<sup>176</sup> His misconduct was not so "flagrant, violent, serious or extreme as to render him unfit for further service."<sup>177</sup>

An employer's concept of the proper "amenities" cannot be used to stifle stewards. The steward's termination in *Magnetics International Inc.*<sup>178</sup> was justified in part by saying she "should have been an example to other employees rather than one who 'willingly' violated shop rules."<sup>179</sup> The "violations" occurred while the steward was acting as an employee representative.<sup>180</sup> Although the steward and employer officials had an "otherwise heated confrontation over employee grievance handling," the employer "offered no credible evidence beyond its own conclusionary characterizations that [the steward's] conduct of her protected union activities was so flagrant, serious or extensive as to render her unfit for further employment."<sup>181</sup>

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170. *Id.* at 990.

171. *Id.*

172. *Id.*

173. *Id.* See also *Max Factor & Co.*, 239 N.L.R.B. 804 (1978), *enforced*, 640 F.2d 197 (9th Cir. 1980).

174. 153 N.L.R.B. 1244, 1245 (1965) *modified*, 357 F.2d 662 (2nd Cir. 1966).

175. *Id.*

176. *Id.* at 1246.

177. *Id.* at 1247.

178. 254 N.L.R.B. 520 (1981), *enforced*, 699 F.2d 806 (6th Cir. 1983).

179. *Id.* at 521.

180. *Id.*

181. *Id.*

These standards apply even if the steward is preparing for a grievance. The steward in *American Telephone and Telegraph*<sup>182</sup> sought information regarding a change in the employer's organization. Dissatisfied with the information provided, the steward complained to the manager. The meeting degenerated. The steward called the information "garbage" and made "some unkind comments concerning [the manager's] intelligence."<sup>183</sup> The steward received an official warning.

The Board said that during the entire incident the steward "was acting as union agent in pursuit of what she regarded as a need for further data."<sup>184</sup> This was "a legitimate union objective and she was . . . engaging in protected concerted activity."<sup>185</sup> The "shouting and . . . critical comments" were "the very means—albeit, we agree, a rude one—by which she presented her complaint and thus was part of the *res gestae* of the protected activity."<sup>186</sup>

Although rude, the steward's conduct was not "so flagrant or so opprobrious as to place it beyond the protection of the Act."<sup>187</sup> The Board had "long recognized that the disagreements which arise in the collective-bargaining setting sometimes tend to provoke commentary which may be less than mannerly, and that the use of strong language in the course of protected activities supplies no legal justification for disciplining or threatening to discipline an employee acting in a representative capacity, except in the most flagrant or egregious of cases."<sup>188</sup> While the steward's conduct "was less than genteel," it was not so bad as to be beyond protection.<sup>189</sup> In support, the Board noted that the conduct did not cause any significant interference with production.<sup>190</sup>

Stewards acting as representatives are afforded similar protection when acting in a non-grievance setting. In *Richmond Tank Car Co.*,<sup>191</sup> the steward was discharged for making abusive and derogatory com-

182. 211 N.L.R.B. 782 (1974), *enforced*, 521 F.2d 1159 (2nd Cir. 1975).

183. *Id.* at 782-83.

184. *Id.* at 783.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 783 n.1. *See also* C.W. Sweeney & Co., 258 N.L.R.B. 721, 723 (1981), where the employer argued "that [the steward's] conduct was so opprobrious as to lose the protections of the Act and warrant the discharge." The Board, however, disagreed, finding that:

The record lacks any evidence that this altercation in any manner disrupted [the employer's] production or even that any employees heard [the steward's] statement that she would not leave the premises unless she was removed bodily. . . . [The steward] was not loud or abusive. . . . The absence of such evidence leads us to the conclusion that [the steward's] efforts . . . were not so outrageous or disruptive as to remove her from the protections of the Act.

*See also* OMC Stern Drive, 253 N.L.R.B. 486 (1980), *enforced*, 676 F.2d 698 (7th Cir. 1982) (holding that the employee's conduct was not so flagrant as to lose the protections of the Act).

191. 264 N.L.R.B. 174 (1982), *enforcement denied*, 721 F.2d 499 (5th Cir. 1983).

ments to the plant superintendent when the employees walked off the job in protest of safety conditions. He said the superintendent did "not know how to run the Plant" and was "not worth a shit."<sup>192</sup> An arbitrator upheld the discharge.

The Board said the arbitrator failed "to evaluate [the steward's] language as part of the *res gestae* of concerted protected activity."<sup>193</sup> The profanity "was not so egregious or flagrant" as to be unprotected.<sup>194</sup> The remarks were prompted by the supervisor's "unresponsiveness to the employee's well founded concerns about the safety conditions."<sup>195</sup> In addition, the steward's language was similar to that often heard in the workplace.<sup>196</sup> It "could hardly have been 'so violent or of such serious nature as to render [the steward] unfit for further service'" since the employer waited about a month to discharge him.<sup>197</sup>

The "*res gestae*" concept extends this protection beyond a grievance meeting. The steward in *United States Postal Service (Columbus, OH)*<sup>198</sup> was investigating an employee's potential grievance when he "uttered a single spontaneous obscene remark" calling his supervisor a "stupid ass."<sup>199</sup> This was "provoked at least in part by the failure of the supervisor . . . to provide an immediate and direct answer to [the steward's] inquiries."<sup>200</sup> The case was "comparable to prior cases wherein obscenities uttered by an employee as part of the *res gestae* of concerted protected activity were not so flagrant or egregious as to remove the protection of the Act and warrant the employee's discipline."<sup>201</sup>

The steward in *Union Fork & Hoe Co.*<sup>202</sup> had been discharged for insubordination during a grievance meeting. An arbitrator held the steward "to a higher degree of proper conduct within the plant because the other employees look up to the steward."<sup>203</sup> The arbitrator said mis-

192. *Id.* at 175.

193. *Id.*

194. *Id.* at 176. *See also* Consumers Power Co., 245 N.L.R.B. 183 184, 188 (1979), where the steward's parting comment to his supervisor ("I don't give a fuck who you call") was not so opprobrious as to be unprotected.

195. 264 N.L.R.B. at 176.

196. *Id.*

197. *Id.* *Richmond* uses the term "serious nature" where the actual *Bettcher* language is "serious character."

198. 250 N.L.R.B. 4 (1980).

199. *Id.* at 5.

200. *Id.* at 4 n.1.

201. *Id.* The Board distinguished *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979):

The employee [in *Atlantic Steel*] had asked his foreman a question about overtime assignments, had received an answer, and had then uttered an obscene characterization of the foreman or his answer as the foreman walked away. . . . [T]he majority emphasized that his obscenity was unprovoked and was made on the production floor during his working time. . . .

202. 241 N.L.R.B. 907 (1979).

203. *Id.* at 907.

conduct “is much more visible when a Union steward becomes engaged in such conduct because the eyes of the entire department are upon the steward.”<sup>204</sup>

The Board refused to defer to this decision. The arbitrator’s standard conflicted with the policies of the Board and the Act.<sup>205</sup> The Board was particularly concerned because the discipline was imposed for activities undertaken in the processing of a grievance.<sup>206</sup> The Board explained that “the policy of not deferring to arbitration awards where the punishment of overzealous stewards is at issue insures that the grievance and arbitration machinery is used effectively in the manner in which it was intended.”<sup>207</sup>

This “machinery” can operate even before a formal grievance is filed.<sup>208</sup> For example, the steward in *Consumers Power Co.* had been disciplined for using company time to informally investigate a disagreement which had not yet become a formal grievance.<sup>209</sup> The Board said that an employee could not be disciplined for his efforts to settle a dispute informally if such efforts did not detract from the employee’s performance of his duties to his employer.<sup>210</sup>

In the Board’s view, the steward was disciplined for activities which amounted to administration of the grievance procedure. The Board felt that while not improperly motivated, the employer’s discipline of a steward “for pursuing his responsibilit[ies], . . . of necessity, has a significant effect upon employees and is inherently destructive of important employee rights.”<sup>211</sup> The employer’s act threatened “to reduce all of [the employees’] protected activity to an exercise in futility.”<sup>212</sup>

Post-grievance as well as pre-grievance activity can be protected. The employees disciplined in *United States Postal Service (San Angelo, TX)*<sup>213</sup> presented a grievance to their immediate supervisor and a manager. After discussing the grievance, the manager ended the meeting and ordered the employees back to work. The employees, continuing the discussion, followed the supervisor and manager onto the work floor.

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204. *Id.*

205. *Id.* at 908. See *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955) (where the Board said it would defer to an arbitration award if the parties agreed to be bound by it, the underlying proceedings were fair and regular and the results were not contrary to the Act). See also *Peck, A Proposal to End NLRB Deferral to the Arbitration Process*, 60 WASH. L. REV. 355 (1985); *Snow & Abramson, supra* note 4, at 836-38; *Stone, supra* note 13, at 1533-35.

206. *Union Fork*, 241 N.L.R.B. at 908.

207. *Id.* (citing *Clara Barton Terrace Convalescent Center*, 225 N.L.R.B. 1028, 1029 (1976)).

208. See, e.g., *Adam Loos Boiler Works Co.*, 176 N.L.R.B. 949 (1969), *enforced*, 435 F.2d 707 (6th Cir. 1970); *F.J. Buckner Corp.*, 163 N.L.R.B. 81 (1967), *enforced*, 401 F.2d 910 (9th Cir. 1968).

209. 245 N.L.R.B. 183, 186 (1979).

210. *Id.* at 186-87.

211. *Id.* at 187.

212. *Id.*

213. 251 N.L.R.B. 252 (1980), *enforced*, 652 F.2d 409 (5th Cir. 1981).

The manager repeated the work order; the employees continued their discussion. When the manager began to repeat the order, the employees returned to work. They were later given warning letters.<sup>214</sup>

The Board stated that permitting the employer "to bifurcate the conduct in issue . . . 'would enable an employer by its own whim to define the nature of protected activity.'"<sup>215</sup> Grievance participants are afforded "some latitude" because "it is unrealistic to believe that the participants involved in a heated discussion can check their emotions at the drop of a hat."<sup>216</sup> The employees "merely continue to dispute verbally the merits of a grievance after tempers had run high on both sides and after they were told to return to work."<sup>217</sup> The Board held that this conduct was not sufficiently egregious to remove the employees from the protection of the Act.<sup>218</sup>

*Cook Paint and Varnish Co.*<sup>219</sup> concerned the confidentiality of employee/steward consultations. An employee's grievance was processed up to arbitration. About two weeks before the hearing, the employer questioned the steward about the underlying incident and about the steward's conversations with the employee. The employer also asked the steward to produce notes regarding the grievance.

The Board felt that this interview was "an unwarranted infringement on protected union activity."<sup>220</sup> The steward's involvement in the incident arose solely "as a result of his status as union steward."<sup>221</sup> His participation in the grievance "was a direct result of the execution of his duties as union steward in representing" the employee.<sup>222</sup> The employer

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214. *Id.*

215. *Id.* at 252.

216. *Id.*

217. *Id.*

218. *Id.* In dissent, Member Penello found that:

[the employees' behavior after the manager] terminated the grievance meeting went beyond verbal insubordination since they engaged in overt acts by defying two . . . orders that they return to work. Furthermore, . . . their second refusal . . . occurred in a production area during working time when other employees were likely to be present. Under these circumstances, their overt acts of defiance would clearly tend to undermine [the employer's] right to maintain order and respect. Thus their failure to return to work when ordered to do so was not protected even though they continued to discuss their grievance.

See also *Container Corporation of America*, 255 N.L.R.B. 1404, 1405 (1981), where the Board found:

[the supervisor's] termination of the grievance meeting was in accordance with . . . the contract and that [the steward] did not have the right to extend the meeting until he was ready to end it on his own terms. . . . Thus, once the meeting was closed [the steward] was not at liberty to flout [the supervisor's] orders to return to work. . . . Nor was he immune from possible disciplinary action for his refusals to follow [the supervisor's] orders because he had been pursuing a grievance just moments before and wanted to argue the issue further. . . .

219. 258 N.L.R.B. 1230 (1981).

220. *Id.* at 1231.

221. *Id.*

222. *Id.* at 1232.

sought information and material obtained “by the steward in the course of fulfilling his representational functions.”<sup>223</sup>

The employee/steward “consultation . . . constitutes protected activity in one of its purest forms.”<sup>224</sup> The employer’s conduct would reduce the employees’ “willingness to candidly discuss matters with their chosen statutory representatives.”<sup>225</sup> Stewards would be constrained in their representation of employees if they could be forced, under the threat of discipline, to disclose the substance of their investigations or consultations.<sup>226</sup> The Board asserted that the employer’s conduct could “cast a chilling effect over all . . . employees and their stewards who seek to candidly communicate with each other over matters involving potential or actual discipline.”<sup>227</sup>

Stewards are protected in their writing as well as their speech. In *Clara Barton Terrace Convalescent Center*,<sup>228</sup> the steward had been discharged because a grievance letter which she had written was characterized as “abrupt or officious in tone and contained an inappropriate reference to giving [a supervisor] a reprimand.”<sup>229</sup> The arbitrator upheld the discharge.

The Board refused to defer, explaining that the arbitrator “did not deal at all with the statutory protection we accord employees who pursue such legitimate grievances even if the terms of such grievances are couched in imprecise or improper language.”<sup>230</sup> Deferral was “especially inappropriate” in cases where discipline was imposed in reprisal for grievance activities.<sup>231</sup> Were the Board to defer to the arbitrator’s award it would “discourage a grievant’s recourse to the grievance and arbitration procedure for fear that an inartfully or overzealously worded grievance might subject him to reprisal from his employer.”<sup>232</sup>

There are however limits to steward representational activity even during grievance processing.<sup>233</sup> Steward conduct may not exceed “neces-

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223. *Id.* The Board “firmly” rejected “the concept that an employer . . . may unilaterally determine the relevance of the information and its entitlement to obtain the information and then set about enforcing its determination through threats of discipline.” *Id.* at n.9.

224. *Id.* at 1232.

225. *Id.*

226. *Id.*

227. *Id.*

228. 225 N.L.R.B. 1028 (1976).

229. *Id.* at 1028.

230. *Id.* (citing *Crown Cent. Petroleum Corp.*, 177 N.L.R.B. 322 (1969), *enforced*, 430 F.2d 724 (5th Cir. 1970)).

231. *Id.* at 1029.

232. *Id.*

233. *See, e.g.*, *Champion Parts Rebuilders Inc.*, 260 N.L.R.B. 731 & n.3 (1982), *modified*, 717 F.2d 845 (3d Cir. 1983) (where the grievance raised matters which did not have “any direct or reasonably foreseeable impact upon terms and conditions of employment of unit employees”; thus, the “grievance filing activity was not protected.”).

sary, reasonable and proper bounds.”<sup>234</sup> Stewards may not persist in processing a grievance in a manner contrary to the agreement or workplace rules.<sup>235</sup> They must obey reasonable employer directions even when handling grievances.<sup>236</sup> They are not insulated from discipline for refusing to obey proper work orders.<sup>237</sup>

Dissatisfied with the results of a grievance meeting, the steward in *Calmos Combining Co.*<sup>238</sup> continued a loud, disruptive conversation on the workfloor. The plant manager told the steward to stop shouting and encouraged him to take the grievance to the next level. The steward continued to shout and dared the manager to fire him. The manager obliged.

The Board found the steward’s “refusal . . . to stop shouting and his abusive language” unprotected.<sup>239</sup> The steward’s conduct was only “tangentially” related to the grievance.<sup>240</sup> His “continued intransigence was not a part of the *res gestae* of the grievance discussion.”<sup>241</sup> The manager’s order was “reasonable and lawful” and “should have been obeyed.”<sup>242</sup> The steward’s “refusal to do so was not related to [his] protected processing of the grievance.”<sup>243</sup>

The steward in *Charles Meyers & Co.*<sup>244</sup> had been warned—in writing by the employer, orally by her union associates—to moderate her conduct during grievances. At her last meeting, she berated the plant superintendent in a “loud and vituperative” manner which “led employees in the area to stop work.”<sup>245</sup> She said the superintendent “should have his mouth bashed in, that it was high time someone stepped on him

234. See, e.g., *Schwebel Baking Co.*, 249 N.L.R.B. 35 (1980); *Wilson & Co.*, 43 N.L.R.B. 804 (1942).

235. See, e.g., *Container Corp. of Am.*, 255 N.L.R.B. 1404 (1981); *Swank Constr. Co.*, 239 N.L.R.B. 844 (1978); *Chevrolet Div. of General Motors Corp.*, 161 N.L.R.B. 438 (1966); *Crucible Steel Castings Co.*, 101 N.L.R.B. 494 (1952). Cf. *OMC Stern Drive*, 253 N.L.R.B. 486 (1980), *enforced*, 667 F.2d 1275 (7th Cir. 1982), where the Board said:

[E]mployees who pursue in good faith an alleged mistaken interpretation of a collective bargaining agreement are nonetheless still engaged in protected activity. . . . We believe that [the employee’s] activities were good-faith attempts to process grievances, and that the alleged violations of the grievance procedure were, at most, technical, and certainly were not so clearly transgressions as to remove said grievance activity from the protections of the Act.

*Id.* at n.2.

236. Compare, e.g., *Chevrolet Div. of General Motors Corp.*, 161 N.L.R.B. 438 (1966), with *New Process Gear Div. of Chrysler Corp.*, 245 N.L.R.B. 554 (1979).

237. See, e.g., *Mead Corp.*, 275 N.L.R.B. No. 52 (1985); *Jos. Schlitz Brewing Co.*, 240 N.L.R.B. 710 (1978); *Associated Retailers’ Suburban Delivery Co.*, 181 N.L.R.B. 456 (1970); *National Cash Register Co.*, 169 N.L.R.B. 639 (1968).

238. 184 N.L.R.B. 914 (1970).

239. *Id.* at 914.

240. *Id.*

241. *Id.* at 915.

242. *Id.*

243. *Id.*

244. 190 N.L.R.B. 448 (1971).

245. *Id.* at 448.

(or his toes), and that she was going to do it.”<sup>246</sup> The “tirade concluded with her repeatedly daring the superintendent to discharge her.”<sup>247</sup> The superintendent did and the Board upheld his action since the employee’s conduct had carried her beyond the Act’s protection.<sup>248</sup>

Although stewards are given considerable latitude in discharging their duties, the latitude is not an unfettered license. The steward in *New Process Gear*<sup>249</sup> was lawfully suspended for insubordination during the processing of a grievance. He ignored established procedures. He insisted on discussing the grievance after the supervisor clearly indicated the meeting was over. He pursued the supervisor and engaged in loud, abusive conduct. He refused to leave the supervisor alone or allow him to do his work. He threatened to continue the conduct for the entire shift.

Stewards are expected to follow established procedures and respect legitimate authority. In *Rickel Home Centers*,<sup>250</sup> the steward received an employee complaint and started to leave his work station to discuss it with the manager.<sup>251</sup> The steward’s immediate supervisor reminded him that the grievance procedure required an initial discussion with the supervisor. The steward “refused to explain or even describe the problem” to the supervisor.<sup>252</sup> He left his work station without authority and refused to explain why he left. This constituted “insubordination unpro-

246. *Id.*

247. *Id.*

248. *Id.* at 449.

249. 249 N.L.R.B. 1102 (1980).

250. 262 N.L.R.B. 731 (1982).

251. *Id.* Compare United States Postal Serv. (Richmond, CA), 252 N.L.R.B. 624 (1980) *enforcement denied on other grounds*, 671 F.2d 503 (9th Cir. 1981); Chatham Mfg. Co., 221 N.L.R.B. 760, 767 (1975), *enforced*, 92 L.R.R.M.(BNA) 3711 (4th Cir. 1976); Stergiou Painting and Sheeting Co., 213 N.L.R.B. 314, 318-19 (1974).

In the *Postal Service* case, the steward was suspended for leaving her work station and attempting to intervene in a supervisor/employee discussion. The steward acted at the employees’ request. The supervisor told her that “this is not union business.” 252 N.L.R.B. at 624. The steward ignored several orders to return to work, “insisting that she had a right to remain with the employees, telling them that they did not have to speak with [their supervisor] without the presence of their union steward.” *Id.* The Board found:

no insubordination here. We find, instead, a conscious intent to preclude [the steward] from carrying out an official, and protected, union function . . . without engaging in conduct which can be reasonably and objectively viewed as insubordinate. Certainly, [the steward’s] conduct involved neither a refusal to work nor a disruption of work production, and her conduct did not exceed “acceptable bounds” and lose the protection of the Act. . . . [The supervisor] provoked the confrontation by his unwarranted interference with [the steward’s] protected right to investigate the grievances.

*Id.* at 624-25. The Board also noted that:

[The steward’s] efforts on behalf of the employees—though persistent and adamant—were not so injurious or disruptive as to be unprotected. [The steward’s] actions, at worst, were insufficiently serious to deprive an employee performing his or her duties as a steward of the protection of the Act.

*Id.* at n.4.

252. 262 N.L.R.B. at 731.

tected by the Act and for which his status as union steward provided no immunity."<sup>253</sup>

Insubordinate behavior similarly gave the employer in *United States Postal Service (New Haven, CT)*<sup>254</sup> a defensible reason for disciplining a steward.<sup>255</sup> The steward conducted a "loud and insulting" discussion, refused a request "to contain himself" and "caused fellow employees to stop work, albeit briefly, thus disrupting operations."<sup>256</sup> Recognizing the employer's right "to maintain order and respect in the conduct of its business," the Board said the steward's "derogation of a reasonable order to quiet down by continuing to shout on the work floor, hurling personal insults and disrupting operations constituted unprotected activity."<sup>257</sup>

It is the Board's function to strike the proper balance to determine when a steward's conduct is protected. However, standards such as "animal exuberance vs. violent or serious misconduct" or "routine conversational bruising vs. opprobrious statements" or "protected zeal vs. unprotected insubordination" or tests such as "less restrictive measures" produce confused, contradictory decisions.<sup>258</sup> To the extent that a line can be drawn from them, it has been characterized as "fuzzy and often tenuous."<sup>259</sup> The following section will propose a clearer, broader line.

### III

#### THE UNION STEWARD AND LEGISLATIVE IMMUNITY

The proposal in this section follows the workplace government model. The parties to a collective bargaining agreement devise a general code for workplace government which must be continuously applied and adapted.<sup>260</sup> This application and adaptation, which is a part of collective bargaining, gives content to the code and establishes prospective rules

253. *Id.*

254. 268 N.L.R.B. 274 (1983).

255. *Id.* at 275.

256. *Id.*

257. *Id.* *Cf.* The Goodyear Tire & Rubber Co., 271 N.L.R.B. 343, 346 (1984).

258. Snow & Abramson, *supra* note 4, at 808:

The line between a steward acting as steward and a steward acting as employee is often not readily discernible. Moreover, once it has been decided that a steward was acting in his representative capacity, the decision-maker must still determine whether the steward went "too far" in playing that role. Discipline imposed on a steward for insubordinate conduct will be upheld where the steward's conduct was "clearly outrageous." But, there are many shades of gray between "clearly outrageous" and "clearly acceptable."

259. *Id.* at 797. See also Bierman, *Judge Posner and the NLRB: Implications for Labor Law Reform*, 69 MINN. L. REV. 881, 896-904 (1985), where the author discusses three reasons for the Board's shifting standards: (1) "[T]he NLRA is sufficiently vague to allow differing and even contradictory interpretations," *Id.* at 896; (2) "[T]he Board's development and application of tests on a case-by-case basis," *Id.* at 900; and (3) "[T]he changing political composition of the NLRB." *Id.* at 902.

260. See Katz, *supra* note 17, at 261:

But collective bargaining does not end with the signing of the agreement. In a real sense, it is but the point of departure from which the parties may proceed to establish a sound

and procedures.<sup>261</sup> It is a legislative or lawmaking process.

The parties should work out their own problems, establish their own system for adjusting disputes.<sup>262</sup> This may be the collective bargaining agreement's most significant function—providing a process by which employees, through their representatives, participate in daily workplace government. Through their representatives, they adjust disputes affecting the terms and conditions of their employment.<sup>263</sup>

The parties responsible for creating a code for workplace government are equally responsible for applying and adapting that code. An agreement will usually include a procedure for raising and resolving such questions.<sup>264</sup> The preparation, presentation and resolution of these questions is more than a single adversarial episode. The parties' interpretation and application results in a continuous administration of their code and is an integral part of workplace government. It is an element of collective bargaining. It is lawmaking.<sup>265</sup>

Although employees have a right to individually present grievances, federal policy clearly prefers having their representative do this.<sup>266</sup> This is a key to equalizing workplace power.<sup>267</sup> Stewards are the employees' most direct contact with the employer.<sup>268</sup> Stewards are watchdogs,<sup>269</sup>

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relationship. The assurance of continuous harmonious relationships thereafter depends upon the day-to-day operation.

See also Stone, *supra* note 13, at 1548-49.

261. *Warrior & Gulf*, *supra* note 1, 363 U.S. at 581. See also Klare, *supra* note 1, at 463.

262. See Willborn, *supra* note 1, at 731: "Every political system, including the 'industrial democracy' established by the NLRA, consists of procedures for establishing substantive rules, the substantive rules themselves, and procedures for determining the applicability of substantive rules to particular situations."

263. *Warrior & Gulf*, *supra* note 1, 363 U.S. at 581. For a different perspective, see Klare, *supra* note 1, at 461-62:

The theoretical purpose of modeling collective bargaining on the legislative paradigm is to conceive it as a system that performs the managerial function of constantly generating and revising the operating rules of the workplace while at the same time appearing to be a procedure to which the governed, the employees, have consented.

264. See Snow & Abramson, *supra* note 4, at 795 n.2.

265. Katz, *supra* note 17, at 252: "The provisions governing grievance procedures in collective bargaining agreements are vital governmental processes. . . ." See also Stone, *supra* note 13, at 1574:

Under industrial pluralism . . . the collective bargaining agreement is termed a system of government. The notion of government by consent of the governed implies that each side has accepted not only the particular terms of the agreement but also the entire network of procedures that surrounds the creation of the agreement, its enforcement and its renegotiation. The particular rules that are generated by these processes are thought to express both sides' consent to every aspect of the labor-management relationship. The entire panoply of workplace regulations and decisions . . . is implicitly within the union's consent. Thus virtually all management decisions are legitimated by the theory.

266. 29 U.S.C. § 159(a). See Katz, *supra* note 17, at 254-55.

267. See Cox, *Rights Under a Labor Agreement*, *supra* note 31, at 625-27; Cox, *supra* note 6, at 24-25. See also Lynd, *supra* note 39, at 492-94, which criticizes Cox' view as "one-sided."

268. Yaffe, *The Protected Rights of the Union Steward*, 23 *INDUS. & LAB. REL. REV.* 483 (1970): The steward's "primary role is that of protector of employee rights and interests and in this role he must serve as the advocate for aggrieved employees in confrontations with management and its supervisory representatives."

insuring that the agreement and workplace common law are followed.<sup>270</sup> They advocate employee interests. They work for a fair administration of the agreement.<sup>271</sup>

As the immediate employee representatives, stewards experience substantial workplace conflict.<sup>272</sup> They are subject to pressure from above and below. The employer expects them to be reasonable and cooperative, sometimes servilely so. The employees expect them to be loyal and supportive, sometimes blindly so.

The constituency's demands and the employer's expectations generate tension. Stewards are equals and employees—equals when representing the constituency, employees otherwise. Stewards need freedom to represent without fear of reprisal. However, the employer has a right to control the work force—including stewards who, despite their office, remain employees. The tension is generated by the steward's roles as both representative and employee, and by the employer's obligation to bargain and right to maintain control.

As important as the grievance process is and as important as stewards are to that process, limits can be imposed. The employer does not have to accept violence, abusive language, interruption of production, refusals to work, or refusals to obey lawful rules and procedures.<sup>273</sup> Stewards cannot presume to invade employer prerogatives, use their status to shirk work or refuse to follow work orders. They may not insult a supe-

269. Snow & Abramson, *supra* note 4, at 795:

As a front line troubleshooter, the union steward plays a vital role in effecting peaceful union-management relations through the grievance process. In addition, the steward often serves as watchdog to ensure that management personnel abide by the terms of the collective bargaining agreement.

270. See, e.g., Carillon House Nursing Home, 268 N.L.R.B. 589 (1984); Rikal West, Inc., 266 N.L.R.B. 551, *enforced*, 721 F.2d 402 (1st Cir. 1983); Drury Constr. Co., 260 N.L.R.B. 721 (1982); Paddock-Pleas Co., 251 N.L.R.B. 591 (1980).

271. See, e.g., McGuire and Hester, 268 N.L.R.B. 265 (1983); Humes Electric Inc., 263 N.L.R.B. 1238 (1982), *enforced*, 715 F.2d 468 (9th Cir. 1983); Pittsburgh Press Co., 234 N.L.R.B. 408 (1978).

272. See Yaffe, *supra* note 270, at 483 ("The union steward, because of the nature of his responsibilities, often becomes a source of conflict in the union-management relationship."); Comment, *Harsher Discipline*, *supra* note 77, at 1193:

[A] shop steward . . . is the union representative who comes in closest contact with the members. His major functions are to handle grievances . . . and to advise the rank-and-file concerning the terms of their employment contract. For these reasons, the steward experiences the full impact of potential conflict and tension in the work area. Thus, the position can be a burdensome one if taken seriously since any problem within the department becomes a problem for the steward. (Citations omitted).

273. See, e.g., Anaconda Aluminum Co., 197 N.L.R.B. 336, 345 (1972) (insubordination); A. Borchman & Sons Co., 174 N.L.R.B. 203, n.1 (1969) (same); National Cash Register Co., 169 N.L.R.B. 639 (1968) ("gross" infraction of company rules); Rivera Mfg. Co., 167 N.L.R.B. 772, 775 (1967) (belligerent refusal to follow instructions); Klate Holt Co., 161 N.L.R.B. 1606, 1612 (1966) (insulting remarks and refusal to accept disciplinary sanctions); Traylor-Pemco, 154 N.L.R.B. 380, 387 (1967) (insubordinate violation of instructions); Pinellas Paving Co., 132 N.L.R.B. 1023, 1031 (1961) ("insubordinate, disrespectful, belligerent and abusive conduct"); Wilson & Co., 43 N.L.R.B. 804, 820 (1942) ("abusive defiance").

rior and refuse to accept the subsequent discipline or circumvent valid rules regarding working time or performance. They may not ignore or abuse the grievance procedure or interfere with an employer's grievance investigation.<sup>274</sup>

As the previous section indicated, "fuzzy, often tenuous" standards determine whether a steward has crossed the line of protection.<sup>275</sup> Sometimes stewards can investigate grievances; other times they cannot. Sometimes they can circumvent procedures; other times they cannot. Sometimes they can be rude or crude; other times they cannot. Sometimes they can engage in pre- or post-hearing conduct; other times they cannot.

The standard which this section proposes seeks to reduce the opportunities for such line drawing by the NLRB. As the cases indicate, the Board becomes an arbiter of conduct between parties who are equal participants in workplace government, who are, in a sense, distinct but equal "houses" of a legislature.<sup>276</sup> There are compelling reasons for limiting the occasions for such Board intervention.<sup>277</sup>

Federal policy says "the desirable method" for settling grievances "arising over the application or interpretation of an existing collective bargaining agreement" is the "method agreed upon by the parties."<sup>278</sup>

274. See, e.g., *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981) ("Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise. . . ."); *Manville Forest Prods. Corp.*, 269 N.L.R.B. 390 (1984) (advising employees not to cooperate with employer's investigation); *Pathe Laboratories, Inc.*, 141 N.L.R.B. 1290, 1299-1301 (1963) (violation of a "long-standing and business-like practice which was countenanced by the contract . . ."); cases cited *supra* note 273. But see *Magnetics Int'l, Inc.*, 254 N.L.R.B. 520 (1981) (questioning work assignments); *Clayton Constr. Corp.*, 250 N.L.R.B. 798 (1980) (same), *enforced*, 652 F.2d 6 (8th Cir. 1981); *Pullman Trailmobile*, 249 N.L.R.B. 430 (1980) (alleged abuse of grievance procedure); *Jones Dairy Farm*, 245 N.L.R.B. 1109 (1975) (enforcement of safety regulations).

275. *Snow & Abramson*, *supra* note 4, at 797:

At the heart of all steward discipline cases is a tension generated by the steward's need to be free from the fear of reprisal and by management's conflicting need to exercise control over all employees. It is this tension that separates the steward discipline cases from other discipline cases and, consequently, makes them considerably more difficult to resolve.

276. See *Cox*, *supra* note 31, at 621-22; *Willborn*, *supra* note 1, at 731.

277. *Stone*, *supra* note 13, at 1515:

According to the industrial pluralist view, there is a separation of powers in the workplace; the parties are said to govern themselves democratically. A corollary of this description of the industrial world is the prescription that the processes of the state—the courts and administrative tribunals—should keep out. The workplace, portrayed as a self-contained mini-democracy, becomes in the industrial pluralist theory an island of self rule whose self-regulating mechanisms must not be disrupted by judicial intervention or other scrutiny by outsiders.

See also *Willborn*, *supra* note 1, at 728-29.

278. 29 USC § 173(d). See *Klare*, *supra* note 1, at 463:

There is truth to the traditional view that labor and management developed grievance arbitration as a private dispute resolution system to keep the law "out" of their affairs. But the force of law has also always been a critical factor in the encouragement and proliferation of grievance arbitration systems. . . . [T]he Supreme Court has worked assiduously to refine the mystique of grievance arbitration as a "favored process" and "proved technique for

This policy "can be effectuated only if the means chosen . . . is given full play."<sup>279</sup>

The "means" normally chosen, the grievance procedure, "is at the very heart of industrial self-government." It molds "a system of private law for all the problems which may arise." It allows them to be resolved "in a way which will generally accord with the variant needs and desires of the parties." The procedure is "a vehicle by which meaning and content are given to the collective bargaining agreement."<sup>280</sup> The steward plays a key role in that procedure, a role which should be "given full play."

In a different setting, the Board treats stewards in a favorably discriminatory manner.<sup>281</sup> The agreement in *Gulton Electro-Voice, Inc.*<sup>282</sup> gave a seniority preference (called superseniority) to certain union officers with regard to layoff and recall rights. The issue was whether this was lawful for officers who did "not perform steward or steward-like functions; i.e., grievance processing or other on-the-job contract administration."<sup>283</sup>

The Board said such a seniority provision on its face discriminates "on the basis of union related activities and in and of itself is at odds with Section 7 of the Act."<sup>284</sup> However, such seniority for stewards furnishes a "benefit . . . to *all* unit employees" that "compensates for its inherent discrimination."<sup>285</sup> The Board ruled that:

In consideration of the underlying purpose of the Act "to provide additional facilities for the mediation of labor disputes affecting commerce," insuring the enforcement of the collective bargaining agreement by retaining on the job union representatives responsible for processing grievances is a sufficiently compelling reason to allow limited superseniority with respect to layoff and recall to those who perform steward-like duties. It is the immediacy of attention that stewards can offer that place [sic] the stewards in such a special position. Further, steward job-retention superseniority is necessary to the stewards' ability to carry out the

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industrial peace." Indeed, the Court has made enforced adherence to arbitration agreements a "dominant motif" and "kingpin of federal labor policy." (citations omitted).

279. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960): "That policy [29 U.S.C. § 173(d)] can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." The Court continued, "the processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." *Id.* at 568.

280. *Warrior & Gulf*, *supra* note 1, 363 U.S. at 581.

281. See Note, *Union Steward Superseniority*, 6 N.Y.U. REV. L. & SOC. CHANGE 1 (1976).

282. 266 N.L.R.B. 406 (1983), *enforced*, 727 F.2d 1184 (D.C. Cir. 1984). See also *UAW Local 1384 v. NLRB*, 756 F.2d 482 (7th Cir. 1985); *NLRB v. Niagra Machine & Tool Works*, 746 F.2d 143 (2nd Cir. 1984).

283. 266 N.L.R.B. at 406.

284. *Id.* at 408.

285. *Id.*

primary duties of their union position.<sup>286</sup>

These justifications extend only to union officers performing steward-like duties.<sup>287</sup>

The Board placed stewards in a "special position." It permitted the favorable discriminatory treatment because "it is necessary to further the administration of the bargaining agreement on the plant level."<sup>288</sup>

The stewards' special position should also entitle them to extended protection when engaged as the employees' representative in workplace government. Stewards, as representatives of a constituency, engage in workplace lawmaking. As such, they should be afforded legislative immunity.

The Supreme Court, in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,<sup>289</sup> decided that the absolute immunity afforded federal and state legislators should be extended to individuals acting in a legislative capacity at a regional level. The Court, in doing so, cited the following:

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The [previous] holding of this Court . . . that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.<sup>290</sup>

The Court said "the special nature of their responsibilities" made immunity appropriate for legislators, even on a regional level.<sup>291</sup>

The steward's special position is like the "special nature" of legislators. Stewards are legislators in workplace government. Stewards can be

286. *Id.*

287. *Id.*

288. *Id.* at 409.

289. 440 U.S. 391, 404 (1979). The Court's decision involved an extension of *Tenney v. Brandhove*, 341 U.S. 367 (1951), which held "that state legislators are absolutely immune from suit under § 1983 for actions in the sphere of legitimate legislative activity." The *Tenney* holding "was rooted in the long struggle . . . for legislative independence, a presupposition of our scheme of representative government." *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2813 (1985). For a critical analysis of *Tenney*, see Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 491-504 (1982).

290. *Lake Country*, 440 U.S. at 405 (citing *Tenney*, 347 U.S. at 377).

291. *Id.* at n.30. See Eisenberg, *supra* note 289 at 489:

In legislative immunity cases, as in all cases that grant absolute immunity, the Court attempts to ground its holding in sound public policy. Defendants are immune, the Court tells us, because it is a good idea that they be so. Courageous legislative decisionmaking requires an atmosphere uncomplicated by threats of personal liability.

This immunity has been extended to a state supreme court acting as a "legislature" in adopting state bar disciplinary rules. See *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719 (1980).

subjected to discipline, including discharge, for trying to do their duties. They can be "subjected to the cost and inconvenience and distractions of a trial." Stewards can be subjected "to the hazard of a judgment against them based upon . . . speculation as to motives."

The Court subsequently considered the official immunity question in *Nixon v. Fitzgerald*.<sup>292</sup> The Court noted that "[a]mong the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties."<sup>293</sup> Submitting officials "'to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute.'"<sup>294</sup>

The Court "recognized that the sphere of protected action must be related closely to the immunity's justifying purposes."<sup>295</sup> Although absolute immunity "should extend only to acts in performance of particular functions of [the] office," the Court "refused to draw functional lines finer than history and reasoning would support."<sup>296</sup> The privilege extended "to all matters 'committed by law to [an official's] control or supervision,'" <sup>297</sup> to actions "'taken . . . within the outer perimeter of [the official's] line of duty'" <sup>298</sup> and to judicial acts "occurring outside 'the normal attributes of a judicial proceeding.'" <sup>299</sup>

In *Harlow v. Fitzgerald*,<sup>300</sup> decided the same day as *Nixon*, the Court said officials, such as "legislators, in their legislative functions," who have "special functions or constitutional status," are entitled to absolute immunity.<sup>301</sup> Such immunity shields officials "from undue interference

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292. 457 U.S. 731 (1982). See Nahmod, *Constitutional Wrongs without Remedies*, 62 WASH. U.L.Q. 221 (1984); Note, *Presidential Immunity: The Separation of Powers as a Bar to Accountability Under the Law*, 56 TEMP. L.Q. 190 (1983) [hereinafter cited as Note, *Presidential Immunity*]; Note, *Absolute Presidential Immunity from Civil Damage Liability*, 24 B.C.L. REV. 737 (1983) [hereinafter cited as Note, *Absolute Presidential Immunity*]; Note, *Absolute Presidential Immunity from Civil Damages Liability*, 62 NEB. L. REV. 437 (1983); Note, *President Absolutely Immune from Civil Damages Liability for Official Acts*, 13 SETON HALL 374 (1983); Note, *An Examination of Immunity for Federal Executive Officials*, 28 VILL. L. REV. 956 (1982) [hereinafter cited as Note, *An Examination of Immunity*].

293. 457 U.S. at 752 n.32.

294. *Id.* (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). The Court, in discussing official immunity, recently wrote of the "obvious risks of entanglement in vexatious litigation" and said "the mere threat of litigation may significantly affect the fearless and independent performance of duty. . . ." *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2813 (1985).

295. 457 U.S. at 755.

296. *Id.* See Note, *Absolute Presidential Immunity*, *supra* note 292, at 750-51.

297. 457 U.S. at 755-56 (quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896)).

298. *Id.* (quoting *Barr v. Matteo*, 360 U.S. 564, 575 (1959)).

299. *Id.* (quoting *Stump v. Sparkman*, 435 U.S. 349, 363 (1978)).

300. 457 U.S. 800 (1982).

301. *Id.* at 807. See Note, *Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901 (1984); Sowle, *The Derivative and Discretionary—Function Immunities of Presidential and Congressional Aids in Constitutional*

with their duties and from potentially disabling threats of liability."<sup>302</sup> Exposing officials to liability is done:

at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute or the most irresponsible [public officials] in the unflinching discharge of their duties."<sup>303</sup>

The Court has identified similar costs in the disciplining of stewards. In *Metropolitan Edison*, it said there is "little doubt that an employer's unilateral imposition of discipline on union officials inhibits qualified employees from holding office."<sup>304</sup> Neither employer nor employee representatives should be "coerced in the performance of their official duties."<sup>305</sup> Both "are entitled to loyal representatives in the plants."<sup>306</sup> The union official should not be placed in a position where failing "to comply with the employer's directions would place the official's job in jeopardy," but complying "might cause him to take actions that would diminish the respect and authority necessary to perform his job as a union official."<sup>307</sup>

The proposal here is to draw a broader line than the Board has drawn. Stewards receiving, investigating, preparing or presenting a grievance or otherwise representing employee interests are acting within the "sphere of legitimate legislative activity" and should be afforded absolute immunity from discipline. Due to the special nature of their responsibilities, stewards should be free to act without fear of employer reprisal. They should be free to independently discharge their duties without fear of consequences which might render them unduly cautious.<sup>308</sup> They, like legislators, should be immune from the costs which

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*Tort Actions*, 44 OHIO ST. L.J. 943 (1983); Comment, *Entity and Official Immunities Under 42 U.S.C. Section 1983: The Supreme Court Adopts a Solely Objective Test*, 28 S.D.L. REV. 337 (1983).

302. 457 U.S. 806 (1982).

303. *Id.* at 814. See Hyman, *Qualified Immunity Reconsidered*, 27 WAYNE L. REV. 1409, 1417-18 (1981):

Qualified immunity is justified by the same governmental need which justifies absolute immunity. Governmental servants must be immune from damage actions if they are to properly carry out their jobs. An actor will avoid decisions that might harm third parties if the victim can sue him for the harm he causes. If governmental interests are better served by action than restraint, the threat of liability will mean the governmental functions are not properly carried out. . . . Talented people will refuse to accept government jobs if they believe that this work will expose them to damage actions.

For a cost-benefit analysis of *Harlow*, see Nahmod, *supra* note 292, at 246-50.

304. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983).

305. *Id.* at 704.

306. *Id.* at 704 n.9 (quoting H.R. REP. NO. 245, 80th Cong., 1st Sess. 17 (1947)).

307. *Id.* at 705.

308. Compare Note, *Presidential Immunity*, *supra* note 292, at 223-24:

The argument that an absolute privilege is necessary to protect an official from fear of

potential liability extracts: deterrence from holding office or vigorously performing its duties, diversion of energy and attention, and dampening of ardor.

Legislative immunity is justified in several ways. One commentator said legislative immunity promotes an important interest in representative government, insures the integrity of the legislative process, preserves legislative independence and prevents the intimidation of legislators.<sup>309</sup> These can all be transferred to the steward's role in workplace government. The steward is an employee representative engaged in daily legislation. While so engaged, the steward is entitled to be treated as an equal by the employer, free from employer coercion in the performance of official duties.

Another commentator said immunity advances the public good by promoting effective and efficient government.<sup>310</sup> Government is made more effective by immunity because it promotes unhampered decision-making; it is made more efficient by the conservation of time, money and energy. Again, these same considerations apply to the steward's role in workplace government. To be effective and efficient, stewards must operate free of employer coercion or intimidation. They must be free to act as an equal, not as an employee. They must be free to act without the threat of being subjected to the uncertain results of protracted litigation.

Legislative immunity does not attach to the legislator but to the office.<sup>311</sup> It is designed to serve not the individual but the constituency

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consequences of his malice is strikingly convoluted. As one commentator has aptly noted, if our primary concern is the public interest, it would certainly follow that fear of such consequences is precisely one of the fears we should want our officials to have. Indeed, some commentators have seen almost no merit whatsoever in the unsubstantiated arguments that, without an absolute immunity, qualified people will leave public service and important decisions will not be made.

309. Sowle, *supra* note 301, at 981. See also Note, *An Examination of Immunity*, *supra* note 292, at 957: "The concept of official protection arose from a concern that public officers should be able to carry out their duties freely without fear of potentially disabling threats of liability arising from their actions."

310. Note, *supra* note 301, at 914, 932-33. See also Comment, *supra* note 301, at 339, where the author said:

immunity decisions focus on balancing the benefit derived from protection of individual rights and the benefit of effectively functioning governments. For example, in order to attract competent governmental officials, it is necessary that they receive some sort of immunity to shield their decisions from a barrage of litigation. Not only does this immunity attract competent officials, but it also enables them to work effectively by freeing them from constant legal action and the need to defend themselves against dubious claims.

311. Comment, *supra* note 301 at 351:

Entitlement to absolute immunity depends upon the governmental official meeting two requirements. Initially, the official must demonstrate that public policy demands that members of a governmental body enjoy absolute immunity when they perform a certain function. Secondly, the defendant official must demonstrate that he was performing a protected function as a member of a governmental body at the time he committed the alleged wrongful act. . . .

See also Cox, *supra* note 70, at 340, where, in discussing the Supreme Court's *Metropolitan Edison* decision the author characterizes its rationale as:

which is entitled to vigorous, unhampered representation. There is an important social interest in representatives making independent decisions.<sup>312</sup> Although the decision might be wrong, it is better to assume that risk than to have a system where no decisions are made or actions taken.<sup>313</sup>

The same analysis applies to union stewards. The constituency—the employees—are entitled to vigorous, uninhibited representation. There is a strong policy interest in protecting steward independence and encouraging their spirited defense of employees and employee rights. This can be effectively done only if the steward stands as an equal with the employer, free from fears of discharge or retaliatory discipline. The steward's duties, like a legislator's, demand the exercise of discretion and advocacy. The steward's duties, like a legislator's, often raise a desire for retribution in others.<sup>314</sup> The steward, like the legislator, is placed in a special position by the office held and, as such, is entitled to special protection.<sup>315</sup>

Stewards acting within the scope of their authority while representing employees should be absolutely immune from employer reprisal.<sup>316</sup>

expressly collectivist in its approach: union officials . . . are protected as a means of ensuring that their role as representatives is preserved. In short, the right protected . . . is the collective's right to uncoerced representation; individual union officials are protected only as a means of protecting that right.

312. Nahmod, *supra* note 292, at 223.

313. Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1974). *See also* Note, *Absolute Presidential Immunity*, *supra* note 292, at 761, analyzing cases where the Supreme Court "stressed the public interest in courageous, independent actions by such government officials as well as the potential dangers to the public which could result if civil suits were to distract such officials from the performance of their public duties."

314. *See* Snow & Abramson, *supra* note 4, at 840:

Union stewards rarely have sufficient sophistication in labor relations matters to appreciate the finer aspects of the grievance procedure. Mistakes are common, and, because initial grievance confrontations most often occur in the work place, emotions run high and tempers are quick to flare. This may be especially true where a steward believes the office carries with it a heavy responsibility. Thus . . . decision-makers must season their decisions with an awareness of the emotional quotient and the basically good intentions that may be at play in a grievance confrontation.

*See, e.g.,* Trafford Coach Lines, 97 N.L.R.B. 938 (1952); United States Postal Serv. (Madison Hts., MI), 256 N.L.R.B. 736 (1981). In the latter, a supervisor, angered by a steward's grievance over the supervisor's failure to give required safety talks, investigated the steward's attendance record and suspended him for irregular attendance.

315. Note, *Degree of Immunity Applicable to Senior Aides of the President of the United States in Civil Actions Arising Under the Constitution*: Harlow v. Fitzgerald, 1983 B.Y.U. L. REV. 426, 430 (1983):

[A]n official may be granted absolute immunity as incident to certain positions. Generally, absolute immunity is awarded to the holder of a particular office because the duties of that office both manifest a need for wide-ranging discretion and are likely to provoke retaliatory suits.

*See* N & T Assocs. Inc., 273 N.L.R.B. No. 41 (Dec. 14, 1984), for an example of employer retaliation.

316. *See* Snow & Abramson, *supra* note 4, at 799-800:

Given that the processing of a grievance is a protected activity, stewards implicitly have the right not to be disciplined for performing their duty as grievance representatives. To gain

The Court and the Board have clearly recognized the steward's important role in workplace government. Both have stressed the need for preserving the steward's independence. Both have indicated that this independence is essential to the proper working of workplace government. If, as has been suggested, the grievance procedure must possess stability and premanence, then the individual most actively involved in it should receive protection.<sup>317</sup> The procedure without the player is nothing.

This proposal does not let stewards loose without control.<sup>318</sup> They must act within the scope of their authority and must be performing acts "legislative" in nature.<sup>319</sup> The contours of these limits are, admittedly, hazy at best.<sup>320</sup> One article defined legislative activity "as any activity relating to the due functioning of the legislative process and the carrying out of a member's obligations to his house and his constituents."<sup>321</sup> The authors specifically included the following activities: "speeches, debates and votes; conduct in committee; receipt of information for use in legislative proceedings; publications and speeches made outside of congress to inform the public on matters of national or local importance; and the

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such protection, however, a steward must first show that he or she was engaged in protected activity.

317. Sowler, *supra* note 301, at 945: "Discretionary-function immunity . . . protects the defendant official from liability for the consequences of his decisions when the court determines that the need for protecting the official's decision making functions outweighs the competing interests."

318. But once within the ambit of immunity, a protected official may act maliciously without losing protection, a "hard" rule to be sure, but one which "the courts have found . . . acceptable." Hyman, *supra* note 303, at 1416. The Supreme Court recently said "most officials who are entitled to absolute immunity from liability for damages are subject to other checks that help prevent abuses of authority from going unredressed. Legislators[, for example,] are accountable to their constituents." *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2814 (1985).

319. See, e.g., Note, *Presidential Immunity*, *supra* note 292, at 210-14; Note, *Absolute Presidential Immunity*, *supra* note 292, at 755-57; and Comment, *Tort Immunity of Federal Executive Officials: The Mutable Scope of Absolute Immunity*, 37 OKLA. L. REV. 285, 294-98 (1984).

320. See, e.g., Comment, *supra* note 301, at 352, where the author, analyzing *Tenney v. Brandhove*, said:

[The Court] held that state legislators are absolutely immune from suit under Section 1983 for actions "in the sphere of legitimate legislative activity." The precise extent of this sphere is not clear from a reading of the opinion. The Court, however, did attempt to clarify the scope by stating: "to find that [a legislator] exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the judiciary or the executive." Unfortunately, the Court provided no examples of such a usurpation and recent United States Supreme Court cases dealing with legislative immunity have also provided little guidance.

See also Eisenberg, *supra* note 289, at 502-04; Sowler, *supra* note 301, at 955-58; Note, *An Examination of Immunity*, *supra* note 292, at 960-63; and Note, *Presidential Immunity*, *supra* note 292, at 199, 212 n.162.

The Supreme Court acknowledges that it "has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens." *Doe v. McMillan*, 412 U.S. 306, 320 (1973).

321. Reinstein & Silvergate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1179 (1973).

decision making processes behind each of the above.”<sup>322</sup>

Given the vital importance of the steward’s role in workplace government, the lines, when drawn, should fall on the side of protecting the steward.<sup>323</sup> Perhaps more importantly, the parties themselves, in their agreement, can define and limit the scope, timing and nature of the steward’s duties.<sup>324</sup> It is, after all, their responsibility to establish and maintain a system of workplace government. The policy is to encourage them to handle their own problems.<sup>325</sup> Certainly it would be better to have them establish permanent standards than resorting to the protracted and uncertain Board procedures.<sup>326</sup>

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322. *Id.* at 1179-80.

323. *See, e.g.*, *Union Fork and Hoe Co.*, 241 N.L.R.B. 907, 908 (1979), where the Board said, “[A] steward is protected by the Act ‘even if he exceeds the bounds of contract language unless the excess is extraordinary, obnoxious, wholly unjustified and departs from the *res gestae* of the grievance procedure.’” *See also* *United States Postal Serv. (Richmond, CA)*, 252 N.L.R.B. 624 (1980), *enforcement denied*, 671 F.2d 503 (9th Cir. 1981), where the Board noted that:

[T]he protected nature of a union steward’s conduct is not entirely dependent on whether the employees involved were entitled . . . to request union representation. Rather, so long as his or her efforts do not exceed “the boundaries of acceptable conduct” a union representative’s seeking to honor [an employee’s request for union representation will be deemed protected activity].

*Id.* at n.2.

324. Yaffe, *supra* note 268, at 483-84:

Thus, both unions and management are concerned about the rights and responsibilities of union stewards. This concern has resulted in attempts by the parties to prescribe the specific rights and responsibilities of stewards in collective bargaining agreements. . . .

*See also* *Cox*, *supra* note 31, at 654-55; *Snow & Abramson*, *supra* note 4, at 818.

325. *See* *Cox*, *supra* note 6, at 3; *Klare*, *supra* note 1, at 463.

326. *See* *Shulman*, *supra* note 24, at 1024.