NOTE

Reinstatement of Unfair Labor Practice Strikers Who Engage in Strike-Related Misconduct: Repudiation of the Thayer Doctrine by Clear Pine Mouldings

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This Note discusses the evolution of the Thayer doctrine under which the NLRB would order reinstatement of strikers where they had committed acts of misconduct if these acts were not as serious as their employer’s unfair labor practices. The author first traces the origins of the principle during the period after adoption of the NLRA up until the crystallization of the doctrine in Thayer. The Note then discusses the post-Thayer period where, the author argues, the NLRB frequently misapplied the doctrine, separating the principle from its statutory and theoretical underpinnings. Finally, the author analyzes the NLRB’s recent repudiation of the Thayer doctrine in Clear Pine Mouldings.

INTRODUCTION

When employees strike for economic reasons, an employer may hire replacement workers and is under no duty to “reinstate” striking workers once the strike is over. ¹ However, when an employer’s unfair labor practice provokes employees to strike or prolongs an existing strike, the National Labor Relations Board (NLRB) will routinely order reinstatement² of the strikers as a remedy for their employer’s unfair labor practice.³ Until recently, the Board would order reinstatement even if the

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2. “Reinstatement” is a term of art under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1982), and must be distinguished from “re-employment.” The concept of reinstatement comes into play when strikers lose their jobs because employers have hired nonstriking replacement workers. Even when this happens, striking workers maintain their status as “employees” under the NLRA. NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); Laidlaw Corp., 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).
strikers had committed acts of misconduct during the course of the strike, provided their misconduct was not as serious as their employer's unfair labor practice which prompted or prolonged the strike. This balancing principle, or variations of it, became known as the "Thayer doctrine." This doctrine existed in labor jurisprudence for over forty years until the NLRB's decision in *Clear Pine Mouldings, Inc.* in February of 1984 when the NLRB announced that it would no longer follow the doctrine.

This Note traces the evolution of this equitable principle through more than forty years of labor law, and illustrates how the principle survived despite significant amendments to the National Labor Relations Act (NLRA) which were arguably intended to abolish it. In addition to tracing the evolution and progeny of the Thayer doctrine, the Note analyzes the policies behind it and the reasons for its recent repudiation. The Note concludes that the basis of the doctrine is sound and reasons for its repudiation are ill-conceived, unrealistic, and inappropriate. The stated concern of the Board—to extinguish the notion that misconduct is ever tolerated under the NLRA—is a laudable goal. As a justification for repudiating the Thayer doctrine, however, it is an ill-conceived ideal. The Board fails to recognize the dilemma presented by Thayer-type cases. The Thayer doctrine did not condone misconduct, but rather provided a principled means of choosing which of two guilty parties should suffer the consequences of their actions where the structure of the remedies provided by the NLRA effectively allows for sanctions against one party or the other but not both. The Board's action is unrealistic because it assumes that the Act's remedies are adequate to control employer misconduct which the principle sought to dissuade. Under current conditions, when petitions to the Board can take years to resolve, an employer's unfair labor practices effectively defeat a union organizing drive before any "remedy" can take effect. Finally, the Board's so-called "objective" test, which has replaced Thayer's balancing test, is inappropriate as applied to striker misconduct in this context. In light of the highly charged atmosphere of unfair labor practice strikes, it is unreasonable to expect strikers to sit by calmly while their employer, who has already engaged in unlawful activity in an effort to break the union, begins to hire replacement workers.

The Note is structured as follows. Part I searches for the origins of the principle that not all misconduct of unfair labor practice strikers should disqualify them from the normal remedy of reinstatement following a determination that their employer's unfair labor practice was a cause of their strike. This part covers the period from the adoption of the

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Wagner Act in 1935, the Act's limitation in the *Fansteel* case, the first emergence of the balancing principle in 1939, through the important cases of the World War II era. Part II examines the Taft-Hartley amendments of 1947 and their effect on the claimed statutory basis of the principle. It also describes the ultimate crystallization of the principle, in 1954, into what became known as the "Thayer doctrine." Part III discusses thirty years of application, misapplication and refinement of the Thayer doctrine, emphasizing the statutory basis and proffered justifications for invoking the doctrine, and explaining how these underpinnings were muddled by confused opinions written in the 1970's. This part concludes that this widespread confusion in many published opinions by the Board and by the courts marked the deathknell for the Thayer doctrine. Once divorced from its statutory and theoretical underpinnings, it was easy prey for critics. Finally, Part IV critically analyzes the recent repudiation of the Thayer doctrine in the Board's decision in *Clear Pine*.

I

PRE-THAYER TREATMENT OF EMPLOYEE MISCONDUCT IN THE COURSE OF UNFAIR LABOR PRACTICE STRIKES

A. The Wagner Act

The original NLRA (the Wagner Act) of 1935 granted employees the right "to engage in concerted activities" and the "right to strike." Nothing in the Act itself limited these rights to "civilized," "peaceful" or even "lawful" activity. Because the Act's express purpose was to curb employer interference with employee rights to organize and bargain collectively, it set no express limitations on the means which employees

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Section 7, as originally enacted, provided: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 13 provided: "Nothing in this Act shall be construed so as to interfere with or impede or diminish the right to strike."


The Wagner Act was adopted in the heart of the great Depression and during the advent of the New Deal. It was hoped that the revitalization of the economy would be hastened by smoothing the workings of labor-management relations and encouraging the growth of organized labor. See C. Morris, The Developing Labor Law 25-27 (1983).

Section 1 of the Wagner Act sets forth Congress' understanding that it was "the denial of employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining" which caused "strikes and other forms of industrial . . . unrest . . . " This in turn had the effect of "impairing the efficiency" of commerce and resulted in the "diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods." (Emphasis added). Accordingly, Congress declared a policy of "eliminat[ing] the causes of [such]
could use to exercise their rights under the Act. The Supreme Court, however, soon read such limitations into the Act.

B. The Fansteel Doctrine

In February 1939, the Supreme Court ruled in \textit{NLRB v. Fansteel Metallurgical Corp.}\footnote{7} that a “sit-down strike” by employees, in response to various employer unfair labor practices,\footnote{8} was not “protected activity” under either section 7 or section 13 of the Act.\footnote{9} In \textit{Fansteel}, the employer made anti-union statements and actions, campaigned to introduce a company-sponsored union, isolated the union president from contact with fellow employees, and employed a “labor spy” to infiltrate employee-union meetings. Finally, the employer refused to bargain collectively after the union had gained a majority of the employees in an appropriate bargaining unit.\footnote{10}

The union committee decided to respond to this refusal by occupying the plant and refusing to leave. When the workers refused to obey a direct order to leave, the employer’s attorney “thereupon announced in loud tones that all the men in the plant were discharged for the seizure and retention of the buildings.” The workers continued to occupy the facilities for nine more days.\footnote{11}

The Court found that the strikers were not entitled to reinstatement under section 10(c) of the Act,\footnote{12} the normal remedy for such employer unfair labor practices.\footnote{13} Although the Court acknowledged the Act’s protection of “the right of employees to self-organization and to the selection of representatives of their own choosing without restraint or coer-

\begin{footnotesize}
8. \textit{Id.} at 258. The employer (Fansteel Metallurgical Corporation) was found to have discouraged union membership and refused to bargain, in violation of NLRA § 8(a)(1), (5), 29 U.S.C. § 158(a)(1), (5) (1982).

Section 8(a)(1) provides in relevant part that “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of [§ 7 rights].” \textit{See supra} note 5 (relevant text of § 7).

Section 8(a)(5) makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representatives of his employees . . . .”


11. \textit{Id.} at 248-49.
12. NLRA § 10(c), 49 Stat. 449, 454 (1935) (codified as amended at 29 U.S.C. § 160(c) (1982)). Section 10(c) provided, at that time: “If . . . the Board shall be of the opinion that any person named in the complaint has engaged or is engaging in any . . . unfair labor practice, then the Board . . . shall issue . . . an order . . . to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.”
\end{footnotesize}
the Court refused to construe this protection as "countenancing lawlessness or . . . acts of violence against the employer's property." 15

The NLRB sought to justify their order reinstating the sit-down strikers on three related grounds:

1. That the unfair labor practices of [the employer] led to the strike and thus furnished [the] ground for requiring the reinstatement of the strikers;
2. That under the terms of the Act employees who go on strike because of an employer unfair labor practice retain their status as employees and are to be considered as such despite discharge for illegal conduct;
3. That the Board was entitled to order reinstatement or re-employment in order to "effectuate the policies" of the Act. 16

The Court rejected the first argument by noting that "the Act provided a remedy" for the employer's unfair labor practices—that the employer's conduct "could at once have been the subject of complaint to the Board." 17 Furthermore, the Court ruled, the employer's unlawful acts did not "[deprive] it of its legal rights to the possession and protection of its property" and, conversely, the employees' right to strike gave it "no license to commit acts of violence or to seize their employer's plant." 18

Supporting these rulings, the Court reasoned that:

To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of our society. 19

The Court likewise rejected the Board's second argument, holding that an employer does not lose its right to discharge employees for unlawful conduct just because it has previously committed an unfair labor practice. 20 While acknowledging that the employer could not have discharged the strikers for engaging in "protected" conduct nor interfere

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14. Id.
15. Id. at 256.
16. Id. at 252-53.
17. Id. at 253 (emphasis added); NLRA § 10(c), 49 Stat. 449, 454 (1935) (codified as amended at 29 U.S.C. § 160(c) (1982)). See supra note 12 (relevant text of § 10(c).
18. Compare this attitude about the availability of a Board remedy, stated in an early period of the Board's existence, with the opinion expressed 17 years later in NLRB v. Mastro Plastics:

[Prohibiting employees from striking during renegotiation of a collective bargaining agreement, in order to protest employer unfair labor practices committed during that period,] would deprive them of their most effective weapon at a time when their need for it is obvious, . . . . This would relegate the employees to filing charges under a procedure too slow to be effective. The result would unduly favor the employers and handicap the employees during negotiation periods contrarily to the purpose of the Act. There . . . is inherent inequity in any interpretation that penalizes one party to a contract for conduct induced solely by the unlawful conduct of the other, thus giving advantage to the wrongdoer.

20. Id.
with their "right to strike," the Court held that "[t]he conduct thus pro-
tected [by the Act] is lawful conduct" and "the 'right to strike' plainly con-
templates a lawful strike—the exercise of the unquestioned right to
quit work."\(^{21}\)

However, the Court stopped short of saying that an employer could
discharge any unfair labor practice striker for engaging in any unpro-
tected conduct. Instead, the Court confined its holding to the facts at
issue and held that striking employees could be discharged for "acts of
trespass or violence against employer's property, [for] which they [c]ould
have been discharged] had they remained at work."\(^{22}\)

The theory of the Court's ruling was that an employee who engaged
in unprotected activity "accepted the risk of termination."\(^{23}\) Any em-
ployees so terminated lost their status as "employees" under section 2(3)
of the Act at the moment of termination.\(^{24}\) Such termination meant that
the striker could not be "reinstated" by the Board, even under its discre-
tionary power under section 10(c) to "effectuate the purposes of the
Act," since that section only permits reinstatement of "employees."\(^{25}\)
Finally, as to certain workers who had not been formally discharged and
thus were still technically "employees" under section 2(3), the Court
held that their reinstatement could likewise not be ordered since they had
unlawfully aided and abetted the sit-down strikers and such reinstate-
ments would not further the policies of the Act.\(^{26}\)

Thus, the Fansteel case is significant for two reasons. First, it estab-
lished limits as to the kind of "concerted activity" "protected" under the
Act. Second, it held that workers who engage in conduct beyond those
limits are subject to discharge, regardless of their reason for doing it.

C. Limiting the Fansteel Doctrine

Cases decided after Fansteel construed it narrowly, distinguishing it
on the basis of the degree of violence involved or the "egregiousness" of
the misconduct at issue. Thus, in NLRB v. Stackpole Carbon Co.,\(^{27}\) de-
cided just three months after Fansteel, the Third Circuit ruled that an

\(^{21}\) Id. at 255-56.
\(^{22}\) Id. at 255.
\(^{23}\) Id. at 256.
\(^{24}\) Id. at 255-56; NLRA § 2(3), 49 Stat. 449, 450 (1935) (codified as amended at 29 U.S.C.
§ 152(3) (1982)). Section 2(3) provides:
The term "employee" shall include any employee, and shall not be limited to the
employees of a particular employer, unless the Act explicitly states otherwise, and shall
include any individual whose work has ceased as a consequence of a, or in connection with,
any current labor dispute or because of any unfair labor practice, and who has not obtained
any other regular and substantially equivalent employment . . . .
\(^{25}\) NLRA § 10(c), 49 Stat. 449, 454 (1935) (codified as amended at 29 U.S.C. § 160(c)
(1982)). See supra note 12 (relevant text of § 10(c)).
\(^{26}\) Fansteel, 306 U.S. at 259-61.
\(^{27}\) 105 F.2d 167, 176-77 (3d Cir.), cert. denied, 308 U.S. 605 (1939).
unfair labor practice striker, who had engaged in a fistfight with a non-striker in the course of the strike, was nonetheless entitled to reinstatement as a part of the remedy for the employer’s unfair labor practice.

In *Stackpole* the employer encouraged a company-dominated union while discouraging employees from joining Local 502 of the United Electrical and Radio Workers of America. The court agreed with the Board that these actions violated sections 8(1) and (2) of the Act. After the employer rebuffed the Local’s requests to bargain and to hold a Board-supervised election, members of Local 502 voted to go on strike. The court agreed with the Board that this strike was in response to the employer’s unfair labor practices. On the third day of the strike, the non-striking members of the company union “rushed out of the plant” and a fist fight between the strikers and nonstrikers ensued. About twenty members of the Local were charged with various crimes against persons and property and several were convicted. The day after the strike began (i.e., before the fights), and continuing for a week thereafter, strikers were issued pay checks marked “Paid in full to date,” and replacement workers were hired.

The court held that the employer’s action did not terminate the strikers’ status as “employees” under section 2(3), and that all strikers were entitled to reinstatement with back pay despite their acts of misconduct.

The court distinguished *Fansteel* on three grounds: (1) the fight “took place outside the plant,” (2) there was “no evidence whatsoever that this fight was part of a plan upon the part of the respondent’s striking employees to force compliance with their demands,” and (3) “the fight was started by nonstriking employees.” More important was the court’s final justification that “the rights given to employees under the . . . Act are [not] destroyed because of violence of a type as common to labor disputes as a fist-fight upon a picket line.” Although the court acknowledged *Fansteel*’s teaching that sit-down strikes are unprotected, it interpreted *Fansteel* as narrowly as possible, finding it inapplicable to fistfights.

Some seven months later, the Third Circuit again enforced a Board order of reinstatement with back pay for unfair labor practice strikers

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30. Id. at 175.
31. Id.
32. Id.
33. Id. at 175-76.
34. Id. at 176-77.
35. Id. at 176.
36. Id. (emphasis added).
who had engaged in violence. The Republic Steel strike, which was characterized by violence, was the culmination of a long history of hostile labor-management relations, involving fervent attempts by management to crush the union. These attempts included spies, violence against unionists, and locking out employees in three pro-union plants. At the end of the strike, "a great many of Republic's employees were refused reinstatement because of their union membership." Due to conduct during the course of the strike, several individual strikers were found guilty of criminal conduct. Republic argued that these strikers could not be reinstated. The court rejected this argument, relying on Stackpole. In a now-famous passage the court observed that:

[Fansteel] made it clear that unlawful conduct of the character [involved in that case] deprived the participant of the right of reinstatement. We think it must be conceded, however, that some disorder is unfortunately quite usual in any extensive or long drawn out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of Congress when it provided in Sec. 13 of the Act, 29 U.S.C.A. § 163, that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so the rights afforded employees by the Act would be indeed illusory. We accordingly recently held that it was not intended by the Act that minor disorders of this nature should deprive a striker of the possibility of reinstatement.

Even allowing for such picket line misconduct, however, the Republic Steel court refused to enforce the Board's order reinstating strikers who had been convicted of more serious misconduct. Strikers guilty of lesser—"sufficiently minor"—misconduct were found eligible for reinstatement and the Board's order was upheld as to these strikers.

Stackpole and Republic Steel are particularly interesting because they assert that the "right to strike" guaranteed by the Act implies a

37. Republic Steel Corp. v. NLRB, 107 F.2d 472 (3d Cir. 1939), modified, 311 U.S. 7 (1940).
38. Id. at 474-76.
39. Id. at 475.
40. Id. at 479.
42. Republic Steel, 107 F.2d at 479 (emphasis added).
43. Id. at 480. This misconduct included obstructing the United States mail, destruction of property valued at less than $300, unlawfully interfering with telegraph or telephone messages, transporting explosives, obstructing railway tracks, carrying concealed weapons, and "assault and battery sufficiently serious to call for the imposition of a fine of $200 and costs and a suspended sentence of six months." Id.
44. Id.
"right" to engage in some unlawful conduct. This conclusion arises from the assumption that Congress could not have expected employees to conduct peaceful and orderly picket lines in every strike. But, since each of these cases actually involved the question of whether strikers should be reinstated as a remedy to an employer's unfair labor practice, it was unnecessary to determine whether the picket line misconduct was "protected activity." The cause for the strikers' discharges in each case was not their misconduct, but rather the act of striking.\(^4\) Thus, under the principles announced in \textit{Fansteel}, their entitlement to reinstatement could have been determined by asking whether their reinstatement, as a remedy for the employer's unfair labor practices, would further the purposes of the Act pursuant to section 10(c).\(^4\)

Later courts, perhaps aware of this alternative approach, moved away from any explicit finding that such employee misconduct was "protected," and instead began to blur the basis for their rulings, supporting their holdings by citing "the Act" generally.\(^4\) This tendency is manifested in another case from the Third Circuit, \textit{NLRB v. Elkland Leather Co.},\(^4\) which held that throwing stones at nonstriker's automobiles and minor convictions for "rioting" were not "of sufficient gravity to warrant the [strikers'] exclusion from an order of reinstatement" for their employer's unfair labor practice, and that the reinstatement order "was valid and appropriate to effectuate the policies of the Act."\(^4\)

The 1943 Third Circuit decision, \textit{Berkshire Knitting Mills v. NLRB},\(^4\) moved still further from \textit{Stackpole}'s focus on the employees' protected "right" to engage in misconduct, finding instead that the Board's authority to order back pay under section 10(c) in unfair labor practice cases is "not for the actual benefit of the employee concerned, but as a matter of public concern in the effectuation of the policies of the Act. \textit{It is a public right, not a private claim, which is enforced.}"\(^4\)

\(^4\) Since all of the strikers, not just those guilty of misconduct, were discharged, the strikers were clearly discharged merely for striking. \textit{See supra} notes 33, 39 and accompanying text.

\(^4\) \textit{See supra} notes 12, 13, 25 and accompanying text (discussion of \textit{Fansteel}).

\(^4\) \textit{See, e.g., Stackpole, 105 F.2d at 176; Republic Steel, 107 F.2d at 479 (relying upon § 13's limitation on the Act).}

\(^4\) 114 F.2d 221 (3d Cir.), \textit{cert. denied}, 311 U.S. 705 (1940).

\textit{In Elkland Leather}, the employer engaged in an anti-union campaign including "anti-union manifestos" sent to each worker and threats to shut down the plant. \textit{Id.} at 223-24. In an ensuing strike, several workers were convicted of "rioting" for throwing stones at nonstrikers' cars. \textit{Id.} at 225.

\(^4\) \textit{Id.} at 225 (quoting from the NLRB opinion).

\(^4\) 139 F.2d 134 (3d Cir. 1943), \textit{cert. denied}, 322 U.S. 747 (1944).

\(^4\) \textit{Id.} at 142 (emphasis added).

The employer in \textit{Berkshire} had set up and fostered a company union which entered into contracts which benefited the company more than they did the employees. Furthermore, it interfered with the efforts of an outside union to organize workers. \textit{Id.} at 138-40.

The court upheld the Board's order reinstating strikers who had engaged in "minor" acts of criminal conduct, but excluding those who had committed "major" crimes. \textit{Id.} at 141.
In both *Elkland Leather* and *Berkshire* the objective of each strike was legal and the employees were discharged for the act of striking rather than any misconduct during the strike. Thus the courts in these cases did not need to decide whether the misconduct was protected. The courts' implied holdings were that certain activity, whether or not protected, does not necessarily preclude an order of reinstatement, if that remedy would effectuate the purposes of the Act.

**D. Other Applications of Fansteel**

While the circuit courts whittled away at *Fansteel*, the Supreme Court continued to broaden and refine the *Fansteel* doctrine. At the same time, however, the high court approvingly cited cases such as *Stackpole*, which read *Fansteel* narrowly.52 In *Southern Steamship Co. v. NLRB*,53 three years after *Fansteel*, decided in 1942, the Court with four Justices dissenting, further limited the scope of "protected" misconduct under section 7, finding that a strike by sailors (while docked, away from their home port) violated federal mutiny laws and precluded their reinstatement even though (1) the strike was in protest of their employer's unfair labor practices in refusing to recognize their union and in discharging union members, (2) the strike was nonviolent, (3) the ship was docked during the strike, and (4) the strikers did not attempt to take control of their place of employment as did the strikers in *Fansteel*.54 Furthermore, the strikers were discharged for participating in the strike itself and not for any other misconduct.55 The Court stated that if there was no more to the case, the strikers would surely be entitled to reinstatement.56

However, the sailors' strike itself violated federal maritime law. This case turned squarely on whether the Board had abused its discretion in deciding that reinstatement of these strikers would further the purposes of the Act. The Court found that the Board erred in failing to consider whether reinstatement of the strikers would further the purposes of other federal laws besides the NLRA, stating that, "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."57

The four dissenting Justices in *Southern Steamship* felt that the *Fansteel* doctrine should have been limited to cases of misconduct of a seri-

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53. Id.
54. Id. at 38-41.
55. Id. at 38.
56. Id. (citing NLRB v. Stackpole Carbon, 105 F.2d 167 (3d Cir.), cert. denied, 308 U.S. 605 (1939)).
57. Id. at 47.
ous nature and not be applied to cases of merely "technical" violations of law. The majority did not dispute the argument that the crime committed here was not as serious as that in Fansteel, but noted that Congress must have felt it was serious enough to make it a crime, and that if the law was unwise it was up to Congress to change it.

Thus, Southern Steamship, combined with Fansteel, established the proposition that a striker may be subject to permanent discharge, even if protesting an unfair labor practice, if the strike itself breaches some other federal law or if the means employed during the strike amount to serious acts of misconduct or deprive the employer of the use of its premises.

E. Treatment of Misconduct in Economic Strikes: Sharpening the Grounds for Reinstatement of Unfair Labor Practice Strikers

During this same period, a seemingly unrelated line of cases upheld the right of employers to discharge economic strikers for engaging in any unprotected activity violating any law, or even for striking in breach of contract, so long as the employer's reason for discharge was not shown to be a mere pretext for discouraging union activity.

These cases arguably have no bearing on the cases discussed previously since they involved economic strikes, not unfair labor practice strikes. The Board's remedial power under section 10(c) can be invoked only when there is some "wrong" to remedy. Since an "economic" strike is by definition not triggered by an employer unfair labor practice, the only remaining ground for invoking the Board's remedial reinstatement power is if the strikers are discharged for engaging in "protected" strike activity. Thus, in the economic strike context, the Board is powerless to invoke its remedial power under section 10(c) to reinstate the strikers, if the strikers were discharged for engaging in unprotected strike activity.

In NLRB v. Draper Corp., the court found that a wildcat strike during the course of collective bargaining was unprotected activity. Consequently, the discharge of such employees was not an unfair labor prac-

58. Id. at 50.
59. Id. at 43. Perhaps Southern Steamship is best understood in the context of the atmosphere of 1942, when there was a risk that the Board might order reinstatement of strikers whose demands were in violation of wartime price restraints. The Court may have felt compelled to send a message to the Board that it should consider the purpose of all applicable federal laws before deciding whether reinstatement was "appropriate."
60. Seemingly unrelated until one reads the legislative debates of the Taft-Hartley Act. See infra notes 72-86 and accompanying text.
61. See generally C. Morris, supra note 6, at 1007-15.
63. Id.
64. 145 F.2d 199 (4th Cir. 1944).
tice and they were not entitled to reinstatement at the close of the strike. Likewise, in *American News Co.*, the Board held that a strike to compel an employer to grant a pay increase in violation of wartime wage and price controls was a strike for illegal purposes and thus unprotected. The discharge of those strikers and the failure to reinstate them did not constitute an unfair labor practice.

The Board in *American News* specifically recognized that its remedial power was limited because it was not dealing with an unfair labor practice strike:

A critical fact which shapes our consideration of the case is . . . that the strike was neither provoked nor preceded by unfair labor practices. Had it been, an independent basis would have existed for an order directed against respondent and the problem presented by the strike might have been solved in the context of our powers to require appropriate remedial action, under Section 10(c). As the case comes to us, however, this course is foreclosed . . . . We must thus squarely face the question whether the strike, standing by itself, was the kind of collective activity protected by Section 7, so as to make respondent's action in treating the employment terminated and in refusing reinstatement a violation of Section 8.

This passage is quite significant, for it reveals that the Board, like the courts, was operating under the assumption its power to order reinstatement as a remedy under 10(c) is independent from the question whether a striker's misconduct is protected under section 7. That is, an employer's unfair labor practice could trigger a strike and the Board could exercise remedial power under 10(c) to order reinstatement, even though the discharged employee engaged in some activity during the strike which was unprotected under section 7.

Bearing this distinction in mind, the interpretation of the Congressional revisions of section 10(c) in the Taft-Hartley Act of 1947 takes on a bizarre twist. As the next section explains, the legislative history of the Act reveals that many of its principal architects did not really comprehend the just-described distinction under which the Board and the courts had been operating.

65. *Id.*
66. 55 N.L.R.B. 1302 (1944).
67. *Id.* at 1313-14. One year later, the Seventh Circuit followed the *American News* rule in *NLRB v. Indiana Desk Co.*, 149 F.2d 987 (7th Cir. 1945), finding a similar economic strike to be for an illegal purpose and thus unprotected, leaving the employees subject to discharge by the employer and the Board powerless to order their reinstatement.
THE EFFECT OF THE TAFT-HARTLEY AMENDMENTS; THE THAYER DOCTRINE

A. The Taft-Hartley Act of 1947

For the purposes of this Note, the most significant amendment to the NLRA by the Taft-Hartley Act of 1947 was the addition of a proviso to section 10(c) limiting the Board's remedial powers so it may not reinstate any employee discharged "for cause." This limitation on the Board's remedial power was enacted as part of a broader design to curb the Board's perceived tendency to reinstate union members who had been discharged for unlawful or improper conduct on grounds that the purpose of the discharge in fact was to penalize workers engaging in protected union activities.

The legislative history of this proviso indicates that the drafters intended to preserve, rather than to change, existing law. On the other hand, the legislative history also indicates that the authors of the proviso did not actually understand the existing law! Specifically, the authors did not recognize that, since Fansteel, the Board and the courts had developed a fundamental conceptual distinction between the question whether misconduct falls outside the "protection" of section 7, and whether misconduct is "serious" enough to disqualify a striker from a reinstatement order under section 10(c) as a remedy for an employer's unfair labor practice.

This confusion is apparent from the discussion contained in the House Conference Report, concerning section 7 and the new 10(c) "for

70. 61 Stat. 136, 29 U.S.C. § 160(c) (1982). The proviso reads: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."
74. See supra notes 60-69 and accompanying text (describing this distinction); H.R. Con. Rep. No. 510, supra note 71, at 39, reprinted in LMRA HISTORY at 543 (showing congressional failure to recognize it).
cause" proviso. The House conferees expressed their displeasure with the Board's early efforts to include unlawful activities within the definition of "protected" activity under section 7. The conference report favorably cites the Board's American News decision, as an indication that the Board finally conceded that, "[u]nder the existing provisions of section 7 of the [NLRA], employees are not given any right to engage in unlawful or other improper conduct." However, American News clearly distinguished its treatment of misconduct in economic strikes from its treatment of misconduct in unfair labor practice strikes. Thus, while the conference report correctly understood the Board's interpretation of section 7, it failed to note that the Board expressly left open the option of reinstating strikers who commit "unprotected" acts of misconduct if the Board had an independent basis for invoking their remedial power—for example, as a remedy for an employer unfair labor practice.

Failing to acknowledge the fundamental distinction between section 7 and section 10(c), the report states that American News and the cases that follow it—all of which involve economic strikes—"had the effect of overruling such decisions of the Board as that in Matter of Berkshire Knitting Mills, wherein the Board attempted to distinguish between major crimes and minor crimes for the purposes of determining what employees were entitled to reinstatement." The House conferees failed to recognize that the Berkshire case involved an unfair labor practice strike and the question of whether employees convicted of major or minor crimes were entitled to reinstatement as a remedy for their employer's unfair labor practice. The issue in Berkshire was whether reinstatement would further the purposes of the Act—not whether the misconduct was "protected." Moreover, the court of appeals in Berkshire affirmed the Board's treatment of the reinstatement issue and the Supreme Court denied certiorari.

Thus the Conference Committee’s assumption that American News overruled Berkshire fails to grasp the distinction between the two lines of

75. Id. at 38-40, reprinted in LMRA HISTORY at 542-44.
76. Id. at 38-39, reprinted in LMRA HISTORY at 542-43.
79. In the former case, the controlling issue is whether the conduct of the employee is protected under § 7, whereas in the latter case, it is whether the reinstatement of the misbehaving striker would effectuate the purposes of the Act under § 10(c). See supra text accompanying notes 62-63, 68.
80. H.R. CON. REP., supra note 71, at 39, reprinted in LMRA HISTORY at 543 (citation omitted).
82. Id. at 1003 n.49.
83. See supra notes 50-51 and accompanying text.
84. 139 F.2d 134 (3d Cir. 1943), cert. denied, 322 U.S. 747 (1944).
cases. Regardless of the actual state of the law, the Committee acted upon the assumption that *Berkshire* was no longer good law.\(^5\)

Even so, the ultimate issue is not what the Conference Committee thought it reported out, but rather what Congress thought it passed when it enacted the 10(c) proviso. This inquiry is further complicated by the debates that occurred on the Senate floor in which Senator Taft assured his fellow senators that the 10(c) proviso made *no change* in the existing law.\(^6\) Of course, it is impossible to know what the rest of Congress thought the existing law was, but it is not unreasonable to assume that many representatives relied on the conference report to answer any questions regarding the state of "existing law."

Assuming then, that Congress did misunderstand the existing law at the time of the passage of the 10(c) proviso, what interpretation should properly govern the construction of section 10(c)? The law as it actually was, or Congress' perception of it? The rest of this section analyzes the courts' handling of this problem.

**B. Initial Board and Judicial Responses to the Taft-Hartley Amendments**

The Board paid little heed to the House conferees' understanding that cases like *Berkshire* had been overruled. Instead, the Board continued to allow reinstatement of employees guilty of conduct that clearly

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\(^5\) This fact is further illustrated by the absolute language contained in the following passage of the conference report:

> **H.R. CON. REP., supra note 71, at 59.**

> Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for such reason is protected in specific terms in section 10(c).

> *93 Cong. Rec. S6677-78 (1947), reprinted in LMRA HISTORY at 1593-95 (1948).*

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\(^6\) The following exchange took place between Sen. Pepper and Sen. Taft, a sponsor of the bill:

> **Mr. PEPPER.** [T]his language [the "for cause" proviso] allows a worker to be discharged because of union activities, although that may be only a concurrent cause of discharge.

> **Mr. TAFT.** I think the Senator is completely mistaken. That is not all the effect of this language. *It merely states the present rule.* If a man is discharged for cause, he cannot be reinstated. If he is discharged for union activity, he must be reinstated.

> **Mr. PEPPER.** Let me comment on what the able Senator from Ohio has said. If it were not intended to change the existing law, why was anything placed in the conference report on the subject?

> **Mr. TAFT.** Let me say why. When we have a conference with the House and the House yields on all the major points, if the House conferees want certain language in, and the language does not do anything more than state the existing law, it is a little hard to refuse to put it in. That is why we put it in. For the purposes of the RECORD, I am glad to make that statement, because there is no intent whatever to change the existing law on this particular question.
STRIKE-RELATED MISCONDUCT

1986]

exceeded the bounds of section 7 protection if that was an appropriate remedy for an employer’s unfair labor practice. For example, in 1949 the Board ordered reinstatement of unfair labor practice strikers even though the strikers had committed such presumably unprotected acts as throwing a hammer through the windshield of a nonstriking employee’s car,\(^87\) deliberately ramming and damaging the car of a nonstriker, and throwing a rock at a company truck.\(^88\) In each case the Board supported its orders of reinstatement by citing Republic Steel and/or Berkshire.\(^89\) In none of these cases, however, did the employer claim that the employees’ misconduct was the cause of their discharge. Thus, as the Board acknowledged in each instance, it decided only whether reinstatement would effectuate the purposes of the Act, and did not address whether the misconduct was a valid “cause” for discharge under section 10(c).\(^90\)

The Supreme Court gave meaning to the “for cause” proviso some four years later, however, in Local 1229 (Jefferson Standard),\(^91\) sustaining the discharge of employees who, rather than striking, continued working but distributed handbills containing disparaging criticism of the quality of their employer’s product without mentioning their labor dispute.\(^92\) The Court discussed section 7 at some length but never decided whether such activity was protected. Instead, the Court upheld the discharges on the basis of the “for cause” proviso of 10(c), stating that employers had a clear right to fire employees who engage in such “disloyal” conduct.\(^93\) The dissenters chastised the Court for relying on the 10(c) “for cause” proviso rather than on section 7.\(^94\) Justice Frankfurter, writing for the dissent, advised that sections 7 and 10(c) were “two halves of a pair of shears”\(^95\)—i.e., what is not protected constitutes “cause” for discharge, and if activity is cause for discharge it is necessarily “unprotected.” The Court’s ruling, in Frankfurter’s view, must be interpreted to mean that the conduct was unprotected.\(^96\)

C. The Thayer Case

The issue of “cause” finally came before the NLRB in the case of H.N. Thayer Co.\(^97\) In Thayer, the Board was asked to determine whether

\(^88\). Kansas Milling Co., 86 N.L.R.B. 925 (1949), remanded, 185 F.2d 413 (10th Cir. 1950), supplemented, 97 N.L.R.B. 219 (1951).
\(^89\). Horn, 83 N.L.R.B. at 1179 n.11; Kansas Milling, 86 N.L.R.B. at 928 n.9.
\(^90\). Horn, 83 N.L.R.B. at 1179 & n.11; Kansas Milling, 86 N.L.R.B. at 928 & n.9.
\(^91\). NLRB v. Local Union No. 1229, IBEW (Jefferson Standard), 346 U.S. 464 (1953).
\(^92\). Id. at 476-78.
\(^93\). Id. at 472-77.
\(^94\). Id. at 478, 480 (Frankfurter, J., dissenting).
\(^95\). Id. at 480 (Frankfurter, J., dissenting).
\(^96\). Id.
\(^97\). 99 N.L.R.B. 1122 (1952).
an employer, whose long history of unfair labor practices had culminated in a strike of its employees, could nonetheless refuse to rehire any of the strikers because their strike had been enjoined and found by a state court to have been carried out for an illegal purpose and in an illegal manner. The Board held that it was not bound by the findings of the state court and, under its own review of the facts, that the strikers would not be entitled to reinstatement, "unless there is merit to any of the . . . several contentions relating to the question of whether or not the strike and the strike conduct constituted protected concerted activity." The Board directly linked the question of reinstatement eligibility to the scope of section 7 protection. Despite this seemingly more restrictive test, the Board found that the throwing of a broken bottle into a driveway, harassment of nonstrikers at their homes, and chasing a nonstriker while he was leaving the plant, were all "protected" activities since they did not involve "actual restraint, violence, or coercion, or conduct which exceeded the animal exuberance and mutual harassment characteristics of such strike situations." Accordingly, the Board ordered reinstatement of all strikers.

Judge Magruder, writing for the First Circuit Court of Appeals, refused to enforce the Board's order for two reasons. First, Magruder held that the Board erred in linking the concepts of "protected activity" under section 7 with the concept of whether an employee was entitled to reinstatement under section 10(c). Second, he refused to interpret section 7 so broadly as to justify the Board's finding that several acts of striker misconduct constituted "protected" activity.

The crux of the court's dissatisfaction, however, was the Board's apparent linkage of the question of whether the misconduct of unfair labor practice strikers should bar their reinstatement to a determination of whether the activity was protected under section 7. The court pointed out that the power of the Board to order reinstatement [under 10(c)] is not necessarily dependent upon a determination that the strike activity was a "concerted activity" within the protection of § 7. Even if it was not [protected], the . . . Board has the power under § 10(c) to order reinstatement if the discharges were not "for cause" and if such an order would effectuate the policies of the Act. . . . [A] finding that an activity is not protected under § 7 does not, ipso facto, preclude an order reinstating employees who have been discharged because of their participation in the

100. Id. at 1133. See also id. at 1204-21 (administrative law judge's description of the incidents).
101. Id. at 1134.
103. Id. at 752-57.
unprotected activity.  

Accordingly, Judge Magruder remanded the case to the Board for a determination of whether strikers who had participated in certain incidents—which the court had found to be outside the protection of section 7—should nonetheless be appropriately included in the reinstatement order.  

The most famous aspect of the court's decision is the instructions given to the Board regarding the factors to be considered in any determination of whether reinstatement would be appropriate under section 10(c). The court advised that:

It ordinarily may be assumed that the Board, as a part of the process of determining whether reinstatement would effectuate the purposes of the Act, will balance the severity of the employer's unfair labor practice which provoked the industrial disturbance against whatever employee misconduct may have occurred in the course of the strike.  

Several curious and significant aspects stand out in the court's ruling. First, in supporting its distinction between section 7 protection and the Board's power of reinstatement under 10(c), the court cited only one case, *NLRB v. Elkland Leather.*  

Elkland Leather was the first case to focus solely on whether reinstatement would effectuate the policies of the Act, thus avoiding the question of whether section 7's protection allowed strikers to throw rocks.  

Relying on this distinction, the *Thayer* court took an exceedingly narrow view of the scope of "protected" activity under section 7. Indeed, many of the particular activities the court found to be unprotected were not of a very violent or serious nature. The court might have felt compelled to adopt this stricter interpretation of section 7 in light of the Taft-Hartley amendments to the Act, which undermined the claim that "Congress must have contemplated" such activity when it granted the right to strike. The court distinguished *Jefferson Standard* by saying Justice Frankfurter's "shears" cut only in one direction—i.e., misconduct which disqualifies a striker for reinstatement under the 10(c) "for cause" proviso is necessarily unprotected under section 7, but not all unprotected conduct necessarily constitutes "cause" under 10(c). Thus the court found that the issue of what is "cause" is a conceptually distinct inquiry.  

The second significant feature of the *Thayer* opinion is its ruling that

104. *Id.* at 753 (emphasis added) (citations omitted).
105. *Id.* at 757.
106. *Id.* at 755.
107. *Id.* at 753 n. 7; see *supra* note 48 (for the facts of the case).
110. *Compare Republic Steel,* 107 F.2d at 479-80 with *Thayer,* 213 F.2d at 757.
111. *Id.* at 753 n. 6.
“what is cause in one situation may not be in another.” That determination, the court held, properly “depends on the surrounding circumstances.” This ruling distinguished 10(c) from the section 7 issue of whether activity is “protected.” “Surrounding circumstances” are completely irrelevant to the latter determination.

The court cited no authority for its “situational” interpretation of the 10(c) proviso. The most that can be gleaned from the legislative history is that the “for cause” proviso was not to be used as a vehicle for discriminatory discharge. Thus, some inquiry into the employer’s actual motive is clearly appropriate. But the Thayer court has said something wholly different. Thayer states that the “for cause” proviso allows—and indeed requires—the court to take into consideration the employer’s unfair labor practice that “touched off” the strike. Numerous cases found such a consideration of the employer’s unfair labor practice to be appropriate in determining whether reinstatement would “effectuate the purposes of the Act.” Thayer says that the relevant considerations for determining “cause” under 10(c) are identical. But the court offered no explanation why such considerations should carry over into the “cause” situation.

By fashioning the test for “cause” to closely parallel the test for whether reinstatement will “effectuate the purposes of the Act,” the court essentially read the “for cause” language right out of the statute. The court’s view gave “for cause” no independent significance apart from the Board’s basic duty to effectuate the purposes of the Act.

The third notable feature of Thayer is that the court acknowledged that the statute dictates that the Board not even reach the inquiry of whether reinstatement would “effectuate the polices of the Act” unless and until it determines that the strikers were not discharged for cause. Indeed, the court could not have read section 10(c) any other way.

On remand the Board in Thayer stated that it might not follow the

112. Id. 113. Id. 114. See id. at 756-57 & n.20. 115. See NLRB v. Dixie Shirt, 176 F.2d 969, 974 (4th Cir. 1949). 116. Thayer, 213 F.2d at 757 & n.20. 117. See supra notes 47-51 and accompanying text. 118. Thayer, 213 F.2d at 757. 119. Section 10(c), as amended by Taft-Hartley flatly provides that: “No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . for cause.” LMRA § 101, 61 Stat. 146 (codified as amended at 29 U.S.C. § 160(c) (1982)).

In short, the Board has no power to order reinstatement of an employee who has been discharged for cause. Thus, if the court finds that the employee was discharged for cause, that ends the inquiry. There is no need to reach the issue of whether reinstatement would further the purposes of the Act.
court's advice in future cases but would do so in this case. Applying these principles, the Board concluded that reinstatement "would not effectuate the Act's policies" as to those strikers whom the court had found committed acts of misconduct that "were coercive in nature and calculated to instill fear of physical harm in the non-striker victims." Notably, the Board never reached the issue of whether the conduct would amount to "cause" under the Act.

Two dissenting Board members found the majority's ruling unsupported. Undertaking a more careful analysis, the dissenters first determined whether the discharges were "for cause," and then whether reinstatement would effectuate the purposes of the Act. Both questions were answered in the negative.

In finding that the discharges were not "for cause" the dissenters first emphasized that the misconduct was rather tame but nonetheless accepted the court's characterization of the incidents as being "coercive in nature." Next the dissenters pointed out that "the strike was an unfair labor practice strike conducted in an atmosphere of considerable provocation" and "daily frustrations," and that it was "not surprising that the strikers' conduct fell short of the desired standard on these few occasions."

Nevertheless, the dissenters admitted, "[t]he test for determining whether conduct constitutes coercion under sections 7 or 8 is, of course, whether such conduct ... is likely to, or tends to, produce a coercive effect, regardless of the specific motivation of the conduct." On the other hand, they pointed out, the test for determining the existence of "cause" for refusing to reinstate is whether "[t]he misconduct was ... of such a character as would render the employees unfit for further employment."

This reasoning by the dissenting Board members illustrates the effect of the Taft-Hartley amendments and the rule laid down in Thayer. Note that none of the cases cited by the Board were approved by the House Conference Report. In fact, Congress arguably thought these

\[120. 115 N.L.R.B. 1591, 1595 (1956).\]
\[121. \textit{id.} at 1596 (quoting the court of appeals decision, 213 F.2d at 757).\]
\[122. \textit{See id.} at 1597-1606 (Murdoch and Peterson, Mbrs., dissenting).\]
\[123. \textit{id.} at 1597-1607.\]
\[124. \textit{id.} at 1601-02 \& n.11.\]
\[125. \textit{id.} at 1602.\]
\[126. \textit{id.} \]
\[127. \textit{id.} at 1603.\]
\[128. \textit{id.} at 1604 (emphasis added). The authorities cited for this latter standard include the two 1949 cases (discussed \textit{supra} text accompanying notes 87-90), which did not even consider the "cause" issue, and the Republic Steel and Elkland Leather cases (discussed \textit{supra} notes 37-51, 53, and accompanying text) which seemed to be talking about "protected" activity.\]
cases had been overruled. Nevertheless, the dissent's use of the equitable principle first announced in Stackpole and later explained in Republic Steel showed how this principle could be interpreted as being part of the "existing law" codified by the "for cause" proviso of section 10(c).

III

APPLYING THE THAYER DOCTRINE

A. Early Board Resistance to the Thayer Doctrine and Ultimate Adoption

The Board at first refused to follow the Thayer court's "balancing" approach to section 10(c) in any future cases. The Board held true to its promise for many years. However, in the early 1960's the Board adopted the "Thayer doctrine" as its own administrative rule. This capitulation occurred shortly after the Board received a tongue-lashing from the District of Columbia Circuit in the seminal case of Local 833, UAW v. NLRB (Kohler Co.).

Kohler is a landmark opinion for two reasons. First, it was the earliest attempt to give the Thayer rule a theoretical underpinning. Second, it converted Thayer from merely an advisory rule into an absolute command.

The factual issues in Kohler presented a clear-cut opportunity for the application of the Thayer interpretation of the "for cause" proviso. The employer's unfair labor practices had been truly egregious—as the court noted, "more typical of a 'bygone era.' " The ensuing strike was an unfair labor practice strike. All of the strikers had been replaced. The Board had ordered reinstatement of all of the strikers except for seventy-seven strikers who had been discharged for committing various acts of unprotected misconduct during the strike, thus activating the

129. See supra text accompanying notes 72-85.
130. Thayer, 115 N.L.R.B. at 1591. See supra note 120.
133. Id. at 701. Kohler refused to bargain in good faith by implementing unilateral wage changes and by refusing to furnish information necessary to contract negotiations. It violated the employees' § 7 rights by engaging in surveillance and anti-union espionage, by evicting strikers from company-owned housing and by discharging workers for union activity.
134. Id. at 700.
135. The misconduct included "belly-to-back" mass picketing, physical assault, demonstrations by large, jeering crowds at the homes of nonstrikers, mass picketing at Kohler's employment office, and organizing the misconduct. Id. at 702.

This case differs slightly from those discussed up to this point. In prior cases, all of the strikers had been discharged by the employer, and later the employer refused to rehire those strikers that had engaged in acts of misconduct. In this case, the employer apparently discharged the 77 strikers at the time they actually committed the misconduct. See Kohler, 128 N.L.R.B. at 1102. However, the ultimate effect was the same. Once the strike was over, all of the strikers' jobs had been taken by
“for cause” proviso of section 10(c), but not section 7.

The Kohler court identified two distinct theoretical bases for Thayer’s mandate that the Board, when remedying an employer unfair labor practice which prompted a strike, should “balance” the employer’s unfair labor practices against the misconduct of the discharged strikers. The first justification for this balancing was the consideration that “the employer’s antecedent unfair labor practices may have been so blatant that they provoked employees to resort to unprotected action.” This was not a new idea. "Provocation" as used in this context, however, was meant to convey a much broader idea than a sudden, momentary flaring up of irrational behavior. Kohler suggests a more grinding, continual provocation over a period of years (as was actually the case in Kohler), which culminates in an outburst of misconduct that might well last several weeks. However, critics of this justification for the Thayer principle have suggested that the real motivation for striker misconduct in such situations probably has less to do with the unfair labor practices of the employer than with the hiring of replacement workers. If so, the "provocation" argument for the Thayer doctrine is really a corollary to the equitable principle of “unclean hands.” Since the employer began the chain of events which caused the strike and may have provoked the misconduct, it is not entitled to invoke the benefits of the section 10(c) “for cause” exception to the Board’s remedial powers.

The second more compelling justification advanced by Kohler in support of the Thayer doctrine was that “reinstatement is the only sanction which prevents an employer from benefitting from [its] unfair labor practices through discharges which may weaken or destroy a union.” This rationale can be interpreted two ways. The first is the implied suggestion that the union has some “right” to engage in unprotected conduct as a means of “self help” against an employer’s unlawful attempts to break the union. An alternative interpretation—and one more consis-
tent with the remedy-based focus of Thayer—is that employees are reinstated not because they have any "right" to be, but rather because they are the incidental beneficiaries of the remedy which the Board is compelled to impose in order to deter the kind of "blatant" unlawful conduct committed by the employer. The logic of this approach is that, although two wrongs have been committed, the Act is better effectuated by balancing the wrongs, and taking action against the greater wrong, even if the lesser wrongdoer might escape the usual consequences of his action—here, a discharge. As the Kohler court noted:

 [T]he Board must consider both the seriousness of the employer's unlawful acts and the seriousness of the employees' misconduct in determining whether reinstatement would effectuate the policies of the Act. Those policies inevitably come into conflict when both labor and management are at fault. ... These policies are, inter alia, to "protect the right of employees to organize and bargain collectively" and to assure that labor organizations respect employer's rights and do not jeopardize public safety.

Furthermore, the court noted, this course of action is justified because the employee is still vulnerable to "other sanctions" such as "criminal prosecutions, civil suits," and the "possibility of discharge." clause in a collective bargaining agreement, or, alternatively, whether striking is barred by § 8(d)(4) of the NLRA, as amended, 61 Stat. 140, 141-42, 29 U.S.C. § 158(d) (1982) which provides that no strike may be resorted to during the 60-day bargaining period prior to the termination or modification of a collective bargaining agreement.

The Court concluded that, under normal circumstances, the employees would have been barred from striking. But in this case, during the course of the bargaining the employer had committed unfair labor practices which threatened to destroy the union. Thus, the Court held that the employees must be allowed to strike in order to effectuate the purposes of the Act. To deny them the right to strike, the Court said, would be to "deprive them of their most effective weapon at a time when their need for it is obvious." Mastro, 350 U.S. at 286. See supra note 17.

144. 300 F.2d at 702-03 & n.10 (citations omitted).
145. See id. at 703 n.12 (cases cited).
146. See id. at 703 n.13 (cases cited).
147. Id. at 703 (emphasis in original). In support of this last point the court cited Hart & Pritchard, The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board, 52 HARV. L. REV. 1275, 1319 (1939). That article disputed Fansteel's logic that to allow reinstatement would put a "premium" on resorting to violence. The authors argued:

[C]learly the strikers would have not been in a better over-all position as a result of their conduct. They would have suffered the positive discouragement of the state laws.... Nor would the operation of the state laws have been the sole discouragement. For at best—under any other doctrine other than one providing automatic reinstatement for everybody—the men would have risked their jobs, even though it were eventually to be held that some or all of them survived the risk.

Id. (citation omitted).

Thus, the Kohler court meant that, since the Thayer rule was flexible and thus did not "provide[ ] automatic reinstatement for everybody ....," id., it remained a deterrent since it could not be "relieved" upon in the same way that a "right" might be. The court also cited Berkshire, where the court reinstated some strikers, but not others who had committed relatively "major" acts of misconduct. See supra notes 50-51 and accompanying text.
After thus concluding that reinstatement of employees who engage in unprotected activity might well "effectuate the policies of the Act" in the case then before it, the court found that the Board had not established that the strikers were discharged "for cause" under 10(c). The dissent noted that the record clearly indicates that the Board had found many instances of striker misconduct that constituted "valid grounds for discharging [the strikers]." Nevertheless, the majority held that the Board did not "allude to factors which may be relevant considerations under [the 'for cause'] provision, such as the employer's unfair labor practices, each employee's job history, and the relationship between acts of misconduct and fitness for continued service." Applying the Thayer approach to the "for cause" issue, the Board could not have relied on that proviso in refusing reinstatement.

B. Widespread Acceptance of the Thayer Principle

The Supreme Court denied certiorari of the circuit court's ruling, even though the Kohler Co.'s petition offered persuasive evidence that, according to its legislative history, the section 10(c) "for cause" proviso was clearly intended to prevent reinstatement after discharges for misconduct such as was involved in Kohler. Although the Supreme Court was provided with strong arguments and a clear opportunity to overturn Kohler and the Thayer doctrine, it refused to do so.

The Supreme Court's willingness to let Kohler stand is typical of the judicial willingness to read some "leeway" for strike misconduct into the Act, particularly when both sides have been at fault, even though the Act on its face lacks any authority for such balancing. Throughout the 1960's and early 1970's, the Thayer principle of balancing wrongs was accepted by virtually every circuit to consider the matter, although some circuits, particularly the Fourth and the Sixth, had a lower tolerance for strike misconduct than others. While the ultimate reason for

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148. Kohler, 300 F.2d at 709 (Miller, J., dissenting).
149. The sole authority cited to support the relevance of past employer practices is the Brief for the National Labor Relations Board in Opposition to Certiorari at 21-22, NLRB v. Thayer Co., 213 F.2d 748 (1st Cir.), cert. denied, 348 U.S. 883 (1954).
150. Kohler, 300 F.2d at 705. The leading authorities cited to support the relevance are a law review Note, 32 N.Y.U. L. Rev. 839, 846-48 (1957), and two pre-Thayer decisions: NLRB v. Illinois Tool Works, 153 F.2d 811 (7th Cir. 1946); NLRB v. Kelco Corp., 178 F.2d 578, 582 (4th Cir. 1949). Several arbitration decisions are also cited.
151. Cert. Petition No. 898, October Term 1961 at 43-45. The Kohler Co.'s petition emphasized Congress' understanding that cases like Berkshire had been overruled and that § 10(c) was intended as "assurance that the Board would not revert to the practice of reinstatement in the case of employees who engaged in unprotected activity." Id. at 44.
152. See infra notes 154-55 (cases cited).
153. See supra notes 69-86 and accompanying text.
154. See, e.g., Oneita Knitting Mills, Inc. v. NLRB, 375 F.2d 385 (4th Cir. 1967) (throwing water balloons and eggs at cars on the highway disqualified unfair labor practice strikers from rein-
this accommodation of "minor" misconduct is difficult to identify with any certainty, it seems to have been motivated by a general recognition of the need to look at strike situations "realistically"—that is, in the context in which the striker's misconduct occurred. Furthermore, this willingness may have been due in part to the recognition of the gross inadequacies of traditional Board remedies when employers commit unfair labor practices at critical moments in a union's struggle to organize or bargain. Whatever the reason, the Thayer doctrine remained unquestioned for many years.

Against this backdrop of virtually universal acceptance of Thayer, and perhaps because of it, many courts and even the Board sloppily failed to identify the precise statutory basis for this tolerance for "minor" striker misconduct, and merged the concepts of "protected activity" under section 7 with the wholly distinct concept of "appropriate remedy" under section 10(c). As a consequence, some opinions spoke of a protected "right" to engage in strike misconduct so long as the misconduct did not make the striker unfit for future employment.

For example, in Allied Industrial Workers, Local Union No. 289 v. NLRB, the Court of Appeals for the District of Columbia found that

statement where the incidents were too dangerous to be considered "minor" and "too remote in time" (several days) to have been "provoked" by earlier incident) (employer's unfair labor practices included unilateral changes in work assignments which affected seniority rights and discriminating discharge of some unionists, but no violent threats or coercion); Kayser-Roth Hosiery Co. v. NLRB, 447 F.2d 396 (6th Cir. 1971) (strikers "packing" buses intended to transport nonstriking employees to the employer's plant held "unfit" for reinstatement) (employer's unfair labor practices prompting the strike consisted of surface bargaining and unilaterally granting a raise during negotiations). But see Golay & Co. v. NLRB, 371 F.2d 259 (7th Cir. 1966), cert. denied, 387 U.S. 944 (1967) (brief "sit-down" strike and a few hours of "mass picketing" did not preclude reinstatement where misconduct was provoked and outweighed by employer's "massive" unfair labor practices) (spying on union activities, interrogating and threatening employees, promising or granting benefits, attempting to form a company union, and interfering with employees' rights to wear union insignia); Seminole Asphalt Refining, Inc. v. NLRB, 497 F.2d 247 (5th Cir. 1974) (two unfair labor practice strikers denied reinstatement, one for throwing cherry bombs onto the employer's property in the vicinity of flammable storage tanks, another for throwing a brick through window of a moving truck) (employer's unfair labor practices involved threats, interrogation, "the creation of the impression of surveillance," and laying off the three most active union organizers).

476 F.2d at 868 (D.C. Cir. 1973), noted this underlying basis:

It is not unusual to become involved . . . in an attempt to envision the totality of the circumstances, as whether the "misconduct is so violent or of such serious character as to render the employee unfit for further service," NLRB v. Illinois Tool Works, 153 F.2d 811, 816 (7th Cir. 1946); whether such misconduct constitutes a "trivial rough incident" or occurs "in a moment of animal exuberance," Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941); whether the employer's unlawful acts were serious or provocative [Kohler], supra, 300 F.2d at 703; and whether reinstatement would effectuate the policies of the Act, id. at 703.

156. See infra notes 193-96.

157. See supra notes 61-68 and accompanying text (discussion of this distinction and its importance).

refusing reinstatement of strikers in violation of Thayer and Kohler constituted violations of section 8(a)(1) and (3) (interference with union activity and discriminatory discharge). Thayer and Kohler stand for no such principle.\footnote{159}{See supra notes 130-50 and accompanying text.}

A discharge violates section 8(a)(1) or (3) only if it is intended to discourage activity that is “protected” under section 7. Thayer explicitly rejected the idea that misconduct is in anyway “protected.” In fact, the Thayer court emphasized that the activity at issue there was not protected by section 7. Instead, reinstatement was allowed in Thayer to prevent the employer from benefitting from its unfair labor practices, thus subverting the purposes of the Act. And since the same objection could be made against reinstating strikers guilty of misconduct, the Thayer court “weighed” the wrongdoing of each party to ensure that the greater wrongdoer would be penalized, thereby ensuring that the purposes of the Act were furthered to the greatest extent possible.\footnote{160}{See supra notes 106-11 and accompanying text.}

Another example of a similar misapplication of Thayer is Kayser-Roth Hosiery Co. v. NLRB,\footnote{161}{447 F.2d 396 (6th Cir. 1971).} which cites Thayer, (a remedy-based analysis) and Republic Steel (a rights-based analysis) for the same proposition.

Finally, the Board’s major decision in Coronet Casuals, Inc.,\footnote{162}{207 N.L.R.B. 304 (1973).} clearly misapplied the Thayer case, merging a discussion of implicit section 7 allowances for “minor” misconduct with discussion of the Thayer balancing principle, although Thayer made clear that the two concepts are in no way related.

Once the Thayer doctrine became perverted, the idea behind the doctrine was lost. Characterizing the Thayer doctrine as a striker’s “right” clearly could not be supported by any reasonable interpretation of Thayer or section 7.\footnote{163}{Any notion that § 7 allows for misconduct is flatly rejected by Thayer, and is clearly not supported by the legislative history of Taft-Hartley. See supra notes 76, 103-10 and accompanying text.} Divorced from its theoretical underpinnings, the Thayer principle became easy prey for attack. Those attacks and its ultimate downfall are the subject of the following section.

\footnotesize{\textsuperscript{159} See supra notes 130-50 and accompanying text.  
\textsuperscript{160} See supra notes 106-11 and accompanying text.  
\textsuperscript{161} 447 F.2d 396 (6th Cir. 1971).  
\textsuperscript{162} 207 N.L.R.B. 304 (1973).  
\textsuperscript{163} Any notion that § 7 allows for misconduct is flatly rejected by Thayer, and is clearly not supported by the legislative history of Taft-Hartley. See supra notes 76, 103-10 and accompanying text.}
IV
RETIREFM FROM THE THAYER DOCTRINE, AND ITS
ULTIMATE REPUDIATION IN CLEAR
PINE MOULDBNGS

A. First Signs of Disenchantment with the Thayer Principle

In the late 1970's, the first signs of disenchantment with the Thayer balancing principle appeared in the Fifth Circuit case of Mosher Steel Co. v. NLRB. The Mosher opinion, though weak in its grasp of certain labor law principles, did properly grasp Thayer's distinction between "protected activity," whether an employee was discharged "for cause," and whether reinstatement would "effectuate the purposes of the Act." However, the Mosher court curiously believed it necessary to decide whether reinstatement would effectuate the Act's purposes even though it had already determined that the misconduct was sufficient "cause" for discharge.

Aside from this aberrant statutory interpretation, the Mosher opinion's most significant feature is its explicit refusal to undertake a Thayer style "balancing" of the employer's misconduct against that of the striking employees. In Mosher the strikers' misconduct was directed, not at the employer, but rather at the nonstriking employees. The court interpreted Thayer as being based on some notion of "self-defense" against the employer and held that balancing may be appropriate when judging striker misconduct directed against the employer but not when that misconduct is directed against "fellow worker[s]."

Together with this disenchantment with the Thayer doctrine, courts began to reject the NLRB's gradual expansion of the scope of "protected activity" under section 7. As noted above, in 1971 the Board, in Coronet Casuals, relied in part on its misapplication of Thayer to hold that "minor" strike misconduct is within the scope of section 7 protection, and that such conduct must be viewed in the circumstances in which it was committed. In NLRB v. W.C. McQuaide, Inc., the Third Circuit rejected this interpretation of section 7 and held that "protected activity" does not include misconduct such as threats, which "under the circum-

164. 568 F.2d 436 (5th Cir. 1978).
165. See, e.g., id. at 439, 440-42 (finding employees guilty of committing "unfair labor practices").
166. Id. at 441.
167. Id.
168. Id. at 439.
169. Id. at 441-42. This statement ignores the fact that Thayer itself involved misconduct against fellow employees. See supra text accompanying note 100. Accordingly, the Mosher court failed to comprehend that the true basis of the Thayer doctrine was not a notion of "self defense."
170. See supra note 162 and accompanying text.
171. 552 F.2d 519 (3d Cir. 1977).
stances existing . . . may reasonably tend to coerce or intimidate [non-striking] employees in the exercise of rights protected under the Act.”

This limitation of section 7 was accepted in subsequent years by various NLRB administrative law judges, but was not recognized by the NLRB until its decision in Clear Pine, discussed below.

Since McQuaide did not involve an unfair labor practice strike, and since Thayer based its holding upon section 10(c) rather than section 7, the Thayer court’s interpretation of section 7 is in fact quite similar to the standard adopted in McQuaide. However, since Thayer’s balancing principle had been relied upon in cases like Coronet Casuals to justify a broader interpretation of section 7, when those cases came under siege, Thayer fell with them.

B. Repudiation of the Thayer Doctrine in Clear Pine

In 1984 the NLRB both adopted the McQuaide interpretation of section 7 and abandoned the Thayer doctrine in a single stroke. The NLRB’s ruling in Clear Pine rejected the expanded interpretation of section 7 that it had followed in the 1970’s and repudiated more than twenty years of Board precedent and over forty years of court support for the Thayer doctrine and its various permutations.

The Clear Pine decision was in fact a modification of a 1978 Board opinion which held that a strike was an unfair labor practice strike and which ordered reinstatement of all strikers. The first part of the 1984 Clear Pine ruling has been widely discussed for its adoption of McQuaide’s narrow “objective” test to determine whether conduct is sufficiently egregious to refuse reinstatement. However, Clear Pine’s repudiation of the Thayer doctrine—its holding that not all “unprotected” conduct is necessarily so egregious as to make reinstatement of such strikers inappropriate, and that a “balancing” of wrongs is required.

172. Id. at 528 (quoting Local 542, Int'l Union of Operating Eng'rs v. NLRB, 328 F.2d 850 (3d Cir.), cert. denied, 379 U.S. 826 (1964)).
175. Id.
176. Id. at 1046 n.14.
179. The Board adopted a so-called “objective” test to determine whether “coercive” conduct has been engaged in. This test, first announced in NLRB v. W.C. McQuaide, Inc., 552 F.2d 519 (3d Cir. 1977), measures neither the state of mind of the striker nor the victim of the alleged coercion, but rather seeks to determine if, under the circumstances, the conduct “may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.” Id. at 528 (quoting Local 542, Operating Eng'rs v. NLRB, 328 F.2d 850, 852-53, (3d Cir.), cert. denied, 379 U.S. 826 (1964)).
to determine whether reinstatement of strikers will "effectuate the purposes of the Act"—has been virtually ignored. Each of these elements of the opinion will now be analyzed.

1. **Adoption of the McQuaide Test For Determining Whether Striker Misconduct is "Protected" Under Section 7 or 13**

   Since this Note concerns the distinction between section 7 and section 10(c), rather than the proper scope of section 7 generally, the analysis of this part of the Clear Pine ruling will be somewhat curtailed. For present purposes, the relevance of this particular part of Clear Pine is that the cases which it rejected were largely those cases which distorted the Thayer doctrine to justify a broader interpretation of section 7. As this Note has explained, these cases suffered from a lack of precedential support, and did not comport with a reasonable interpretation of the intent of Congress when it passed the Taft-Hartley amendments to section 7. As Clear Pine points out, Congress was very concerned that nonstrikers be free to exercise their right to work, and therefore modified the definition of section 7 activity to include the right to refrain from concerted activity. Furthermore, section 8(b) was added to the NLRA to specifically prohibit "a labor organization or its agents" from coercing any employee in their right to engage in, or refuse to engage in, concerted activity.

   As such, it is difficult to take issue with this part of the Board's ruling. What is objectionable, however, is the Board's blurring of this idea with the more important equitable principle that underlies the Thayer doctrine, that is, whether the Board has a duty to consider an employer's unfair labor practices in designing a remedy which will effectuate the purposes of the Act. The Board's ruling with respect to the remedy issue stands upon much less firm ground than its adoption of the McQuaide test.

2. **Clear Pine's Rejection of Thayer's Distinction Between "Protected" Activity Under Section 7 and Misconduct Which Renders Employees Ineligible for Reinstatement Under Section 10(c)**

   The issue before the Board was the reinstatement of unfair labor practice strikers, which technically triggers only a discussion of the policies and requirements of section 10(c). However the Board began its
discussion with an analysis of whether the conduct met the requirements of section 7—whether the conduct was "protected." Finding it was not, the plurality held that the strikers were per se not entitled to reinstatement, implicitly rejecting the distinction drawn by Thayer and Kohler. Neither commentators nor even the dissenting members of the Board noticed this conceptual merger. This neglect is not surprising, given the blurring of the distinction in 1970's reinstatement cases. Once this distinction was ignored, it was easy for the Board to demonstrate that the legislative history of section 7 clearly did not contemplate violence against nonstrikers, even "minor violence."

There is evidence suggesting that the Board's abandonment of the Thayer distinction was a deliberate act, rather than a mere oversight. Footnote 16 briefly analyzes the legislative history of the "for cause" proviso of section 10(c). The text accompanying that footnote states that "it is clear that Congress never intended to afford special protection to all picket line conduct, whatever the circumstances." The footnote then quotes the portion of the House Conference Report in which the Committee, erroneously interpreting then existing law, suggests that it is codifying this erroneous interpretation through the section 10(c) "for cause" proviso. The Board goes even further, quoting extensively from the Fansteel opinion to the effect that "the right to strike" contemplates little more than "the right to quit work."

In sum, the Board mounted a double-barreled attack on the Thayer/Kohler principles. Not only did it fail to acknowledge the distinction between sections 7 and 10(c), it went on to restrict the protection of section 7 to a greater extent than any case since Fansteel.

3. Repudiation of the Thayer Balancing Test to Determine Whether Reinstatement Would Effectuate the Policies of the Act

The Board continued its dismantling of the Thayer doctrine by rejecting the policy of "balanc[ing] the severity of the employer's unfair labor practice that provoked the strike against the gravity of the striker's misconduct . . . [i]n deciding whether reinstatement should be ordered after an unfair labor practice strike." The Board identified six justifications for abandoning the Thayer principle.

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184. See supra notes 102-05.
185. See supra notes 157-63.
186. Clear Pine, 268 N.L.R.B. at 1046 n.16.
187. Id. (emphasis added).
188. Id. See supra notes 72-85 and accompanying text.
189. Clear Pine, 268 N.L.R.B. at 1046. Cf. id. at 1047 n.23 (apparently limiting the bounds of protected conduct to that which is allowed under § 8(c)).
190. Id. at 1047 & nn.24-25.
First, the Board stated that "nothing in the statute . . . support[s] the notion that striking employees are free to engage in or escalate violence or misconduct in proportion to their individual estimates of the degree of seriousness of an employer's unfair labor practices." While this argument is indisputable as presented, it misses the point of the 

Thayer doctrine.

The balancing test in Thayer was not based on any sort of "right" of employees to engage in misconduct. Thayer was justified on the ground that, when both sides are guilty of some wrongdoing, one of those two sides will end up "getting away with" breaking the law, and the policies of the Act are best served by making sure that the party who has committed the greater of the two wrongs pays the consequences of their action. Stated in this manner, there are no "rights" to engage in misconduct on either side. Nevertheless one party will always avoid punishment and, under the Thayer principle, that party is necessarily the one who committed the lesser wrong. After Clear Pine, whenever a striker engages in any misconduct in response to an employer unfair labor practice the employer will always be the party escaping effective legal sanction regardless of the relative gravity of the wrongs committed.

This allows the employer to achieve the unlawful objective of its unfair labor practice. In the usual Thayer situation, any remedy short of complete reinstatement with backpay will constitute a clear victory in the employer's unlawful efforts to destroy union power. Typically, "either the employer has discharged select union advocates during the upswing of an organizational campaign or it has refused to bargain with the union—often newly installed—in an effort to undermine or destroy it." In either case, the remedies afforded by the Act—short of reinstatement—are woefully inadequate. In addition to problems of delay and failure to compensate for consequential damages, the employer may be able to irreparably crush an employee organizational drive during the two or three years before an NLRB reinstatement order can be effectively enforced. "Similarly, an employer may deliberately refuse to bargain with a newly certified union by raising insubstantial defenses to its certification in an 8(a)(5) proceeding. By the time the Board's bar-

191. Id. at 1047.
192. See supra text accompanying notes 72-85.
194. Id. at 1229. See generally St. Antoine, A Touchstone for Labor Board Remedies, 14 WAYNE L. REV. 1039, 1047 (1968); Note, NLRB Power to Award Damages in Unfair Labor Practice Cases, 84 HARV. L. REV. 1670 (1958).
gaining order is enforced, the union's strength may have withered."\(^{196}\)

Viewed from this perspective, "nothing in the statute . . . support[s] [Clear Pine's] notion that [employers] are free to engage in or escalate violence or [unfair labor practices]"\(^{197}\) merely because the striking employees might engage in minor acts of picket line misconduct. The Board fails to grasp this irony.

The Board's second justification is that its duty is "to fashion remedies which will discourage unfair labor practices and the resort to violence and unlawful coercion by employers and employees alike."\(^{198}\) This argument is certainly indisputable but is not inconsistent with the Thayer doctrine. The Act requires the Board to be at least as vigilant in preventing employers from achieving unlawful objectives through deliberate unfair labor practices as in preventing employees from engaging in unprotected conduct. The Board offers no explanation as to how it intends to deal with the employer misconduct problem.

Furthermore, the Board's standard of permissible conduct limits the strikers' activities to "peaceful patrolling [and] . . . nonthreatening expression of opinion, verbally or through signs and pamphleteering."\(^{199}\) This standard fails to recognize that some misconduct is inevitable, especially during strikes protesting egregious unfair labor practices by the employer.\(^{200}\) As stated in the concurrence to the Board's Clear Pine ruling, "The Board's application of the McQuaide test must be informed by the knowledge that picket line actions often include tense, angry, and hostile confrontations in which emotions run high and threats are hurled that cannot reasonably be interpreted as auguries of violence. The Board must take care not to impose on industrial disputes a code of ethics alien to the realities of confrontational strikes and picket lines and contrary to our national tradition of free speech."\(^{201}\)

Third, the Board submits that such balancing of misconduct is inappropriate because it "condones misconduct on the part of employees as a response to the employer's unfair labor practice and indeed makes it part of the remedy protected by the Act."\(^{202}\) Here again, the Board misses the point of the Thayer doctrine. The principal Thayer justification is an equitable one, designed to choose between the lesser of two evils. Even from a "self help" perspective, however, the Clear Pine approach does nothing more than allow an employer to use unfair labor practices as

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\(^{196}\) Lopatka, supra note 193, at 1229.

\(^{197}\) Clear Pine, 268 N.L.R.B. at 1047.

\(^{198}\) Id.

\(^{199}\) Id. at 1047 & n.23.

\(^{200}\) See, e.g., supra notes 37-44 and accompanying text (discussion of the Republic Steel strike).

\(^{201}\) Clear Pine, 268 N.L.R.B. at 1048 n.2 (Zimmerman, Dennis, Mbrs., concurring) (citing McQuaide, 552 F.2d at 528 & n.20).

\(^{202}\) Id. at 1047 n.25.
part of its arsenal of economic weapons, based on a calculated gamble that the employees will be provoked into engaging in acts of misconduct, allowing the employer to discharge them and achieve the objectives of its unfair labor practices. Surely nothing in the Act permits these tactics in economic warfare.

Fourth, the Board claimed that “retaliation breeds retaliation and, in the emotion-charged strike atmosphere, retaliation will likely initiate an escalation of misconduct, culminating in the violent coercive actions we condemn.” This argument assumes that picket line misconduct is engaged in as part of a calculated strategy rather than a natural outcome of the emotion-charged atmosphere when replacement workers have been hired—a dubious proposition.

Fifth, the Board claimed that such balancing makes it “virtually impossible . . . for employees to know what is expected of them during a strike” and that it is the Board’s purpose “to discourage any belief that misconduct is ever a proper element of labor relations.” A fact-specific standard is more flexible than an absolute rule. However, in effectuating the purposes of the Act the Board must weigh the need for certainty against the need to do justice in the particular case. One factor that should be evaluated in determining this need for certainty is the availability of other mechanisms to curb striker misconduct. Strikers who commit acts of violence against non-strikers are fully subject to civil liability and criminal punishment. It is therefore inaccurate to say that strikers are wholly without guidance about the conduct that is expected of them. In effect then, the real question is whether misbehaving strikers should be subject to the additional penalty of losing their jobs.

The problem with the Clear Pine argument for an “absolute” standard is that it wholly ignores the likely consequence of the rule ultimately adopted. Under an absolute standard, it is to the employer’s advantage to goad strikers into acts of misconduct so that the employer can escape any sanction for its unfair labor practice. Unlike employee
misconduct, employer efforts to crush a union are not subject to civil or criminal liability. The sole sanction against such employer misconduct is the economic penalty of requiring reinstatement with backpay of all unlawfully discharged strikers. By removing this sanction whenever strikers engage in even minor misconduct, the adoption of the \textit{Clear Pine} standard, far from “discouraging” unlawful conduct, ironically encourages the belief that \textit{employer} misconduct is a proper element of labor relations.\footnote{Sixth, the Board argued that such “unclear and permissive standards . . . have failed to adequately protect [nonstriking] employee rights.”\footnote{There may be some substance to this justification since nonstriking employees generally bear the brunt of striker misconduct. On the other hand, while the protection of the rights of nonstriking employees is a major objective of the Taft-Hartley Act, there are times, such as in the unfair labor practice situation, where this purpose conflicts with another purpose of the Act—the right to organize and bargain collectively. In such situations these two goals cannot be met concurrently and the courts and the Board must deal with this dilemma.} However, replacement workers hired during an unfair labor practice strike enjoy far fewer rights than do replacement workers in an economic strike. Replacement workers must be fired at the resolution of an unfair labor practice strike if the strikers want their jobs back, while replacement workers hired during an economic strike have a right to retain their jobs. This different treatment makes sense because replacement workers in an unfair labor practice strike are indirect beneficiaries of the employer’s unlawful conduct. This rationale also applies to the \textit{Thayer} setting. Thus the fact that replacements may be subject to some abuse from irate strikers as a result of that same employer conduct is, therefore, less cause for concern. Finally, the Board’s argument ignores the fact that nonstriking employees can protect their right to be free from physical abuse through other vehicles, such as civil suits and criminal charges. Somehow, economic “capital punishment” seems to be a rather extreme penalty which may not “fit the crime” in most cases. Even if stiffer sanctions might be necessary to protect the rights of nonstrikers, those sanctions should not be unreasonably severe, nor should they benefit the employer whose unlawful conduct precipitated the strike.

\footnote{37-44) occurred today, none of the employees would be entitled to reinstatement under the \textit{Clear Pine} standard of “peaceful and reasoned conduct.” In \textit{Republic Steel}, the employer engaged in violent anti-union tactics prompting criminal acts in response by union members. Under the \textit{Clear Pine} test, there would be no room for considering these supposedly “extraneous” facts. The \textit{Thayer} doctrine was expressly intended to prevent such unjust results.}

\footnote{207. \textit{Contra Clear Pine}, 268 N.L.R.B. at 1047 n.25.}

\footnote{208. \textit{Id.}
In sum, the Board's justifications for repudiating the Thayer balancing test mischaracterize the reason behind the rule, fail to acknowledge the new, and perhaps greater, problems resulting from its repudiation, and seem to be disingenuous in their concern for "effectuating the policies of the Act." Clear Pine represents a lopsided concern for effectuating certain limited policies of the Act while wholly ignoring the legislative interest in curbing employer's unlawful interference with the employees' rights to bargain collectively through a representative of their own choosing. The Board's action is arbitrary and capricious, and an abuse of their mandate to effectuate all of the policies of the Act, not just those it agrees with. From a purely practical standpoint, the Board's ruling is remarkable for its absolute refusal to approach the problem of strike misconduct from a realistic perspective—a concern that, until recently, was thought to be an important part of effectuating the Act's policies.  

V  
POST-CLEAR PINE DEVELOPMENTS  

In the months since Clear Pine was handed down the Board has applied it without hesitation. Many of these decisions involve economic strikes. However, a few have involved unfair labor practice strikes. These cases illustrate the impact of the Clear Pine decision.  

In PBA Inc., the Board refused to order reinstatement of unfair labor practice strikers who threw rocks at cars of nonstriking employees and company officials and uttered threats at customers. The Board held that these actions had a "reasonable tendency to coerce and intimidate them, regardless of whether they are employees or nonemployees." The Board, however, cites no authority within the Act protecting the rights of "nonemployees."  

The strike occurred in the midst of a fledgling union's efforts to gain recognition. The employer threatened to close its plant if the employees joined the union, warning that it would never sign a contract with the union and promising higher wages and benefits to employees who did not support the union. The employees guilty of misconduct permanently lost their jobs. The only sanctions imposed on the employer were a "cease-

209. See supra text accompanying notes 155-56.  
212. Id.
and-desist" order and the posting of a notice informing employees of their rights, issued three and one-half years after the events took place.

In *Preterm, Inc.*, the Board made some distinctions between protected and unprotected conduct under the *Clear Pine* standard, and ordered reinstatement of some strikers whose misconduct was not of "such serious nature" as to fall beyond the scope of the Act's protection. This misconduct included blocking a nonstriker's car and warning employees that "We are going to get you." This ruling is significant in its allowance for some conduct beyond the mere "right to quit work" and "peaceful picketing." Nevertheless, the Board found the fact that the strike was prompted by an employer's bad faith bargaining to be irrelevant.

The Board also appeared to adopt a distinction between misconduct which occurs prior to the discharge versus misconduct which occurs after an unlawful discharge. In *McEver Engineering*, the Board was asked to rule on the reinstatement of two employees who committed misconduct after being unlawfully discharged for refusing to work in unsafe conditions. The Board stated "in the absence of exceptions, we adopt the [AL's] findings that post-discharge misconduct . . . does not warrant denial of their reinstatement rights under *Clear Pine Mouldings* . . . ." It is unclear what the Board would have done had the issue been raised on appeal. However, in pre-discharge misconduct cases, the Board has shown firm allegiance to the approach of *Clear Pine*.

**CONCLUSION**

By repudiating the *Thayer* doctrine in *Clear Pine*, the NLRB has returned to the rule of *Fansteel*, which was rarely followed even in its own day. While the Board's stated motives are laudable—*i.e.*, to discourage unlawful conduct of any kind—its actions are unlikely to achieve this result, because it attempts to solve the problems of striker misconduct while ignoring the problem of employer misconduct.

Misconduct of any kind in labor relations is regrettable and should not be condoned. But when both sides of a labor dispute are at fault and the statutorily available remedies are designed so that punishing one will mean excusing the another, clearly the most equitable approach is to dis-

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214. Id.
215. 275 N.L.R.B. No. 128 (1985) (employee misconduct involved two verbal threats and one shove to company officials, all committed after the employees were discharged for refusing to work atop a large tank, 65 to 80 feet above the ground, in a driving rainstorm).
216. Id.
217. See, e.g., Rourie Bertrand Dupont, Inc., 271 N.L.R.B. 443 (1984) (throwing nails at a truck precluded reinstatement for ULP striker); Central Mack Sales, Inc., 273 N.L.R.B. No. 159 (1984) (reinstatement denied for misconduct, although employer refused to bargain by unilaterally changing terms of employment, and violated § 8(a)(1) and (3) by reducing work hours because of union activities and by refusing to reinstate a ULP striker).
cipline the more serious wrongdoer. The Board has apparently forgotten that the *Thayer* doctrine stands for this simple principle. Although this idea may have been lost in recent applications of *Thayer*, it should not be abandoned for that reason, and certainly not without serious consideration of the implications of such a move. Until an alternative principle can be formulated to handle the difficult task of curbing misconduct of all parties in a labor dispute, the *Thayer* doctrine should continue to be applied.