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## Biting the Hand that Feeds: Third Party Appeals and NLRA Objectives

Matthew Knowles

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# BITING THE HAND THAT FEEDS: THIRD PARTY APPEALS AND NLRA OBJECTIVES

*Matthew Knowles\**

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### INTRODUCTION

Words hurt—and your boss has feelings too. Criticism of a company's products, services, management, or labor practices is never good for business. But when the attacker is an employee, trained and paid to work towards the firm's prosperity, his words can cut deeper than the bottom line. The employer may feel *betrayed* and amply justified in firing such an 'ungrateful' or 'disloyal' employee.

But this sentiment might elicit little sympathy from the single parent who, unable to find cover the day a child is sick, wants to speak out against a company policy of firing all absentees, or from the long-serving employee whose co-workers are thoughtlessly fired in a downturn. These workers feel they have a right to express their concerns, and that the public has a right to hear them.

Both perspectives are valid. Each has a place in the nation's labor law. On the one hand, most employees in the United States are employees at-will, meaning they can be fired for any reason or for none at all,<sup>1</sup> and courts have found a duty on the worker's part to refrain from harming his employer's interests.<sup>2</sup> An employer is not obliged to pay unwanted or unnecessary workers. On the other hand,

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1. See generally Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984).

2. See generally Matthew W. Finkin, *Disloyalty! Does Jefferson Standard Stalk Still?*, 28 BERKELEY J. EMP. & LAB. L. 541 (2007).

the National Labor Relations Act<sup>3</sup> (“NLRA” or “the Act”) protects a worker’s efforts to better her conditions of employment,<sup>4</sup> and this includes working against the employer’s interests by forming unions,<sup>5</sup> organizing strikes,<sup>6</sup> or appealing to third parties for support in a dispute.<sup>7</sup> An employer commits an unfair labor practice when it fires an employee for engaging in conduct covered by the Act.<sup>8</sup>

These features of U.S. Labor Law can coexist, however uneasily. Activity that is protected by the NLRA cannot justify a worker’s termination; any unprotected activity can. But the National Labor Relations Board (“NLRB” or “the Board”) and Federal Courts of Appeals have recognized a third class of activity: conduct otherwise protected by the Act may nonetheless be grounds (or “cause”)<sup>9</sup> for termination if it is deemed to be ‘disloyal.’<sup>10</sup> Both the Board and the courts have struggled to define the scope of this class, as illustrated by a recent split between the Eighth and D.C. Circuits on the issue.<sup>11</sup>

This Note addresses the problems caused by the disloyalty exception to section 7 of the NLRA and argues that the exception can and should be abandoned. Part I introduces the National Labor Relations Act and the National Labor Relations Board, discusses the Act’s conflicting policies and provisions, and presents the Supreme Court decision that gave birth to the disloyalty exception: *Jefferson Standard*.<sup>12</sup> Part II traces the Board’s struggle to formulate an objective test for disloyalty amenable to consistent application, and explores criticisms of the exception as subjective, indeterminate, outdated, and fundamentally inconsistent with the Act. Finally, Part III argues that the true problem lies with the Board’s failure to choose between conflicting theories of the Act’s policy in light of the Taft-Hartley Amendments. It suggests that the Board recognizes the difficulties inherent in the disloyalty exception but feels bound by

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3. See generally National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012). See also *National Labor Relations Act*, NAT’L LABOR RELATIONS BD. [hereinafter *NLRA Overview*], <https://www.nlr.gov/resources/national-labor-relations-act> [<https://perma.cc/8W7J-VX6W>].

4. 29 U.S.C. § 157.

5. *Id.*

6. *Id.*

7. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566–67 (1978).

8. 29 U.S.C. § 158(a)(4).

9. *Id.* § 160.

10. *NLRB v. Local Union No. 1229, Intern. Broth. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464, 472, 474 (1953).

11. Compare *DirecTV, Inc. v. NLRB*, 837 F.3d 25, 28 (D.C. Cir. 2016), with *MikLin Enters., Inc. v. NLRB*, 861 F.3d 812, 815 (8th Cir. 2017).

12. See generally *Jefferson Standard*, 346 U.S. 464.

*Jefferson Standard* to retain the doctrine in some form. Part III asserts that the Board is in fact free to create its own test and goes on to offer an approach that would respond to both the problems with the present doctrine and the concerns of the *Jefferson Standard* Court.

### I. THE NLRA, THE NLRB, AND *JEFFERSON STANDARD*

Part I describes labor relations in the United States prior to passage of the NLRA. This part considers the effects on working conditions of the ‘employment-at-will’ doctrine and lays out the key protections of the Act. Part I next explores the Supreme Court’s decision in *NLRB v. Jones & Laughlin Steel Corp.*<sup>13</sup> and Congress’ passage of the 1947 Taft-Hartley Amendments, as well as the influence of both developments on Justice Burton’s opinion for the Court in *Jefferson Standard* and on subsequent interpretations of that case.

#### A. Freedom of Contract and Employment At-Will

When Congress enacted the National Labor Relations Act in 1935 the legal landscape was bleak for the American worker. Under the dominant freedom of contract doctrine all interference in employer-employee relations was viewed, at best, as inefficient, and at worst as a denial of each party’s God-given right to dispose of his labor or capital as he wished.<sup>14</sup>

Freedom of contract shaped labor law in at least two ways. First, it provided a tool with which pro-industry judges could strike down laws passed for the common good on the grounds that they unconstitutionally regulated agreement—most famously in *Lochner v. New York*.<sup>15</sup> Second, it served to justify the American ‘at-will’ employment regime.<sup>16</sup> Under this system, according to the Supreme Court of Tennessee in 1884:

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty

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13. 301 U.S. 1 (1937).

14. STEPHEN F. BEFORT & JOHN W. BUDD, *INVISIBLE HANDS, INVISIBLE OBJECTIVES* 87 (2009).

15. 198 U.S. 45, 53 (1905) (striking down a New York worker-protection statute on the grounds that it “interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer”).

16. See Epstein, *supra* note 1, at 953–56.

of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.<sup>17</sup>

But the at-will system was not as even-handed as the court implies. While the law imposed few duties on employers, courts did find a duty on the worker's part to "do nothing to injure his Master's Business."<sup>18</sup> This vague duty, which has been described as "a basic obligation of faithfulness to the master's interests,"<sup>19</sup> was used to support "just cause" discharge of workers who had violated neither the law nor the terms of their employment contracts.<sup>20</sup> Even contracted workers, then, could find themselves without protection when they acted to further their own vital interests—if furthering such interests came at the expense of the employer's.

In an environment hostile to regulation, meanwhile, wages and conditions were determined by the market.<sup>21</sup> Here, employers held the cards. Incorporation allowed consumers of labor to band together and bargain as a unit, while labor bid down its own wages in a scramble for work, of any kind, at any price.<sup>22</sup> Workers who tried to organize were fired (or worse),<sup>23</sup> and were without recourse under the at-will doctrine. The results were predictable: dangerous conditions, low pay, and long hours.<sup>24</sup> Discontent fostered unrest and, ultimately,

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17. *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 518–19 (Tenn. 1884).

18. WILLIAM CAMPBELL, 1 FRASER ON MASTER AND SERVANT, EMPLOYER AND WORKMAN, AND MASTER AND APPRENTICE 88 (3d ed. 1882) (italics omitted).

19. Finkin, *supra* note 2, at 549.

20. *See, e.g., Lacy v. Osbaldiston*, 8 C & P 83, 173 ER 408 (1837).

21. *See generally* Daniel J. Chepaitis, *The National Labor Relations Act, Non-Paralleled Competition, and Market Power*, 85 CAL. L. REV. 769 (1997) (arguing that the corporation is a form of employer concerted activity and defending the NLRA as necessary to correct that one-sided exercise of price-distorting market power).

22. *Id.*

23. *See* Kenneth M. Casebeer, *Labor Struggles, Collective Action, and Law*, in AMERICAN LABOR STRUGGLES AND LAW HISTORIES 1, 8 (Kenneth M. Casebeer ed., 2d ed. 2017) (The law "authorized permanent discharge and replacement of strikers, [and] criminal and civil conspiracy convictions [were] sustained by courts at all levels through sweeping injunctions prohibiting labor activity . . .").

24. *See* BEFORT & BUDD, *supra* note 14, at 29 ("[I]n the early 1900s, the average unskilled worker who earned \$10 a week could barely afford a run-down, two-room apartment without running water. By one count, industrial accidents resulted in 25,000 deaths, 25,000 permanent disability cases, and 2 million temporary disability cases per year. If these numbers are accurate, then there were more U.S. casualties in the workplace than on the battlefield during World War I. A 1909 government survey revealed that 85 percent of wage earners typically worked at least fifty-four hours per week . . .").

industrial strife; strikes plagued the early twentieth-century workplace.<sup>25</sup>

### B. The National Labor Relations Act

Senator Robert Wagner, author of the first version of the NLRA (“the Wagner Act”),<sup>26</sup> hoped by the legislation to promote industrial peace through “industrial democracy.”<sup>27</sup> Although the Wagner Act pursued several different policies,<sup>28</sup> Congress enacted the NLRA “to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.”<sup>29</sup> Section 7 of the NLRA, “the essence of the entire statute,”<sup>30</sup> grants employees the right to unionize, to strike, and to bargain collectively for mutual aid and protection.<sup>31</sup> Section 10(c) empowers the Board to remedy employer action violating employees’ section 7 rights.<sup>32</sup> That same section, however, prohibits the Board from ordering reinstatement of any employee terminated “for cause.”<sup>33</sup>

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25. See S. REP. NO. 74-573 at 1–2 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, 2301 (1985) (“In 1933 over 812,137 workers were drawn into strikes, and in 1934 the number rose to 1,277,344. In this 2-year period over 32,000,000 working-days were lost because of labor controversies.”).

26. See *The 1935 Passage of the Wagner Act*, NAT’L LABOR RELATIONS BD., <https://www.nlr.gov/who-we-are/our-history/1935-passage-wagner-act> [<https://perma.cc/ZZ5Z-C89E>].

27. 79 CONG. REC. S7568 (daily ed. May 15, 1935) (statement of Sen. Wagner).

28. See Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 230 (2005) (“The NLRA’s policies include promoting collective bargaining; safeguarding workers’ full freedom of association, self-organization, and designation of representatives of their own choosing; acting for mutual aid or protection; achieving equality of bargaining power; protecting the right to strike; preventing business depressions; improving wage rates; increasing the purchasing power of wage earners; and stabilizing competitive wage rates and working conditions within and between industries.”).

29. See *NLRA Overview*, *supra* note 3.

30. Charles J. Morris, *How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board’s Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 16 (2012).

31. 29 U.S.C. § 157 (2012) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”).

32. 29 U.S.C. § 160.

33. *Id.*

Section 3 of the Act establishes and governs the procedures of the National Labor Relations Board.<sup>34</sup> The Board, an independent federal agency charged with enforcing the Act,<sup>35</sup> determines national labor relations policy—within the limits set by Congress.<sup>36</sup> The Board is composed of five members, appointed to five-year terms by the President with the advice and consent of the Senate.<sup>37</sup>

The NLRB is responsible for investigating unfair labor practice allegations, finding relevant facts, and adjudicating such complaints in the first instance. Board orders are not self-enforcing, however, and appeals are heard in the federal circuit with jurisdiction over the dispute. The Board's conclusions enjoy great deference in the U.S. Courts of Appeals:<sup>38</sup> from 2010 to 2015, seventy-six percent of Board orders were enforced in full on appellate review, with eighty-five percent enforced at least in part.<sup>39</sup>

### C. *Jones & Laughlin Steel Corp.* and the Taft-Hartley Amendments of 1947

In order to understand *Jefferson Standard*, the case at the center of this Note, it is important to consider two developments between the 1935 passage of the Wagner Act and the Supreme Court's ruling in 1953.

In 1937, the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*<sup>40</sup> upheld the constitutionality of the NLRA for the first time.<sup>41</sup> It is significant that the Court upheld the Act under Congress's power to regulate interstate commerce, on the grounds that that failure to recognize collective bargaining rights was a chief cause of the strikes

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34. 29 U.S.C. § 153.

35. *Id.*

36. Morris describes the Board as functioning like a “Supreme Court,” intended to give shape to those provisions of the Act expressed in broad and flexible language. *See* Morris, *supra* note 30, at 16.

37. *Who We Are*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/who-we-are> [<https://perma.cc/2R9T-WGFW>].

38. *See* *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011) (finding that a reviewing court “must uphold the judgment of the Board unless, upon reviewing the record as a whole, [it] conclude[s] that the Board’s [factual] findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case”) (citation omitted).

39. *Appellate Court Decisions, 1974–2017*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/news-outreach/graphs-data/litigations/appellate-court-decisions-1974-2016> [<https://perma.cc/5X8Y-23YL>].

40. 301 U.S. 1, 30 (1937).

41. *Id.* at 30.

that so often disrupted the national economy.<sup>42</sup> One commentator argues that the decision represents a missed opportunity: the Court's use of economic terminology, rather than the language of industrial democracy, reduced *Jones & Laughlin* to a limited victory at best for supporters of "worker human rights."<sup>43</sup> The decision made clear that the interests at stake were commercial, not democratic.<sup>44</sup>

Ten years later, however, the 80th Congress overrode President Truman's veto to enact the Taft-Hartley Amendments of 1947<sup>45</sup> ("Taft-Hartley" or "the Amendments"). Taft-Hartley, in contrast to the Wagner Act, was supported by management and sharply opposed by organized labor.<sup>46</sup> Labor leaders claimed that the Amendments, which, *inter alia*, gave employees the right to refrain from union membership<sup>47</sup> and employers a right to freedom of speech,<sup>48</sup> were a "flagrant violation" of the Thirteenth Amendment to the Constitution.<sup>49</sup> The Act's defenders, on the other hand, argued that it safeguarded the rights of both individual workers and management against abuses by excessively powerful unions and protected the public from strikes made possible by union employment monopolies.<sup>50</sup> While both supporters and opponents would agree that Taft-Hartley was intended to limit union power as expanded by

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42. *Id.* at 42 ("Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace."). Several Legislators involved in drafting the Bill, however, had believed that the Thirteenth and Fourteenth Amendments offered clearer paths to constitutionality. See James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 54–55 (2002).

43. James A. Gross, *The NLRB: Then and Now*, 26 ABA J. LAB. & EMP. L. 213, 216–17 (2011).

44. See Pope, *supra* note 42, at 83–85.

45. Act of June 23, 1947, PUB. L. NO. 80-101, 61 Stat. 136. The statute's official name is the Labor Management Relations Act, 1947.

46. FRED WITNEY & BENJAMIN J. TAYLOR, LABOR RELATIONS LAW 42–43 (Prentice Hall eds., 7th ed. 1996).

47. 29 U.S.C. § 157 (2012).

48. *Id.* § 158(c).

49. See Pope, *supra* note 42, at 109 ("AFL Secretary George Meany delivered the administration's response. Five months before, Meany had charged that Taft-Hartley transgressed the Thirteenth Amendment and warned that American workers would inevitably resist 'such a flagrant' violation of the Constitution.").

50. WITNEY & TAYLOR, *supra* note 46, at 43.

the Wagner Act,<sup>51</sup> they dispute whether the Amendments changed the statute's underpinning policy objectives.<sup>52</sup>

Although Taft-Hartley granted new rights to individual workers and employers, it did not repeal the Act's substantive provisions supporting collective bargaining.<sup>53</sup> The conflicting policy implications left the Court in *Jefferson Standard* with the task of reconciling the pro-worker Wagner Act with the pro-management provisions of Taft Hartley.<sup>54</sup> Compounding the difficulty was apparent inconsistency between, on the one hand, the rights-based language of the Wagner Act and its legislative history, and on the other, the Court's holding in *Jones & Laughlin* that the Act merely regulated interstate commerce.<sup>55</sup> Such were the tensions in American labor law when the Supreme Court confronted the problem presented in *Jefferson Standard*: can an employee's section 7 right to engage in "concerted activities for . . . mutual aid or protection"<sup>56</sup> be harmonized with an employer's section 10 right to terminate that employee "for cause?"<sup>57</sup>

#### D. *Jefferson Standard*

The labor dispute in *Jefferson Standard* revolved around an arbitration provision in the employment contract between a North Carolina broadcasting company and its twenty-two technicians.<sup>58</sup> The technicians, represented in negotiations by Local Union No. 1229, International Brotherhood of Electrical Workers ("the union"), sought renewal of the existing scheme under which all discharge disputes were resolved through arbitration.<sup>59</sup> The broadcaster,

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51. See Morris, *supra* note 30, at 15 (acknowledging that Taft-Hartley pursued "limitations on the exercise of economic power that unions were either employing or were deemed likely to employ").

52. See *id.* at 8 (blaming the revisionist efforts of organized management for "[t]he common assertion that Taft-Hartley changed the policy of the Act").

53. See 29 U.S.C. § 157. See generally Morris, *supra* note 30.

54. See Gross, *supra* note 43, at 221 ("Taft-Hartley's protection of the right to refrain from joining a union as equal to its protection of the right to join a union to engage in collective bargaining has resulted in a U.S. labor policy at cross-purposes with itself.").

55. See generally Pope, *supra* note 42.

56. 29 U.S.C. § 157.

57. *Id.* § 160.

58. *Jefferson Standard*, 346 U.S. 464, 466–67 (1953).

59. See *id.* At the time, arbitration was perceived as a more worker-friendly forum for dispute than the courts, filled with judges "terrified of class struggle, mob rule, the anarchists and their bombs, railroad strikers, and the collapse of the social system as they knew it." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 555 (Simon & Schuster eds., 2d ed. 1985).

Jefferson Standard, sought to limit arbitration to determining the relevant facts, leaving it to the company to decide whether those facts supported the disputed discharge.<sup>60</sup> The negotiations began in December 1948, but talks stalled and the existing agreement expired on January 31, 1949.<sup>61</sup> The technicians remained with the company and negotiations resumed in July, but by July 8 they had broken down once more.<sup>62</sup>

On July 9, the workers began to picket the broadcaster's station, distributing handbills that accused the employer of unfairness and explained the dispute over the arbitration provision.<sup>63</sup> The handbills named the union as the employees' representative; the employees did not strike, and picketed only while off-duty.<sup>64</sup> The company did not object to this conduct, and took no action against the employees involved.<sup>65</sup>

Then, on August 24, the workers issued a new handbill.<sup>66</sup> Omitted were the earlier bill's reference to the union and its emphasis on the disputed arbitration clause; the new handbill instead contained "a vitriolic attack on the quality of the company's television broadcasts."<sup>67</sup> Under the heading "Is Charlotte a Second-Class City?" the handbill suggested that Jefferson Standard did not believe Charlotte deserved television coverage of local sports and other events, and that the company refused to invest in equipment to provide it.<sup>68</sup> Workers distributed the handbills on the streets around the station, placed them in restaurants, buses, and barbershops, and mailed copies to local businessmen.<sup>69</sup>

The company responded, on September 3, by firing ten of the technicians identified as having sponsored or distributed the new handbill.<sup>70</sup> The union complained to the NLRB, alleging that Jefferson Standard had committed an unfair labor practice by firing employees engaged in protected concerted activity.<sup>71</sup> The Board found that one of the terminated employees had played no part in the

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60. *Jefferson Standard*, 346 U.S. at 467.

61. *Id.* at 466–67.

62. *Id.* at 467.

63. *Id.*

64. *Id.*

65. *See id.*

66. *Id.*

67. *Id.* at 468.

68. *See id.*

69. *Id.*

70. *Id.* at 467.

71. *Id.* at 469.

attack and therefore ordered that he be reinstated with back pay.<sup>72</sup> The other nine employees, however, were found to have sponsored or distributed the handbills.<sup>73</sup> The Board ruled that the company had committed no unfair labor practice in firing those employees and declined to order reinstatement.<sup>74</sup>

Two strands of thought run through the Board's opinion. First, the Board notes that the protections afforded workers engaged in concerted activity do not apply where the workers either pursue an "unlawful" objective or resort to "indefensible" means.<sup>75</sup> The opinion argues that the attack, aimed as it was at harming the financial interests of the company, was "hardly less 'indefensible' than acts of physical sabotage."<sup>76</sup> Second, however, the Board emphasizes that "the subject-matter of the employees' verbal attack upon the employer was not related to their interests *as employees*."<sup>77</sup> The Board seems to suggest here that the real problem with the attack was not necessarily the product disparagement but rather the tenuous connection to the labor dispute and its concededly lawful purpose.<sup>78</sup>

The Court of Appeals for the D.C. Circuit reversed the decision of the Board and remanded the case.<sup>79</sup> The court's brief opinion held that the Board had applied the wrong criterion when it asked whether the means used by the employees were "indefensible."<sup>80</sup> The proper inquiry, according to the Court of Appeals, was the same as applied to the employees' ultimate objective—whether the means used were "lawful."<sup>81</sup> The court remanded this question to the Board for further findings.<sup>82</sup>

The Supreme Court, in an opinion by Justice Burton, reversed.<sup>83</sup> Citing section 10(c) of the NLRA,<sup>84</sup> Justice Burton asserted that

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72. *Jefferson Standard Broad. Co.*, 94 N.L.R.B. 1507, 1513–14 (1951).

73. *Id.* at 1518.

74. *See id.*

75. *Id.* at 1509–10.

76. *Id.* at 1511.

77. *Id.* at 1512 (emphasis in original).

78. *Id.* at 1512 n.18. The opinion notes that although the ultimate purpose of the attack, which was intended to extract concessions from the employer in negotiations, was lawful, this purpose was undisclosed. *Id.* at 1511.

79. *See Local Union No. 1229, Int'l Bhd. of Elec. Workers v. NLRB*, 202 F.2d 186, 189 (D.C. Cir. 1952).

80. *See id.* at 188.

81. *See Id.* at 188–89.

82. *Id.* at 189.

83. *Jefferson Standard*, 346 U.S. 464, 465 (1953).

84. 29 U.S.C. § 160(c) (2012) ("No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or

“[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer,” and that “the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise.”<sup>85</sup> Justice Burton quoted the view of Justice Hughes, expressed in *Jones & Laughlin*, that “the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for reasons other than [employee] intimidation and coercion.”<sup>86</sup> Applying these reflections to the facts at hand, the Court wrote:

Assuming that there had been no pending labor controversy, the conduct of [the employees] from August 24 through September 3 unquestionably would have provided adequate cause for their disciplinary discharge within the meaning of s 10(c). Their attack related itself to no labor practice of the company. It made no reference to wages, hours, or working conditions. The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. The attack asked for no public sympathy or support.<sup>87</sup>

The Court held that “[t]he fortuity of the coexistence of a labor dispute affords these technicians no substantial defense.”<sup>88</sup> The only connection between the attack and the contract dispute was that the employees hoped by the former to gain concessions in the latter.<sup>89</sup> The Board treated the handbill not as part of the labor dispute but as a “separable attack” on the employer’s interests, and the Court stressed that this finding was the agency’s to make.<sup>90</sup> Justice Burton’s language indicates that the technicians’ conduct was unprotected because it was not sufficiently related to the contemporaneous labor dispute.

But the Court’s disposition of the case has been interpreted as a holding that the employees’ criticism was unprotected, regardless of

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discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.”).

85. *Jefferson Standard*, 346 U.S. at 472.

86. *Id.* at 474 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–46 (1937)).

87. *Id.* at 476.

88. *Id.*

89. *Id.* at 476–77.

90. *Id.* at 477, 475.

the Board's view of the matter, because the technician resorted to disloyal "means."<sup>91</sup> Justice Burton wrote:

We find no occasion to remand this cause to the Board for further specificity of findings. Even if the attack were to be treated, as the Board has not treated it, as a concerted activity partly or wholly within the scope of those mentioned in s 7, the means used by the employees in conducting the attack have deprived the attackers of the protection of that section, when read in the light and context of the purpose of the Act.<sup>92</sup>

Justice Frankfurter dissented. He made three main points: first, he observed that the Court did not address the holding of the Court of Appeals that the Board applied the wrong criterion by asking whether the conduct was "indefensible" rather than "unlawful."<sup>93</sup> Second, the Justice stressed that section 7 protects many activities that could be classed as disloyal, and that the criterion apparently approved by the majority risked frustrating the whole purpose of Act.<sup>94</sup> Finally, Justice Frankfurter argued that the disloyalty criterion was imprecise and would "open the door wide to individual judgment by Board members and judges."<sup>95</sup>

## II. PAST AND PRESENT PROBLEMS WITH THE DISLOYALTY EXCEPTION

Part II presents a recent Circuit split over the proper approach to third party appeals under the NLRA, comparing the permissive approach of the D.C. Circuit with the Eighth Circuit's restrictive reading of the NLRB's disloyalty doctrine. Part II considers the Board's *Mountain Shadows* test as a response to sustained disagreement and confusion over the holding of *Jefferson Standard* and the factors relevant to disloyalty analysis. Finally, Part II explores other difficulties that have troubled courts reviewing Board interpretations of *Jefferson Standard*, including questions over the proper scope of deference to the Board, the age of the NLRA, and the suggestion of Justice Frankfurter and subsequent commentators that *every* exercise of section 7 rights could be characterized as disloyal.

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91. *Id.* at 477–78.

92. *Id.*

93. *Id.* at 479 (Frankfurter, J., dissenting).

94. *Id.* at 480.

95. *Id.* at 481.

### A. Ongoing Confusion Over the Holding of *Jefferson Standard*

Justice Frankfurter's criticisms of the disloyalty standard as indeterminate and subjective have grown in force in the sixty-five years since the decision. The NLRB and reviewing courts have struggled to clarify the reach and import of *Jefferson Standard*. Critics have noted confusion over the true basis for the majority's decision in that case; the factors relevant to the disloyalty analysis; and the respective roles of courts, Congress, and the Board in defining the exception.<sup>96</sup>

Two recent appellate cases show that *Jefferson Standard* remains inconsistently interpreted and unpredictably applied. The courts in *DirectTV v. NLRB*<sup>97</sup> and *MikLin Enterprises, Inc. v. NLRB*<sup>98</sup> applied the same test, announced in the Board's 2000 *Mountain Shadows*<sup>99</sup> decision, under which employees' appeals to third parties are protected where "the communication is related to an ongoing labor dispute[("prong 1")] and when the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection [("prong 2").]"<sup>100</sup> Prong 1 is supported by language in *Jefferson Standard* explaining that the handbill was so tenuously connected to the labor dispute as to constitute an unprotected "separable attack." Prong 2 is derived from Justice Burton's reflections on disloyalty and from the Court's ambiguous words of disposition. Because *Jefferson Standard* could have been decided on either ground, it is not clear whether satisfaction of either *Mountain Shadows* prong is a necessary or sufficient condition of protection. This ambiguity is at the heart of the present split, in which the Eighth and D.C. Circuits applied the Board's test very differently.

### B. *DirectTV v. NLRB*

In *DirectTV v. NLRB*, the D.C. Circuit upheld a Board order resting on a narrow reading of the disloyalty exception as implemented by the *Mountain Shadows* test.<sup>101</sup> The case arose out of a dispute between a hardware company and its engineers.<sup>102</sup> At issue was the company's compensation policy, which penalized salesmen

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96. See *infra* Sections II.D–F.

97. 837 F.3d 25 (D.C. Cir. 2016).

98. 861 F.3d 812, 821 (8th Cir. 2017).

99. Am. Golf Corp. (*Mountain Shadows*), 330 N.L.R.B. 1238 (2000).

100. *Id.* at 1240 (emphasis in original).

101. *DirectTV v. NLRB*, 837 F.3d 25, 28 (D.C. Cir. 2016), *enforcing* MasTec Advanced Techs., 357 N.L.R.B. 103 (2011).

102. *Id.* at 28–30.

who failed to convince customers to install a phone line with their television.<sup>103</sup> The employees appeared on local television to air their grievances.<sup>104</sup> During their segment, however, the employees not only complained of the unfairness of the policy itself but further alleged that the company had responded to their internal complaints by encouraging them to lie to customers by telling them their receivers would blow up if they failed to install the extra line.<sup>105</sup> After the company terminated the technicians, the Board ordered reinstatement.<sup>106</sup>

Although the opinion of the D.C. Circuit is complicated by the inaccuracy of the employees' allegations,<sup>107</sup> two key points are clear. First, the court upheld the Board's view that, because the employees had referred in the segment to the ongoing pay dispute, they could be terminated only if their conduct was "flagrantly disloyal, wholly incommensurate with any grievances which [the employees] might have."<sup>108</sup> The court did not examine the Board's finding that "the employee communications here were clearly related to the labor dispute,"<sup>109</sup> but ruled that to manifest such a connection entitles employees to a certain degree of immunity from discharge.

The second question presented in *DirectTV* was whether the Board was permitted to consider subjective intent in determining which conduct merits elevation to the status of 'flagrant disloyalty.'<sup>110</sup> Acknowledging its 1992 holding in *George A. Hormel & Co. v. NLRB*<sup>111</sup> that a subjective test for disloyalty risked frustrating the NLRA's purpose of retaining the employer's right to discharge disloyal employees,<sup>112</sup> the court nevertheless upheld the Board's

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103. *Id.*

104. *Id.*

105. *Id.* at 28–31.

106. *Id.* at 28.

107. *Id.* at 29 ("Some of the advice plainly was not meant to be taken literally, such as when a MasTec manager jokingly told technicians they should tell customers the DirecTV system would 'blow up' without a phone connection.").

108. *Id.* at 36 (quoting *MasTec Advanced Techs.*, 357 N.L.R.B. 103, 108 (2011)).

109. *Id.* at 35.

110. *Id.* at 32.

111. 962 F.2d 1061 (D.C. Cir. 1992); *see also* discussion *infra* Section II.D.3.

112. *Id.* at 1065 ("Yet under the Board's subjective test, the employer could not lawfully discharge him without showing also [...] that the employee's conduct . . . was . . . motivated . . . to actually encourage or support a boycott.' Because extending protection to such conduct would so circumscribe as to defeat the employer's right to discharge an employee who is working against the employer's business interest, we conclude that a subjective test is inconsistent with the Act. Rather, the Act requires an objective test of disloyalty.").

approach.<sup>113</sup> The court reasoned that *Hormel* barred a subjective test for the *presence* of disloyalty, not for the *degree* of any disloyalty chargeable to the employee, and held that in analyzing the latter the Board was entitled to consider subjective intent.<sup>114</sup>

Judge Brown dissented—vigorously.<sup>115</sup> She disagreed with the majority on both points, asserting that the case “demonstrates the lengths to which the Board will go to contort an even-handed Act into an anti-employer manifesto. Instead of attempting to balance conflicting interests, the NLRB reacts like a pinball machine stuck on tilt, reflexively ensuring employers always lose a turn.”<sup>116</sup> Judge Brown maintained that *Jefferson Standard* did not require employers to show employees’ flagrant disloyalty.<sup>117</sup> Rather, employees’ appeals to third parties lose the Act’s protection when they *either* fail to refer to a labor dispute *or* are “disloyal,” as defined by *Jefferson Standard* and its progeny.<sup>118</sup> The majority was wrong, therefore, to immunize all conduct falling below its heightened standard.<sup>119</sup>

Judge Brown also differed from the majority on the relevance of employee motive or intent to the disloyalty analysis. The judge argued that circuit precedent demanded an objective test: to show disloyalty *or* the heightened flagrant disloyalty, an employer would be required to prove his employee’s state of mind to fire him, which was a burden the court had previously held to be an unreasonable interpretation of the Act.<sup>120</sup>

### C. *MikLin v. NLRB*

According to the majority in *DirecTV*, the Board had not *required* the employer to show the presence of malicious intent in third party appeals. Instead, the D.C. Circuit merely weighed the absence of such motivation as one factor.<sup>121</sup> In *MikLin Enterprises, Inc. v.*

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113. *DirecTV*, 873 F.3d at 28.

114. *Id.* at 39–40.

115. *Id.* at 46 (Brown, J., dissenting).

116. *Id.* at 47.

117. *Id.* at 52–53.

118. *Id.*

119. *Id.* at 53–54.

120. *Id.* at 48–49.

121. *See id.* at 37–38 (majority opinion) (rebutting charges of “an inconsistency with *Hormel* in the Board’s noting (as one consideration) the lack of evidence that the employees participated in the newscast with the intention to cause subscribers to cancel their service rather than the intention to gain public support in the pay dispute”). MasTec, who provided installation services to DirecTV, petitioned for certiorari to the Supreme Court on the subjective intent issue. MasTec Advanced

*NLRB*, however, the Eighth Circuit confronted a Board decision that *did* treat intent as dispositive: ordering reinstatement of sandwich shop employees because the employer was unable to prove that their public criticisms were maliciously motivated.<sup>122</sup> The Eighth Circuit, sitting en banc, declined to enforce the order, holding that by requiring proof of malicious intent the Board “has not interpreted *Jefferson Standard*—it has overruled it.”<sup>123</sup>

In *MikLin*, the employees of a Jimmy John’s sandwich shop were engaged in a dispute over the employer’s sick leave policy, which barred workers from calling in sick without finding their own replacement.<sup>124</sup> During flu season, the employees put posters up around the shop suggesting to customers that the workers who made their sandwiches could be sick and infectious.<sup>125</sup> Small print at the bottom of the poster made reference to the labor dispute and directed readers to the union website.<sup>126</sup>

When the store manager took down the posters, the employees sent copies to more than one hundred media outlets, along with a letter and a press release to similar effect.<sup>127</sup> The dispute was not resolved, and the employees persevered, issuing a new poster that substituted the company vice-president’s name and personal contact information for the previous language that referred to the dispute.<sup>128</sup> The vice-president was “bombarded” with phone calls from customers concerned about the safety of eating at Jimmy Johns.<sup>129</sup>

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*Techs. v. NLRB*, 138 S. Ct. 138 (Oct. 2, 2017) (denying certiorari). The petition was denied, *id.*, perhaps because (1) the D.C. Circuit did not interpret the Board’s opinion as giving *dispositive* weight to subjective intent, and (2) several courts have acknowledged the relevance of subjective intent as one factor of the analysis. *See, e.g., MikLin Enters., Inc. v. NLRB*, 861 F.3d 812, 821 (8th Cir. 2017).

122. *MikLin Enters., Inc.*, 361 N.L.R.B. No. 27 (Aug. 21, 2014)).

123. *MikLin*, 861 F.3d at 815.

124. *Id.* at 817.

125. *Id.* at 815–16 (“[The posters] prominently featured two identical images of a Jimmy John’s sandwich. Above the first image were the words, ‘YOUR SANDWICH MADE BY A HEALTHY JIMMY JOHN’S WORKER.’ The text above the second image said, ‘YOUR SANDWICH MADE BY A SICK JIMMY JOHN’S WORKER.’ ‘HEALTHY’ and ‘SICK’ were in red letters, larger than the surrounding text in white. Below the pictures, white text asked: ‘CAN’T TELL THE DIFFERENCE?’ The response, in red and slightly smaller: ‘THAT’S TOO BAD BECAUSE JIMMY JOHN’S WORKERS DON’T GET PAID SICK DAYS. SHOOT, WE CAN’T EVEN CALL IN SICK.’ Below, in slightly smaller text, was the warning, ‘WE HOPE YOUR IMMUNE SYSTEM IS READY BECAUSE YOU’RE ABOUT TO TAKE THE SANDWICH TEST.’”).

126. *Id.* at 816.

127. *Id.*

128. *Id.* at 817.

129. *Id.*

When the employer ultimately fired six of the organizing employees, the Board ordered reinstatement.<sup>130</sup>

Vacating the Board's order, the Eighth Circuit expressly rejected the approach of the *DirectTV* majority.<sup>131</sup> The Eighth Circuit's reading of *Jefferson Standard* mirrors that of Judge Brown: reference to a labor dispute is no more than a threshold condition of section 7 protection. Conduct must independently satisfy the disloyalty prong, meaning, at a minimum, that conduct as disloyal as that of the Jefferson Standard technicians is unprotected.<sup>132</sup> The court also held that the Board's test, by requiring malicious intent, would impermissibly restrict the employer's right to terminate.<sup>133</sup>

The dissent argued that *Jefferson Standard* was decided on the grounds that the handbill was insufficiently related to the dispute, and that the language read as requiring a disloyalty exception "cannot be binding here."<sup>134</sup> Moreover, the dissent maintained, the malicious motive requirement was the Board's own creation, and not an interpretation of *Jefferson Standard*.<sup>135</sup> As such, it was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>136</sup>

It is clear that two courts applying the Board's *Mountain Shadows* test can take very different approaches while both claiming to view the test through the lens of *Jefferson Standard*. History has borne out Justice Frankfurter's warning that the majority's opinion would offer little guidance to future courts and Board panels. No party in either case objected to the test itself, which appears designed to accommodate the doctrinal diversity of its predecessors.<sup>137</sup>

#### D. Confusion over the Factors Relevant to Disloyalty Analysis

The problems with the disloyalty doctrine go beyond the structural ambiguities of the *Mountain Shadows* test. As Justice Frankfurter

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130. *Id.* at 818 (referencing the NLRB's previous order of restatement in *MikLin Enters., Inc.*, 361 N.L.R.B. No. 27 (Aug. 21, 2014)).

131. *Id.* at 820 n.1 (stating that "we disagree with the contrary conclusion of the panel majority in [*DirectTV*]").

132. *Id.* at 820.

133. *Id.* at 822.

134. *Id.* at 832 (Kelly, J., dissenting).

135. *Id.*

136. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

137. *See infra* Sections II.D.1–3.

noted in *Jefferson Standard*, ‘loyalty’ is an imprecise term and is hard to define objectively. The dispute over the role of intent is just the latest confusion over the factors relevant to the presence, or severity, of ‘disloyalty.’ Professor Melinda Branscomb writes that the *Jefferson Standard* Court “created this imprecision” when it “used product disparagement and disloyalty almost interchangeably, giving no guidance on the factors relevant to each.”<sup>138</sup> One commentator suggests the term “disloyalty” is no more than a “catchphrase,” without definite content, used in place of rigorous analysis.<sup>139</sup>

### 1. *Early Interpretations of Jefferson Standard*

*Jefferson Standard* was at first interpreted as equating disloyalty with public disparagement of an employer’s product.<sup>140</sup> Later cases, however, made clear that not all disparagement was unprotected.<sup>141</sup> Courts began to focus on the relationship between any disparagement and an ongoing labor dispute, with one prominent approach asking whether the criticism “appeared necessary to effectuate the employees’ lawful aims.”<sup>142</sup> Other factors deemed relevant to the analysis in some courts included the tone of the criticism,<sup>143</sup> the tendency of the criticism to harm the employer,<sup>144</sup> and the apparent motive of the workers.<sup>145</sup> The variety of factors eligible for consideration and the lack of any guiding principle in weighing them

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138. Melinda J. Branscomb, *Labor, Loyalty, and the Corporate Campaign*, 73 B.U. L. REV. 291, 322 (1993).

139. See Finkin, *supra* note 2, at 563.

140. *Patterson-Sargent Co.*, 115 N.L.R.B. 1627, 1627–28 (1956) (discharging striking employees, who distributed handbills claiming that paint made by replacement workers was unsafe, was justified by disloyal product disparagement).

141. See *Cnty. Hosp. of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607 (4th Cir. 1976) (protecting nurse’s televised claims that salary dispute compromised patient care because they were “directly related to protected concerted activities”); *Allied Aviation Serv. Co.*, 248 N.L.R.B. 229 (1980) (holding that airline mechanic’s letter to airport manager linking lack of established operating procedures or training programs with risk of “tragedy” at Auto/Gas site was protected despite inflammatory language because directly connected to labor dispute).

142. *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634, 640–41 (1st Cir. 1982) (determining that nurse’s public criticism of hospital staffing procedures, expressed in letter to newspaper editor, was protected because he had first tried to raise the concern directly with management and because “criticism of the Hospital’s administration was intertwined inextricably with working conditions”).

143. See *generally* *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808 (2d Cir. 1980).

144. See *generally* *NLRB v. Red Top, Inc.*, 455 F.2d 721 (8th Cir. 1972).

145. See *Richboro Cmty. Mental Health Council, Inc.*, 242 N.L.R.B. 1267, 1268 (1979).

against each other produced confusing, apparently conflicting outcomes<sup>146</sup> that did not, Professor Branscomb notes, “turn consistently on loyalty or its absence.”<sup>147</sup>

2. *The Ninth Circuit Shifts Focus to the “Connection” Inquiry that Would Become Prong 1 of the Mountain Shadows Test*

In *Sierra Publishing Co. v. NLRB*<sup>148</sup> the Ninth Circuit tried to gather in the many loose strands of the disloyalty analysis, declaring that each may do some work in distinguishing protected from unprotected criticism.<sup>149</sup> The case involved a dispute between a newspaper and its employees, whose union wrote to the paper’s advertisers noting the disruptive effect of the disagreement on circulation and profits and urging them to encourage the paper to reach a settlement.<sup>150</sup> The court noted, first, that the appeal’s connection to an ongoing labor dispute was the most important factor to consider in determining whether it was unprotected disloyalty or protected concerted activity.<sup>151</sup> Second, the court stated that all third-party appeals were to be evaluated in their whole context, and that although factors such as tone, motive, and harm were all relevant, none was dispositive: “[i]n summary, the disloyalty standard is at base a question of whether the employees’ efforts to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances.”<sup>152</sup> The court held that the letter to the advertisers was protected despite disparaging the paper’s product—which, from

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146. Compare *Golden Day Sch., Inc.*, 236 N.L.R.B. 1292, 1292 (1978) (deciding that day care center engaged in unfair labor practice by firing employees who distributed, to parents of children in the center’s care, a leaflet alleging the center was unsafe and unsanitary, discriminated against disabled children and those funded by the county, falsified evaluations, and lied to parents), with *Red Top*, 455 F.2d at 721 (declining to protect employee’s threat to complain directly to customers about working conditions because it was calculated to harm employer’s business interests).

147. Branscomb, *supra* note 138, at 328.

148. See generally *Sierra Publ’g Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989).

149. See *id.* at 217.

150. *Id.* at 214.

151. *Id.* at 217. The court explained that:

Such a focus is appropriate. If unions are not permitted to address matters that are of direct interest to third parties in addition to complaining about their own working conditions, it is unlikely that workers’ undisputed right to make third party appeals in pursuit of better working conditions would be anything but an empty provision.

*Id.*

152. *Id.* at 220.

the advertiser's point of view, was circulation—because it was related to the dispute, its tone was “constructive and hopeful,” and because, in the absence of malicious intent, any harm to the employer's business interests was reasonable under the circumstances.<sup>153</sup>

3. *The D.C. Circuit Breathes New Life into the “Disloyalty” Inquiry that Would Become Prong 2 of the Mountain Shadows Test*

Three years after *Sierra Publishing*, however, in *George A. Hormel & Co. v. NLRB*,<sup>154</sup> the D.C. Circuit appeared to hold that “working against the employer's business interest” was in fact sufficient to constitute disloyalty forfeiting protection of the Act—however close the connection between the criticism and the labor dispute.<sup>155</sup> In *Hormel*, the court applied the rule that a third party appeal—here, public support for a boycott of the employer's products—is protected only where it: “(1) is related to an ongoing labor dispute and (2) does not disparage the employer's product.”<sup>156</sup> The Board's requirement that the employer prove malicious intent, the court held, “would so circumscribe as to defeat the employer's right to discharge an employee who is working against the employer's business interests.”<sup>157</sup> The test was therefore inconsistent with the D.C. Circuit's interpretation of the NLRA in light of the Taft-Hartley Amendments. The court not only assumed that *Jefferson Standard* precluded product disparagement, but held further that the decision requires the Board to consider the objective tendency of employee conduct to work against the employer's business interest in determining disloyalty.<sup>158</sup>

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153. *Id.*

154. *See generally* *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992) (declining to enforce Board reinstatement order that impermissibly required employer to prove malicious intent and finding company justly discharged worker for rally appearance supporting a boycott of the employer's product, whether the worker intended harm or not).

155. *Id.* at 1065.

156. *Id.* at 1064 (citing *Sierra Publ'g Co. v. NLRB*, 889 F.2d 210, 216 (9th Cir. 1989)).

157. *Id.* at 1065.

158. *Id.*

**E. The Disloyalty Exception Is Inconsistent with NLRA Provisions that Expressly Protect Strikes, Boycotts, and Other Concerted Activity**

The *Mountain Shadows* test applied in *MikLin* and *DirecTV* appears designed to accommodate the conflicting approaches of the *Sierra Publishing* and *Hormel* courts. Both the connection to the labor dispute and the detriment to the employer play a part. But the present split shows the flaw in this approach: as Justice Frankfurter warned in 1953, disloyalty and concerted action are “like two halves of a pair of shears.”<sup>159</sup>

Third-party appeals divide panels so deeply because they “effectuate the employees’ lawful aims”<sup>160</sup> only insofar as the employees “bite the hand that feeds [them].”<sup>161</sup> Any test for protection that seeks to balance the appeal’s value to employees against its threatened harm to employers risks excluding the most effective criticisms, protecting the employer from all but the most toothless charges. The ‘disloyalty exception’ reading of *Jefferson Standard* is fundamentally inconsistent with the NLRA’s express protections because *every* exercise of section 7 rights can be viewed as disloyal—and the greater the prejudice to the employer, the more effectively the activity works towards the employees’ “mutual aid or protection.”<sup>162</sup>

**F. Courts Disagree over the Source and Status of the Disloyalty Exception and the Proper Scope of Deference to the Board**

A further problem with disloyalty analysis is disagreement over the proper scope of judicial deference to Board decisions. Professor Branscomb argues that “principles of administrative law ought to lend some measure of stability” to the doctrine, but that the emotional and political implications of the concept tempt judges improperly to revise Board determinations.<sup>163</sup> In fact, the back-and-forth between the

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159. *Jefferson Standard*, 346 U.S. 464, 480 (1953) (Frankfurter, J., dissenting).

160. *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634, 640 (1st Cir. 1981).

161. NAT’L ACAD. OF ARBITRATORS, *THE COMMON LAW OF THE WORKPLACE* 183 (Theodore St. Antoine ed., 2d ed. 2005) (citing *Forest City Publ’g Co.*, 58 LA 773, 783 (1972) (McCoy, Arb.)).

162. *See* Branscomb, *supra* note 138, at 336 (noting that the Act expressly permits two forms of activity—strikes and lockouts—“that are only successful when they cause or threaten economic harm”; that the Act “*requires* employees to act out of self-interest”; and that “section 7 rights are especially important in situations when the interests of management and labor are *most* antagonistic” (emphasis in original)).

163. *Id.* at 340.

*MikLin* majority and dissent paints a deference picture clouded by more than judicial inconsistency: confusion over the basis for the holding leaves it unclear when the Board can be seen as applying its own test and when it is interpreting *Jefferson Standard*.<sup>164</sup> And if the Board is interpreting Supreme Court precedent that purportedly construed the unambiguous provisions of a statute, the Supreme Court's *BrandX*<sup>165</sup> decision may require greater Board autonomy.<sup>166</sup> A further complication arises with the suggestion that section 10(c), under *Jefferson Standard*, receives its content from the common law of 'master' and 'servant.'<sup>167</sup> This view implies a greater role for the judiciary in defining disloyalty, with the paradoxical result of a Board-defined rule and a court-defined exception.

### G. The Disloyalty Exception Is Out of Date

Finally, several commentators have maintained that the disloyalty exception, and the NLRA itself, are outdated. The character of this charge depends on the critic's understanding of the Act and its provisions: Professor Matthew Finkin argues from changed values, contending that we should re-examine the 'disloyalty' exception in light of modern recognition that much employee criticism serves the public interest.<sup>168</sup> Several writers argue the NLRA and the disloyalty exception are ill-equipped to handle modern 'corporate campaigns,' which "seek to equalize the bargaining power between labor and management through viral action directed at altering consumer perception of a company's image."<sup>169</sup> And Professor Cynthia Estlund argues that labor law's fundamental principles and implementing strategies "have been nearly frozen, or ossified, for over fifty years."<sup>170</sup>

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164. *MikLin Enters., Inc. v. NLRB*, 816 F.3d 1, 7 (8th Cir. 2017).

165. *Nat'l Cable & Tel. Ass'n v. BrandX Internet Servs.*, 545 U.S. 967, 982 (2005) ("[Prior appellate court] construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the *unambiguous* terms of the statute and thus leaves no room for agency discretion.").

166. *MikLin*, 816 F.3d at 7.

167. See Finkin, *supra* note 2, at 548.

168. See generally *id.*

169. Geordan G. Logan, *Social Media Policy Confusion: The NLRB's Dated Embrace of Concerted Activity Misconstrues the Realities of Twenty-First Century Collective Action*, 15 NEV. L.J. 354, 356 (2015). See generally Branscomb, *supra* note 138.

170. Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002).

### III. AN ALTERNATIVE READING OF *JEFFERSON STANDARD*

This part argues that the true flaw in the Board's disloyalty doctrine, as implemented through the *Mountain Shadows* test, is that decision-makers remain free to apply their own conceptions of the NLRA's fundamental purpose. The result is an unstable, unpredictable, and politicized approach to third party appeals. Part III aims to show that, because *Jefferson Standard* need not be interpreted as creating a disloyalty exception to NLRA section 7, the Board is free to craft its own approach to employees' public criticisms of employers. A new test must, however, respond to the *Jefferson Standard* Court's concern that an overprotective rule could proscribe termination even for conduct separable from legitimate concerted activity arising out of an ongoing labor dispute. This part suggests that the Board should focus on the connection between the content of the criticism and the employees' goals in the labor dispute in distinguishing protected from unprotected third party appeals.

#### A. The *Mountain Shadows* Test Fails to Choose Between Competing Visions of NLRA Policy

Although the charges of indeterminacy, subjectivity, and judicial overreach have some force, these problems are far from unique to the disloyalty exception and the *Mountain Shadows* test. Any test will to some extent call on judges to engage in difficult line-drawing and definitional exercises, and even the most flexible statutes age from the moment the Presidential ink is dry. In some matters, "it is more important that the applicable rule of law be settled than that it be settled right."<sup>171</sup>

But not in all matters. The problems surrounding disloyalty doctrine are symptomatic of deeper issues with the NLRA, and these suffice to justify reexamination of at least the constraint that "imposes the most crippling limitations"<sup>172</sup> on workplace collective action.

The fundamental problem with the disloyalty exception, as applied by courts today, is its failure to choose between competing understandings of the Act's purpose. Instead of crafting a rule that reliably separates constructive from destructive criticism, the *Mountain Shadows* test asks panels to balance two opposing but equal, indeed positively correlated, interests while supplying no

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171. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

172. Marion Crane & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791, 1839 (2015).

connection to a broader policy or ultimate objective. Judges who believe Congress intended the Board to further the Act's purposes in the role of "neutral guarantor"<sup>173</sup> of each party's rights will view third-party appeals that aim only to injure the employer financially as a tactic so one-sided as to be incompatible with that policy. These judges stress prong 2 of the *Mountain Shadows* test and focus on 'disloyalty.' If, as other judges believe, Congress intended the Board to promote collective bargaining in the face of the inevitable efforts of organized management to defeat it, then there is no reason the employer's interests should prevail where the employees' conduct is lawful and has "some relation to group action in the interest of the employees."<sup>174</sup> These judges emphasize prong 1 of *Mountain Shadows* and will protect any conduct sufficiently related to the labor dispute to be viewed as part of its anticipated "rough-and-tumble."<sup>175</sup>

The Board's aim is to separate third party appeals that are desirable, in light of the Act's underlying goals, from those that are not. Under the prevailing understanding of *Jefferson Standard*, section 10(c) protects a "right" of the employer—to terminate employees for cause—that must be balanced against the right of the employee to engage in concerted activity. But because the same activity will implicate both rights, the test really asks each decision-maker to apply his own view of the NLRA's purpose. In practice, the disloyalty exception functions like a "minefield"<sup>176</sup>—both employer and employee are punished for the slightest misstep; such care is required that some dare not tread the collective action path at all.

#### **B. The Differing Views on the Role of Disloyalty Doctrine Reflect Wider Disagreement over the Act's Purpose in Light of the Taft-Hartley Amendments**

The disloyalty difficulty mirrors a broader problem with the National Labor Relations Act. Taft-Hartley gave rise to "a controversy never before known to follow the passage of a single labor law,"<sup>177</sup> as politicians, legal scholars, journalists, and representatives of labor and employer interests debated the Amendments' meaning and effect.<sup>178</sup> Even seventy years ago,

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173. Gross, *supra* note 43, at 222.

174. Meyers Indus., 281 N.L.R.B. 882, 887 (1986).

175. *Jefferson Standard*, 346 U.S. 464, 480 (1953) (Frankfurter, J., dissenting).

176. Branscomb, *supra* note 138, at 295.

177. WHITNEY & TAYLOR, *supra* note 46, at 42.

178. *Id.* ("Literally hundreds of articles and tracts have been written on the law. By December 1, 1949, the National Labor Relations Board reported a bibliography

commentators understood that the effect of the Act turned largely on this question: did the pro-employer provisions signal a fundamental shift in the Act's purpose, or did Congress' decision to retain the core employee rights indicate that the changes were merely marginal policy adjustments?<sup>179</sup> As one commentator reminds us, "the legitimacy of Board determinations is dependent on their conformity to statutory policy."<sup>180</sup>

Professor James Gross argues that Taft-Hartley provisions protecting individual rights have been "read as statutory justification for" a policy of employer resistance to collective bargaining and for a concept of the government's role as "neutral guarantor" of *both* parties' rights in a labor dispute.<sup>181</sup> Gross argues that this is inconsistent with the Act's initial policy of *promoting* collective bargaining to correct the power imbalance inherent in the essentially unregulated at-will regime, and that spurious ambiguity allows decision-makers to "choose between these contradictory statutory policies and still claim that they are conforming to congressional intent."<sup>182</sup> Just as some forms of interference with union organization were recast as a defense of the individual employee's right to bargain for himself, so interference with employee's section 7 rights can be justified as protection of the employer's rights under section 10(c).

The aim in designing rules to implement a statutory purpose<sup>183</sup> is to set a standard that limits decision-maker discretion and generates predictable results.<sup>184</sup> But because the *Mountain Shadows* test accomplishes neither goal, its results are most reliably predicted by the political majority of the tribunal applying it.<sup>185</sup> Political inclinations play a legitimate role in agency interpretation, rulemaking, and adjudication, and this is particularly true of the

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on the legislation that included about 300 items. By no means did the list include all the material written or presented in speeches on the legislation.").

179. See generally Morris, *supra* note 30.

180. Lee Modjeska, *In Defense of the NLRB*, 33 MERCER L. REV. 851, 855 (1982).

181. Gross, *supra* note 43, at 222.

182. *Id.*

183. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) ("[An agency's] function of filling in the interstices of the Act should be performed, as much as possible, through this *quasi*-legislative promulgation of rules to be applied in the future.").

184. See, e.g., Ronald A. Cass, *Property Rights Systems and the Rule of Law*, in THE ELGAR COMPANION TO PROPERTY RIGHT ECONOMICS 125, 131 (Enrico Colombatto ed., 2003) ("[T]he degree to which the society is bound by law, is committed to processes that allow property rights to be secure under legal rules that will be applied predictably and not subject to the whims of particular individuals, matters. The commitment to such processes is the essence of the rule of law.").

185. See *supra* Section II.D.

NLRB. The NLRA is a broadly-written statute, and can accommodate diversity and evolution of political opinion on certain issues. But the failure to develop a purpose-built test works particular mischief here, where: (1) the standard devised relies on so subjective and value-laden a concept as ‘disloyalty’; (2) there is no helpful statutory or judicial definition on which to draw;<sup>186</sup> (3) it is not clear how ‘disloyalty’ implicates the Board’s expertise in labor relations;<sup>187</sup> and (4) judges, unclear about whether they are interpreting Supreme Court precedent, an agency interpretation of that precedent, an agency interpretation of the Act, or the NLRA itself, are tempted to substitute their judgment for the Board’s.<sup>188</sup>

Politics drives inconsistent outcomes, both across and within U.S. Courts of Appeals, as illustrated by the vacillations of the D.C. Circuit: Republican-appointed majorities handed down pro-employer decisions in *Hormel* (1992)<sup>189</sup> and *Endicott* (2006),<sup>190</sup> before the Democrat-appointed panel majority changed course in *DirectTV* (2016),<sup>191</sup> limiting the reach of the earlier holdings. In *MikLin*, meanwhile, the court’s two Democrat-appointed judges were alone in their pro-employee dissent, while the vast Republican-appointed majority signed the court’s en banc ruling for the employer.

A significant revision in Board policy can be anticipated. President Trump’s latest appointees<sup>192</sup> create the Board’s first Republican

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186. See Finkin, *supra* note 2.

187. See generally Benjamin L. Ristau, *Dysfunctional Disloyalty Standards in Employee Criticism Cases*, 63 CASE W. RES. L. REV. 913 (2013).

188. See, e.g., *supra* notes 154–58 and accompanying text.

189. See generally George A. Hormel v. NLRB, 962 F.2d 1061 (1992) (before D.H. Ginsburg, Sentelle, & Henderson, Circuit JJ.); *United States Court of Appeals for the District of Columbia Circuit*, BALLOTPEDIA, [hereinafter *D.C. Circuit Judges*], [https://ballotpedia.org/United\\_States\\_Court\\_of\\_Appeals\\_for\\_the\\_District\\_of\\_Columbia\\_Circuit](https://ballotpedia.org/United_States_Court_of_Appeals_for_the_District_of_Columbia_Circuit) [<https://perma.cc/5CSB-Z22X>] (noting the appointing President of each of the Article III and senior judges on the D.C. Circuit).

190. See generally *Endicott Int’l Techs., Inc. v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006) (reversing a Board’s reinstatement order on the grounds that it failed to consider whether the employees’ conduct was disloyal) (before Henderson, Rogers, & Griffith, Circuit JJ.); *D.C. Circuit Judges*, *supra* note 189.

191. See generally *DirectTV, Inc. v. NLRB*, 837 F.3d 25, (D.C. Cir. 2016) (before Rogers, Brown, & Srinivasan, Circuit JJ.); *D.C. Circuit Judges*, *supra* note 189; *Janice Rogers Brown*, BALLOTPEDIA, [https://ballotpedia.org/Janice\\_Rogers\\_Brown](https://ballotpedia.org/Janice_Rogers_Brown) [<https://perma.cc/84UT-3D82>].

192. These include William Emanuel, formerly a partner at Littler Mendelson, a leading management-side labor and employment firm, and Marvin Kaplan, formerly Chief Counsel of the Occupational Safety and Health Review Commission, where he was an outspoken critic of the Board’s perceived pro-union stance. See Sean Higgins, *Senate Confirms Marvin Kaplan for NLRB*, WASH. EXAMINER (Aug. 2, 2017), <http://www.washingtonexaminer.com/senate-confirms-marvin-kaplan-for-nlr/>

majority in almost ten years.<sup>193</sup> Moreover, these appointees are the same sort of “management attorneys” who would, Senator Humphreys predicted in 1953, “interpret[ ] out of existence” the rights protected by the Act.<sup>194</sup> Although the NLRB implements policy by adjudication rather than rulemaking, it should still aim to resolve disputes in a manner that provides “guidance for future cases.”<sup>195</sup> This requires “explicitly identifying the objectives and models”<sup>196</sup> of the Act’s regulation of labor relations.

### C. The Debate over Whether Taft-Hartley Changed NLRA Policy Is Misguided

Whatever the vision of Senator Wagner or the aspirations of commentators then and now, the NLRA is not a human rights statute<sup>197</sup> and is not designed to guarantee any specific working conditions beyond the collective bargaining *process*.<sup>198</sup> But nor is the Act indifferent to the balance of power between the parties or the means used in negotiations. As even Gross concedes, the Wagner Act was upheld as a strike-prevention measure<sup>199</sup> intended to avert “the paralyzing consequences of industrial war”<sup>200</sup>: interference with the flow of interstate commerce. The debate over whether Congress

article/2630466 [https://perma.cc/M2EQ-UGZZ]; Lydia Wheeler, *Senate Confirms Second Trump Nominee to Labor Board*, THE HILL (Sept. 25, 2017), <http://thehill.com/regulation/administration/352345-senate-confirms-second-trump-nominee-to-labor-board> [https://perma.cc/EM44-4Q39].

193. Todd Lebowitz, *NLRB Shifts to Republican Majority; Change in Joint Employment Doctrine is Likely*, WHO IS MY EMP.? (Oct. 9, 2017), <https://whoismyemployee.com/2017/10/09/nlr shifts-to-republican-majority-change-in-joint-employment-doctrine-is-likely/> [https://perma.cc/DU2E-P6V2].

194. *Humphrey Charges ‘Packing’ of N.L.R.B.*, N.Y. TIMES, Oct. 6, 1953, at L25, <https://www.nytimes.com/1953/10/06/archives/humphrey-charges-packing-of-nlr.html> [https://nyti.ms/2DgwwBx].

195. See generally *Jefferson Standard*, 346 U.S. 464, 481 (1953) (Frankfurter, J., dissenting). Justice Frankfurter criticized the majority opinion in part because “[t]he Board and the courts of appeals will hardly find guidance for future cases from this Court’s reversal of the Court of Appeals, beyond that which the specific facts of this case may afford.” *Id.*

196. BEFORT & BUDD, *supra* note 14, at 22.

197. Even James Gross, who argues that the Act *should* have been interpreted as a human rights statute, acknowledges that his view represents the road not taken. See generally Gross, *supra* note 43.

198. These goals are pursued by other labor laws, for example the Fair Labor Standards Act of 1938. See 29 U.S.C. § 202 (2012).

199. See Gross, *supra* note 43, at 217 (noting that the Board’s arguments in *Jones & Laughlin* defended an Act that “could have been titled the ‘Wagner Anti-Strike Law’”).

200. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937).

intended the Board to promote collective bargaining or to serve only as impartial referee is misguided because it loses sight of this ultimate purpose. The extent to which the Board supports collective bargaining in any given area must be determined by the Act's fundamental objective—not the reverse.

Although the Act pursues its purpose through several intermediate policies, its provisions are better seen as tools than goals, as means to its ultimate end of industrial peace.<sup>201</sup> Taft-Hartley consists of provisions designed to prevent abuses of Wagner Act policies that fail to promote, and may undermine, the Act's ultimate purposes of industrial peace, free-flowing interstate commerce, and economic prosperity.<sup>202</sup> In formulating rules that best effectuate the purposes of the Act, the Board should aim to protect criticism that furthers the sustainable, peaceful resolution of a labor dispute, and to discourage criticism that does not. Several considerations might be relevant: is the criticism confined to attacks on the actual labor policies of the company, or does it attack the employer in general? Is the criticism one the employee could bring to the employer itself? Would the harm caused by the attack survive resolution of the labor dispute?

But 'disloyalty' is an unsuitable criterion. It may exclude desirable criticisms, which can further a discussion, release deep-running tensions, prevent strikes, and raise productivity by providing useful input from employees. Conversely, the Board's present test may protect attacks which, because they attack the employer on an independent ground, can only broaden disagreement and disrupt productive activity. Such criticism will often have no compensatory beneficial effect, addressing things beyond the employer's control, things the employer has plans to address in time, or criticism addressing no specific practice of the employer but aiming only to work reputational and commercial harm. Although section 7 does not protect all workers who threaten economic harm to their employer, limitations on that section's scope should be tailored to fit within a larger, purpose-built plan. The disloyalty exception is instead one of "numerous gaps built on conflicting premises with no clear objectives."<sup>203</sup>

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201. *See* NLRB v. Fin. Inst. Emps. of Am. Local 1182, 475 U.S. 192, 208 (1986) ("The basic purpose of the . . . Act is to preserve industrial peace.").

202. *See* 29 U.S.C. § 151 (providing that the assurance of the rights guaranteed by the Act requires elimination of certain "concerted activities which impair the interest of the public in the free flow of [interstate] commerce").

203. BEFORT & BUDD, *supra* note 14, at 195.

#### D. The Board Is Free to Abandon the Disloyalty Exception

As Judge Brown pointed out in her dissent in *DirecTV*, the Board has progressively narrowed the scope of the disloyalty exception.<sup>204</sup> First, it required “flagrant” disloyalty; next, it considered lack of intent as counting against disloyalty; finally, the Board refused to find unprotected disloyalty without proof of malicious intent. But so long as the Board views *Jefferson Standard* as enshrining an employer’s right in some cases to terminate disloyal employees, including those engaged in otherwise protected concerted activity, it will struggle to contain the reach of the exception.<sup>205</sup>

*Jefferson Standard* need not be read as creating a disloyalty exception, or an exception of any kind,<sup>206</sup> to the NLRA’s protections. Although the question before the court was whether the Board erred in excluding “indefensible” conduct from the Act’s protections, as opposed to the narrower “unlawful” formulation, the Supreme Court—as stressed by Justice Frankfurter in dissent<sup>207</sup>—never reached that issue. The Court emphasized throughout its opinion the Board’s finding that the handbill was “a concerted separable attack,” which “was not part of an appeal for support in the pending dispute.”<sup>208</sup> The opinion notes the importance of Board fact-finding in distinguishing genuine concerted activity from contemporaneous, apparently similar, but unprotected conduct.<sup>209</sup> The bulk of the Court’s decision addresses the tenuous connection to the dispute, and

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204. See *DirecTV, Inc. v. NLRB*, 837 F.3d 25, 53 (D.C. Cir. 2016) (Brown, J., dissenting) (observing that, since *Jefferson Standard*, the Board has “gradually weakened the very right the Court went out of its way to vindicate”).

205. In both *MikLin Enters., Inc. v. NLRB*, 861 F.3d 812 (8th Cir. 2017) and *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992), the court seized on prong 2 of the *Mountain Shadows* test to deny employees the protection of the Act. See *supra* Sections II.C, II.D.3.

206. The Supreme Court has apparently recognized the problems arising from the call of concerted, yet unprotected, activity. See *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 16–17 (1962) (“[Section 10(c)], of course, cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which [section] 7 of the Act protects.”).

207. *Jefferson Standard*, 346 U.S. 464, 479 (1953) (Frankfurter, J., dissenting) (“On this central issue—whether the Court of Appeals rightly or wrongly found that the Board applied an improper criterion—this Court is silent. It does not support the Board in using ‘indefensible’ as the legal litmus nor does it reject the Court of Appeals’ rejection of that test. This Court presumably does not disagree with the assumption of the Court of Appeals that conduct may be ‘indefensible’ in the colloquial meaning of that loose adjective, and yet be within the protection of [section] 7.”).

208. *Id.* at 477.

209. *Id.* at 474–75.

the Court offered no test for disloyalty to which future panels could refer.

Moreover, the Court's decision not to remand to the Board, often interpreted as giving binding effect to the Court's disloyalty dicta,<sup>210</sup> just as credibly suggests the reverse. The reason the majority "found no occasion" to remand to the Board was not necessarily, or even plausibly, the Court's silent application of a newly-devised, undefined disloyalty standard. Instead, the most likely explanation is that the Board's own factual conclusion that the attack was "separable" from the dispute compelled the result that it was unprotected. Whether the standard for losing protection is 'unlawfulness,' 'indefensibility,' or 'disloyalty,' the Board could not order reinstatement of an employee fired for activity that was never within the scope of section 7. Alternatively, the Court's talk of remanding may be otherwise explicable: the Court may have viewed as immaterial the Board's decision on whether third-party appeals were protected at all.<sup>211</sup> The important point is that the decision not to remand does not have to be read as a binding holding on disloyalty.

On this reading, *Jefferson Standard* held that where an appeal is not sufficiently connected to the dispute such that it is within the Act's protection, the workers responsible remain at-will employees subject to discharge "for good cause or for no cause, or even for bad cause."<sup>212</sup> One must not forget that, in the absence of a statute to the contrary, "an American employer in 1950 had the absolute *right* to discharge an employee for any reason."<sup>213</sup> Although the concept of "disloyalty" did play a major role in the Court's decision, at-will employees can be fired for no reason. The significance of the technicians' 'disloyalty' stems from the nature of these cases: because

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210. See, e.g., *MikLin*, 861 F.3d at 820 ("The Supreme Court's decision not to remand in *Jefferson Standard* made clear that the Court's disloyalty ruling includes communications that otherwise would fall within section 7 protection, if those communications 'mak[e] a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income.'" (quoting *Jefferson Standard*, 346 U.S. at 471)).

211. The issue of whether third-party appeals were protected at all was not settled until twenty-five years later. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978) (finding employees do not lose section 7 protection "when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship").

212. See *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519-20 (1884).

213. Stephen F. Befort, *Labor and Employment Law at the Millenium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 377 (2002) (emphasis added).

they arise during labor disputes, the employer claiming that a termination was ‘for cause’ will in practice be forced to rebut a showing by the Board’s General Counsel that anti-union animus played some role in the decision.<sup>214</sup> If the employer is unable to point to a distinct reason, it cannot meet this burden. A showing of disloyalty is important, but in the sense that it shows what the employee was *not* fired for.<sup>215</sup>

#### E. The Board’s Test Must Respond to the Concerns of the *Jefferson Standard* Court

The Board is therefore free to discard the unworkable second prong of the *Mountain Shadows* test, which asks whether conduct is “so disloyal as to lose the protection of the Act,” when assessing the protected status of public appeals for support in a labor dispute. Nevertheless, the Board must formulate a test for the “connection” prong that responds to the concerns of Congress, as interpreted by *Jefferson Standard*, in enacting section 7 and section 10(c). The *Jefferson Standard* Court cited *Jones & Laughlin’s* warning that the Board must not “make its authority a pretext for interference with the right of discharge.”<sup>216</sup> And in *Fibreboard Paper Products Corp. v. NLRB*,<sup>217</sup> the Court quoted legislative history explaining that section 10(c) was “intended to put an end to the belief, now widely held and certainly justified by the Board’s decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct.”<sup>218</sup> If, then, the purpose of 10(c) is to prevent wrongdoers sheltering under the protection afforded legitimate concerted activity, it seems unlikely that an easily-evaded requirement that an appeal indicate on its face some connection to the dispute will suffice. What is needed is a

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214. *Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980) (“First, we shall require that the [Board’s] General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.”). The Supreme Court approved the Board’s approach in *NLRB v. Transport. Mgmt. Corp.*, 462 U.S. 393, 404 (1983).

215. See BEFORT & BUDD, *supra* note 14, at 89 (“To demonstrate the illegal basis of her termination, an employee effectively needs to disprove any number of possible at-will reasons suggested by the employer.”).

216. *Jefferson Standard*, 346 U.S. 464, 474 (1953).

217. 379 U.S. 203 (1964).

218. *Id.* at 217 n.11 (quoting H.R. REP. NO. 245, at 42 (1947)).

robust, relation-based test to distinguish protected concerted activity from a “separable” attack.

A better approach to third party appeals would consider the connection between the subject-matter of the criticism and that of the labor dispute.<sup>219</sup> If the criticism would be nullified by successful resolution of the dispute, the NLRB should consider it protected. If not, the criticism would be deemed separable from the dispute, and thus beyond the reach of the Board’s remedial powers. Put another way, the Board could consider the connection between the dispute and the public interest appealed to, asking if the latter would be addressed should the employees prevail in the dispute.

To illustrate the proposed approach, consider *MikLin* and *DirectTV*.<sup>220</sup> In both cases, the outcome would be reversed. In *MikLin*, the labor dispute was about sick days, and the criticism concerned the dangers posed by the employer’s sick day policy. Success in the dispute would immediately further the public interest in uncontaminated sandwiches. The criticism attacked a labor policy of the company that was the subject of an ongoing labor dispute, and the employees had already raised their grievances with management itself. By any measure, this communication was sufficiently related to the dispute to be considered as a part of it. Hence, the sick day poster campaign was protected “concerted activit[y] . . . for mutual aid or protection,”<sup>221</sup> no matter how great—indeed, in proportion to—its economic threat to the employer.

*DirectTV* is a more difficult case. At least some of the employees’ comments, however, should be considered separable from the labor dispute. Their only connection to the controversy was the technicians’ goal that “by the hoped-for financial pressure, the attack might extract from the company some future concession.”<sup>222</sup> The labor dispute was about compensation, but the criticism concerned the company’s sales practices. The employees hoped to exact higher wages, but the public interest appealed to was an interest in honest salesmen. The employees could claim a *causal* connection between the compensation policy and the lies—the company told them to lie to

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219. Judge Brown, dissenting in *DirectTV*, suggested the use of this approach borrowed from another D.C. Circuit case. See *DirectTV, Inc. v. NLRB*, 837 F.3d 25, 58–59 (D.C. Cir. 2016) (Brown, J., dissenting) (citing *Diamond Walnut Growers, Inc. v. NLRB*, 113 F.3d 1259, 1261 (D.C. Cir. 1997) (en banc)) (“Though technically implicating a different line of Supreme Court precedent . . . the court’s analysis resonates in both.”).

220. See *supra* Sections II.A–C.

221. 29 U.S.C. § 157 (2012).

222. *Jefferson Standard*, 346 U.S. at 476–77.

do better under the disputed arrangement—and whether this should suffice is a question for the Board. But a rule that includes every alleged effect of a challenged labor policy would be overprotective.

The proposed approach resembles the connection inquiry that formed part of the *Sierra Publishing* ‘reasonableness’ analysis,<sup>223</sup> and would reach the same result applied to the facts of that case. The employees’ criticism addressed the manner in which the employer handled the labor dispute; it was a concern the workers might effectively have raised with management; and it would be nullified by success in the dispute. Unlike the approach of the Ninth Circuit, though, the proposed approach stops there. Factors such as harm to the employer, malicious intent, or inflammatory style—each of which may contribute to the effectiveness of other conduct expressly protected by the Act<sup>224</sup>—would not restrict the right to engage in concerted third-party appeals. Allowing these to count against the employee tolerates too great a role for subjective policy preferences and imports the prime causes of the present test’s uncertainty.

The proposed test also resembles, to some extent, the First Circuit’s approach in *Five Star Transportation Inc. v. NLRB*,<sup>225</sup> which asks whether a criticism “appeared necessary to effectuate the employees’ lawful aims.”<sup>226</sup> In that case, the Board had carefully distinguished between several letters, which “varied widely in content and tone,”<sup>227</sup> based upon their subject-matter. But this necessity test raises the specter of a proportionality analysis—balancing the gain to the employee against the harm to the employer—that does no more work than the question it seeks to answer: is the conduct “so disloyal . . . as to lose the protection of the act?”<sup>228</sup> Moreover, a requirement that employees show that less harmful (and therefore less effective) means had failed, or were likely to fail, would be complicated to apply and could prevent employees from taking action at the time it would be most effective. The proposed approach requires no such showing.

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223. *See supra* Section II.D.2.

224. *See supra* Section II.E.

225. *See Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 54–55 (1st Cir. 2008) (enforcing reinstatement order where bus drivers’ letters to employer’s employer raised primarily employment related concerns because they “were reasonably necessary to carry out their lawful aim of safeguarding their then-current employment conditions”).

226. *Id.* at 54 (quoting *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634, 640 (1st Cir. 1982)).

227. *Id.* at 49.

228. *Id.* at 52 (quoting *Mountain Shadows*, 330 N.L.R.B. 1238, 1240 (2000)).

A connection-based approach responds to Congress's concerns, in enacting section 10(c), that legitimate activities could provide cover for collateral misconduct. At the same time, the test acknowledges that if employees "are not permitted to address matters that are of direct interest to third parties" in publicly criticizing their employer, "it is unlikely that workers' undisputed right to make third party appeals in pursuit of better working conditions would be anything but an empty provision."<sup>229</sup> Moreover, because protection is confined to criticisms of the employer's labor practices and their direct consequences, the test will tend to exclude criticism of conditions for which the employer cannot be held responsible and criticisms that interfere with management prerogatives. Protected appeals should work no needless commercial harm.

Some may object, arguing that the proposed approach takes no account of whether employees are acting in good faith. Indeed, the above account of section 10(c)'s animating concerns suggests that good faith should really be the key inquiry. Any test that allows bad faith actors to avoid discipline so long as they stay on-message, while providing no protection for good faith critics who step slightly out of line, might appear deeply flawed.

The problem with any test that hinges on good or bad faith is that it will ultimately be a test of subjective intent. Although even the *MikLin* majority recognized that subjective intent is "of course relevant to the disloyalty inquiry,"<sup>230</sup> *Sierra Publishing* noted that, in practice, the employees' motivation will rarely be discernible.<sup>231</sup> And to the extent that the tests applied in *Sierra Publishing* and *Five Star* turned on the intent behind the workers' criticisms, any effort to incorporate such an inquiry into the present approach will struggle under the same difficulties as those courts. A good faith inquiry undermines the simplicity of the connection test and reintroduces the potential for subjective judgments based on judges' personal values: bad faith is as nebulous a concept as disloyalty, and a test for the latter that is grounded in the former will effectively be circular.<sup>232</sup>

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229. *Sierra Publ'g Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989).

230. *MikLin Enter., Inc. v. NLRB*, 861 F.3d 812, 821 (8th Cir. 2017).

231. *Sierra Publ'g*, 889 F.2d at 218 n.13 ("How much reliance to place on motive is problematic because of the Janus-like nature of legitimate and illegitimate intent . . . It is obvious that most concerted activity could be described in such a way as to place it within either characterization.").

232. In fact, "loyalty" and "faith" are synonyms. *Loyalty*, MERRIAM WEBSTER THESAURUS, <https://www.merriam-webster.com/thesaurus/loyalty> [<https://perma.cc/5MHK-HUKU>].

### F. A Connection-Based Test Is Objective and Can Be More Consistently Applied

The connection-based approach would clarify the law governing third-party appeals. All parties would benefit. Employees would no longer be responsible for monitoring factors that are hard to control or measure, such as tone of voice, harm to the employer, or apparent intent. For the employer, the proposed approach would operate more predictably than one rooted in the imprecise and subjective language of ‘disloyalty.’ Tribunals, meanwhile, will be more comfortable with a connection or nexus-based test<sup>233</sup>—which is within judicial competence as ‘disloyalty’<sup>234</sup> has never been.

Moreover, the suggested reading of *Jefferson Standard* views the case as an interpretation not of section 10(c), but of section 7 only. One benefit of this is that it does not implicate the troublesome idea that section 10(c) adopted and imported a pre-existing duty of loyalty under which a ‘servant’ could not injure his ‘master’s’ business interest. This understanding of *Jefferson Standard* simplifies the question of judicial deference to the Board: defining the scope of section 7, courts agree, is for the Board in the first instance. The *Chevron* analysis is therefore straightforward, no longer demanding the gymnastics required to identify the true effect of (i) a Supreme Court interpretation of (ii) one section (10(c)) of a federal statute that (iii) creates an exception which necessarily also defines the scope of another section (section 7) of the same Act.

### CONCLUSION

The rise of social media has vastly amplified workers’ power to express their views before the public and, if handled properly, can serve as an effective means of employer-employee communication. The potential benefits of enhanced employee voice may not be realized if legal uncertainty, or insufficient protection, keeps workers silent. On the other hand, overprotective rules can leave businesses

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233. Judges apply connection-based tests in many areas of the law. For example, in tort law, courts may ask whether an employee’s conduct is sufficiently related to his duties to support an employer’s vicarious liability. Other examples include nexus-based scrutiny of the connection between a statutory scheme and the problem it is intended to remedy (constitutional scrutiny), between multiple pieces of language (interpretation of contracts, statutes, or the Constitution), and between a cause and its purported effect.

234. See Ristau, *supra* note 187, at 920 (arguing that judges should focus on detriment, rather than disloyalty, because they are better-equipped to handle the more objective standard).

exposed to harmful allegations that serve no productive purpose, and merely sour relations further.

In determining the scope of protection afforded third party appeals, the Board need not feel constrained by *Jefferson Standard* to withhold the Act's protection from 'disloyal' communications. That case should instead be understood as making clear that section 7 protects activities, not actors, and that conduct "separable" from the labor dispute is beyond the reach of the NLRB. A requirement that public criticism bears sufficient connection to the labor dispute would enforce the distinction between protected and unprotected conduct drawn by the Supreme Court's interpretation of the Act.

A connection-based approach is grounded in the Act's fundamental purpose of promoting industrial peace and economic prosperity. It admits of consistent application and objective definition, unlike the elusive disloyalty standard that today confounds all parties. Without a test that clearly separates a worker's legitimate public criticism from "biting the hand that feeds him," the Act will struggle to realize its goals and fulfill its potential.