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An employee discharge, because of its severity, has been considered the "capital punishment" of industrial relations. Accordingly, the employer's right to impose such a penalty is subject to certain limitations when the employee is a member of a labor organization. The employer must not only comply with the collective bargaining agreement, but also with the National Labor Relations Act (Act). This compliance is usually satisfied when the reason for the discharge is the employee's misconduct. This position is different, however, when the employee is on strike. In this situation, the striking employee is permitted some leeway to protect his right to return to work.

1. Historically, an employer has been able to discharge an employee employed at will without incurring liability. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (the at will "rule is a harsh outgrowth of the notion of reciprocal rights and obligations in employment relationships"). Recently, however, the tort of retaliatory discharge has limited this broad discretion so as not to permit the employer to discharge an employee when that discharge would violate a clear public policy. Id. Moreover, when an employee is a member of a collective bargaining unit the employer's right to discharge is even more limited. See infra notes 3-7 and accompanying text. Discharge of a union employee can take a variety of forms. The employer may assert one reason for the discharge while hiding an actual and unlawful reason. See infra text accompanying notes 99-107. Furthermore, the employer may constructively discharge an employee by making the work environment so unpleasant that the employee is forced to quit. Sure-Tan, Inc. v. NLRB, 104 S. Ct. 2803 (1984).

A discharge can also take place when an employer refuses to allow a striking employee to return to work. Striking employees have certain rights to return to work at the termination of a strike. These rights are commonly referred to as "reinstatement rights." See infra note 16 and accompanying text. A denial of reinstatement by the employer is analogous to a termination or discharge. NLRB v. Local 1229, IBEW, 346 U.S. 464, 472 (1953) (holding employees discharged for cause). This comment examines the denial of reinstatement because of the striking employee's conduct on the picket line. This denial of reinstatement is also called the forfeiture of reinstatement rights. For a summary of the Board's decisions with respect to forfeiture of reinstatement rights, see Coronet Casuals, Inc., 207 N.L.R.B. 304, 304-05 (1973); Erickson, Forfeiture of Reinstatement Rights Through Strike Misconduct, 31 LAB. L.J. 602 (1980).

6. Id. ("standard . . . changes whenever the conduct occurs within the context of a labor dispute").
strike. The amount of permissible leeway has resulted in conflicting decisions between the federal courts of appeal and the National Labor Relations Board (Board). Recently, in an attempt to rectify this conflict, the Board has adopted a new standard for determining when the discharge penalty is appropriate in light of an employee's strike misconduct.

In Clear Pine Mouldings, Inc., the Board rejected the per se rule that picket line threats, in the absence of any overt acts or gestures, could never justify an employer's refusal to reinstate strikers. The Board replaced the "overt acts" test with an objective test governing all kinds of picket line misconduct. Under the objective test, an employer's denial of reinstatement is proper if the striker's conduct may have reasonably tended to coerce or intimidate employees in the exercise of their rights under the Act. The implementation of this test, however, will result in an unjustified increase in denial of employee reinstatement.

7. See infra text accompanying note 21.
8. See infra text accompanying notes 41-51.
10. Id. at 27,417.
11. Id. at 27,417-18. For a discussion and application of the objective test, see infra text accompanying notes 48-70. The test is termed an "objective" test because of its use of the "reasonable man" in determining conduct which "reasonably tends to restrain or coerce." See NLRB v. W.C. McQuaide, Inc., 552 F.2d 519, 527-28 (3d Cir. 1977). For an example of a "subjective" test, see infra text accompanying notes 46-47.
12. Id. at 27,418. The right most commonly interfered with by picket line misconduct is the right not to strike contained in section 7 of the Act. NLRA § 7, 29 U.S.C. § 157 (1982). For the text of section 7, see infra note 15. See also HAGGARD, UNION VIOLENCE, supra note 5, at 488-89 (targets of union violence).
14. The impact of the objective test is evident in cases which have applied this test. See, e.g., Associated Grocers of New England, Inc. v. NLRB, 562 F.2d 1333 (1st Cir. 1977) (Board determination of protected conduct under "overt acts" test reversed by appellate court following application of objective test); NLRB v. W.C. McQuaide, Inc., 552 F.2d 519 (3d Cir. 1977) (same); Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 (1984) (administrative law judge determination of protected conduct under "overt acts" test reversed by Board following application of objective test).

The adoption of the objective test by the Board will have an even harsher impact on the striking employees' reinstatement rights considering the Board's concomitant abandonment of the Thayer Doctrine in Clear Pine. Id. at 27,418-19. The Thayer Doctrine refers to the Board's statutory power to devise remedies for unfair labor practices "as will effectuate the policies of the Act." NLRA § 10(c), 29 U.S.C. § 160(c) (1982). See HAGGARD, UNION VIOLENCE, supra note 5, at 350-363; D. McDowell & K. Huhn, NLRB REMEDIES FOR UNFAIR LABOR PRACTICES 135-43 (1976) [hereinafter referred to as McDowell, NLRB REMEDIES]. The Thayer Doctrine derived its name in NLRB v. Thayer Co., 213 F.2d 748 (1st Cir.), cert. denied, 348 U.S. 883 (1954) (Board's affirmation of employee's denial of reinstatement remanded by court of appeals for a determination as to whether the employee's reinstatement would be an appropriate
This comment examines the objective test and discusses whether its adoption is warranted. This analysis begins by setting forth general principles relevant to all types of picket line misconduct. In addition, it specifically addresses verbal picket line threats. The comment then recommends that the objective test not be used to determine whether an employer's denial of reinstatement of a striking employee guilty of picket line misconduct is appropriate. It concludes with a proposed balancing test which should be adopted to protect the employees' right to strike.

**PRINCIPLES OF PICKET LINE MISCONDUCT**

Section 7 of the Act grants employees the right to strike, picket, and engage in other concerted activities for the purposes of collective bargaining or other protection. Once employees decide

remedy for the employer's unfair labor practices). The Board's first attempt at this type of remedial power was rejected by the United States Supreme Court in NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939). The Court, however, did not foreclose such a power in every situation. See generally HAGGARD, UNION VIOLENCE, supra note 5, at 351.

The Board expressly adopted the Thayer Doctrine in Blades Mfg. Corp., 144 N.L.R.B. 561 (1963). The Thayer Doctrine played an important role in putting unfair labor practice strikers back to work even if found to have committed unprotected acts. The Thayer Doctrine balanced the severity of a striker's misconduct against the severity of the employer's unfair labor practice. Coronet Casuals, Inc., 207 N.L.R.B. 304, 305 (1973). See also NLRB v. Thayer Co., 213 F.2d 748 (1st Cir.), cert. denied, 348 U.S. 883 (1954). The employee would be reinstated if the employer's wrong was greater than the employee's and if the reinstatement would "effectuate the policies of the Act." Local 833, UAW v. NLRB, 226 N.L.R.B. 1163, 1165 (1978) (multiple threats of one striker unprotected after a Thayer Doctrine balancing, but the implied threat of a second striker held not sufficient to deny reinstatement), enforcement granted in part and denied in part, 568 F.2d 436, 442 (5th Cir. 1978) (threat of second striker unprotected considering violent surrounding circumstances even after application of Thayer Doctrine balancing test). See also Fiberboard Paper Prods. Corp., 180 N.L.R.B. 142, 173 (1969) (list of determining factors in a Thayer Doctrine balancing process). The abandonment of this doctrine and the application of the objective test to determine unprotected picket line misconduct will have its broadest impact in the area of picket line threats.

15. Section 7 of the Act states the employee's right to participate in, or to refrain from participating in union activities. Section 7 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representation of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

to strike, they have certain reinstatement protections depending on the strike classification.\textsuperscript{16} Regardless of the type of strike involved, an employer can refuse to reinstate a striking employee when that employee has engaged in picket line misconduct.\textsuperscript{17}

The picket line misconduct, however, must be sufficient to justify the employer's denial of reinstatement. In addition, not every impropriety "loses the protection of the Act."\textsuperscript{18} The Board has

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\textsuperscript{16} See generally Erickson, Forfeiture of Reinstatement Rights Through Strike Misconduct, 31 LAB. L.J. 602, 602-03 (1980). The employees' reinstatement rights depend on whether they are economic strikers or unfair labor practice strikers. Economic strikers strike to gain better working conditions such as hours, wages, and health and welfare benefits. Id. at 602. Another form of an economic strike is the recognition strike. The recognition strike is a way for a union to pressure an employer to recognize a union without an election. Cabot, The Third Circuit's New Standard for Strike Misconduct Discharges: NLRB v. W.C. McQuaide, Inc., 23 VILL. L. REV. 645, 646-47 (1978). Economic strikers have a right to reinstatement unless they have been permanently replaced. NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333, 345-46 (1938) (permanent replacement of economic strikers allowed where the employer has legitimate business justifications). Unfair labor practice strikers, on the other hand, may not be permanently replaced. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956). Any replacements hired during the strike must be terminated if necessary to make room for returning strikers. Id. An unfair labor practice strike occurs when the employer commits acts such as unilaterally changing contract terms, by not bargaining in good faith or by the unnecessarily prolonging an economic strike. R. Gorman, Basic Text on Labor Law Unionization and Collective Bargaining 339 (1976). See also Stewart, Conversion of Strikes: Economic to Unfair Labor Practice I, 45 VA. L. REV. 1322 (1959); Stewart, Conversion of Strikes: Economic to Unfair Labor Practice II, 49 VA. L. REV. 1297 (1963) (two articles questioning the distinction between the two types of strikes).

\textsuperscript{17} Prior to Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) \textsuperscript{*16,083} (1984), reinstatement rights of strikers guilty of picket line misconduct were treated differently depending on the type of strike involved. Economic strikers had no right to reinstatement if they were guilty of picket line misconduct. Erickson, Forfeiture of Reinstatement Rights Through Strike Misconduct, 31 LAB. L.J. 602, 603 (1980). Unfair labor practice strikers were not subject to the same treatment because of the balancing process of the Thayer Doctrine. The use of the Thayer Doctrine, however, came to an abrupt end when it was abandoned by the Board in Clear Pine. See supra note 14. Now, no matter what the classification, a striker can be denied reinstatement if he or she is guilty of strike misconduct. Cabot, The Third Circuit's New Standard For Strike Misconduct Discharges: NLRB v. W.C. McQuaide, Inc., 23 VILL. L. REV. 645, 647 (1978) (the most essential principle in McQuaide is that in any type of strike, an employer is not obligated to reinstate striking employees who engage in strike misconduct).

found that a certain amount of violence is expected.\textsuperscript{19} For example, minor picket line misconduct, although at times crude and offensive, has not justified a denial of reinstatement.\textsuperscript{20} The Board has reasoned that some leeway for impulsive behavior must be allowed because it is necessarily implied in the right to strike.\textsuperscript{21} Accordingly, vulgar, abusive, and obscene language is protected.\textsuperscript{22} Similarly, gestures, minor scuffles and disorderly arguments have also been protected.\textsuperscript{23} The allowance of this kind of minor strike misconduct has led to what some commentators misleadingly refer to as the “Act’s protection of violence as a concerted activity.”\textsuperscript{24} In reality, the Board is reinforcing the importance of the right to strike. Indeed, if the striking employee’s reinstatement right could

will cause an employee to lose the protection of the Act. McDowell, NLRB Remedies, supra note 14, at 140-41.

\textsuperscript{19} See Republic Steel Corp. v. NLRB, 107 F.2d 472, 479 (3d Cir. 1939) (a strike is “a battle waged with economic weapons,” in which “[r]ising passions call forth hot words” leading to “blows on the picket line”), cert. denied, 309 U.S. 684 (1940). See also NLRB v. W. C. McQuaide, Inc., 552 F.2d 519, 527 (3d Cir. 1977) (“some confrontations between strikers and nonstrikers are inevitable”); NLRB v. Terry Coach Indus., Inc., 411 F.2d 612, 613 (9th Cir. 1969) (“[a]s might be expected, some friction developed”); Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 at 27,417 (1984) (quoting Coronet Casuals, Inc., 207 N.L.R.B. 304, 305 (1973)) (“misconduct must have been in the contemplation of Congress when it provided for the right to strike”); Indiana Desk Co., 56 N.L.R.B. 76, 79 (1944) (“disorder . . . can normally be expected”).


\textsuperscript{22} Associated Grocers of New England, Inc. v. NLRB, 562 F.2d 1333, 1335 (1st Cir. 1977) (obscene gestures, spitting); Coronet Casuals, Inc., 207 N.L.R.B. 304, 304-05 (1973) (obscene language, abusive threats); Terry Coach Indus., Inc., 166 N.L.R.B. 560, 564 (1967) (“employees do not always employ language used in polite society”).

\textsuperscript{23} Star Meat Co. v. NLRB, 640 F.2d 13 (6th Cir. 1980) (striker grabbed and pushed nonstriker); Firestone Tire & Rubber Co., 187 N.L.R.B. 54 (1970) (obscenities and vulgar hand signs), enforcement denied on other grounds, 449 F.2d 511 (5th Cir. 1971) (evidence also showed other serious misconduct); Coronet Casuals, Inc., 207 N.L.R.B. 304, 305 (1973) (minor scuffles and disorderly arguments).

\textsuperscript{24} Haggard, Union Violence, supra note 5, at 322 (violence as a protected concerted activity). The theory is that, because not all forms of violence remain unprotected, the ones that do not lose the striking employee the protection of the Act are protected. Id. at 323. See Erickson, Forfeiture of Reinstatement Rights Through Strike Misconduct, 31 Lab. L.J. 602, 603 (1980) (“[s]ome misconduct is protected concerted activity”).
be lost because of any impropriety committed on the picket line, the right to strike would be of little value.25

Serious strike misconduct, on the other hand, has justified an employer's refusal to reinstate the strikers. Such serious misconduct is usually typified by the seizure or destruction of the employer's property.26 Similarly, denial of reinstatement has also been upheld for acts of physical violence,27 participation in dangerous car chases,28 the use or possession of dangerous weapons on the picket line29 and the throwing of projectiles.30

Because not all forms of misconduct fit neatly into either category, the Board must determine what conduct is protectable. The Board has held that those acts that cause the loss of reinstatement

25. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967) (employer's denial of reinstatement must be justified, otherwise employee is penalized for exercising the right to strike); Erickson, Forfeiture of Reinstatement Rights Through Strike Misconduct, 31 LAB. L.J. 602, 604 (1980) (Congress protected minor acts of violence so as not to jeopardize the right to strike). See Republic Steel Corp. v. NLRB, 107 F.2d 472, 479 (3d Cir. 1939) (rights afforded by Act "illusory" if lost on the basis of any misconduct), cert. denied, 309 U.S. 684 (1940); Coronet Casuals, Inc., 207 N.L.R.B. 304, 305 (1973) (right to strike would be unduly jeopardized if any act of misconduct lost the protection of the Act); Blair Process Co., 199 N.L.R.B. 194, 194 (1972) (the rights contained in sections 7 and 13 of the Act "would be unduly jeopardized if all forms of misconduct . . . would deprive the employee of the protective mantle of the Act, without regard for the seriousness of such conduct") (quoting Terry Coach Indus., Inc., 166 N.L.R.B. 560, 563 (1967), enforced, 411 F.2d 612 (9th Cir. 1969)). See also NLRB v. Erie Resistor Corp., 373 U.S. 221, 233-34 (1963) (respect for the right to strike is based on the fact that a strike is an economic weapon which greatly "implements and supports" the principles of collective bargaining).


27. Trial Mobile Division, Pullman Inc. v. NLRB, 407 F.2d 1006 (5th Cir. 1969) (battery committed on nonstriker); NLRB v. Kelco Corp., 178 F.2d 578 (4th Cir. 1949) (beating of replacement applicant); Jerr-Dan Co., 237 N.L.R.B. 302 (1978) (nonstriker hit in throat and punched in face); Mosher Steel Co., 226 N.L.R.B. 1163 (1976) (nonstriker "stomped" on, "kicked in the head" and "struck in the ribs with a picket sign").


protection must rise to such a level as to make the employee “unfit for future service.” The Board has also stated that a distinction should be drawn between mere “animal exuberance” and those cases where the acts are so flagrant as to constitute serious violence. The one area where this distinction has been most difficult to draw is with verbal threats.

**Verbal Threats**

Verbal threats generally constitute “a declaration of an intention to injure another or his property by some unlawful act.” In strike situations, these threats are usually made by a striker to a nonstriking employee who crosses the picket line. The Board has held that “sufficiently serious threats” justify an employer’s denial of reinstatement. The problem remains, however, as to what constitutes a “sufficiently serious threat.” Before Clear Pine Mouldings, Inc., the Board resolved the problem with the “overt acts” test. Under the “overt acts” test, threats which are not accompanied by any physical movements, contacts or gestures, would not justify a denial of reinstatement. Threats which are accompanied by these overt acts, however, would constitute serious strike misconduct because of the added emphasis or meaning the striker gives.

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34. BLACK'S LAW DICTIONARY 1327 (5th ed. 1979).


to the words. This rule developed into a *per se* rule that, absent violence, a striking employee is not disqualified from reinstatement despite making abusive threats against nonstrikers.

Board decisions, however, are subject to appellate review by the United States circuit courts of appeal. The appellate courts are not limited by Board determinations of fact, nor must they apply the same tests developed by the Board. Accordingly, a variety of tests have developed among the various circuits to determine when a verbal threat would justify an employer's denial of reinstatement.

Currently, the Court of Appeals for the Eighth Circuit uses the "victims fear" standard. Under this standard, threats that place the victim in actual fear of bodily harm justify a denial of reinstatement. A second approach for determining the seriousness of strike misconduct is the "subjective test" used by the Fourth and Sixth Circuits. The critical question arising out of this test is whether the threat was intended to intimidate the victim.

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39. *Id.*
40. *Id.*
42. *See B. Meltzer, Labor Law: Cases, Materials, and Problems 100-104 (2d ed. 1977)* (dealing with the scope of review used by the Board over the administrative law judge, and of the courts over the Board). For a recent case dealing with the scope of appellate review, *see Sure-Tan, Inc. v. NLRB 104 S. Ct. 2803 (1984)* (court of appeals erred in modifying Board's remedial order).
43. The Board's adherence to the "overt acts" test in *A. Duie Pyle, Inc.*, 263 N.L.R.B. 744 (1982), was in spite of federal courts of appeals' rejections of the test. The Board in *A. Duie Pyle, Inc.*, however, did distinguish *McQuaide* based on the absence of violent surrounding circumstances. *Id.* at 745 n.7 (citing NLRB v. W.C. McQuaide, Inc., 552 F.2d 519 (3rd Cir. 1977)).
44. NLRB v. Trumball Asphalt Co., 327 F.2d 841 (8th Cir. 1964). The "victims fear" standard was also used by the First Circuit before that court adopted the objective test. *See NLRB v. Eleco Manufacturing, Inc.*, 227 F.2d 675 (1st Cir. 1955), cert. denied, 350 U.S. 1007 (1956).
45. NLRB v. Trumball Asphalt Co., 327 F.2d 841, 846 (8th Cir. 1964) (threats which placed nonstriker in such fear of bodily harm that he stayed away from the job for five weeks was sufficient to warrant discharge). The Third Circuit considered the adoption of this test but rejected it because its focus was on the effect on the nonstriker, and not on the conduct of the striker. NLRB v. W.C. McQuaide, Inc., 552 F.2d 519, 527 (3rd Cir. 1977).
47. NLRB v. Pepsi Cola Co. of Lumberton, Inc., 496 F.2d 226 (4th Cir. 1974). A striker's threat that "I know where you live, and if you go in there to work, I'll come looking for you," was held to have crossed the line from mere persuasion to intimidation and was therefore unprotected. *Id.* at 228. The Sixth Circuit, using the same striker's intent standard, reached a contrary result on a similar fact pattern in NLRB v. Hartmann Luggage Co., 453 F.2d 178 (6th Cir. 1971) where a striker's threat that "it would be a shame (for the strikers) to have to kill him because he was too young to die," was held to be only picket line rhetoric and not literally intended and thus protected from discharge. *Id.* at 184. The Third Circuit also considered adoption of this test but rejected it. NLRB v. W.C. McQuaide, Inc., 552 F.2d 519, 527 (3rd Cir. 1977). The possible
The most recent test developed to determine the seriousness of a threat is the objective test used by the First and Third Circuits. This test asks whether the threat may reasonably tend to restrain or coerce employees in the exercise of their statutory rights. If the answer to this question is yes, the employee would not be protected from discharge. Therefore, as a general rule, federal courts have rejected the use of the Board's "overt acts" test. The impact of the rejection of the "overt acts" test, however, can be seen by its effect on the Board.

The National Labor Relations Board

In Clear Pine Mouldings, Inc., the Board rejected its own "overt acts" test and replaced it with the objective test. In Clear Pine, an administrative law judge found that a striker's picket line conduct was not sufficiently serious to justify the denial of rein-

reason for the Third Circuit's rejection of this test is the difficulty in assessing the striker's intent.


49. The Third Circuit enunciated the test as "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." 552 F.2d at 528 (quoting Local 542, Int'l Union of Operating Eng'rs v. NLRB, 328 F.2d 850, 852-53 (3d Cir.), cert. denied, 379 U.S. 826 (1964)).

50. Id. The difference between the "overt acts" test and the objective test can be seen by the disparate treatment of the strikers before the Board and the First and Third Circuits. In McQuaide, the Board ordered the reinstatement of a striking employee who had followed a nonstriker to an entrance of the plant and said that he would "get him." Id. at 528. In another incident, the striker shook his fist at a truck driver and said that he would beat him up if he drove again. Id. In still a third incident, the striker told another truck driver, "scab, you're going to get yours," and the striker partially blocked the driver's exit. Id. The Third Circuit denied the Board's order of reinstatement holding that an employer does not have to "countenance conduct that amounts to intimidation and threats of bodily harm." Id. at 527. Because that strike had been marked by incidents of violence and harrassment, the strikers' statements "were not merely spontaneous picket line activity," but serious strike misconduct. Id. at 528.

In Associated Grocers of New England, Inc. v. NLRB, 562 F.2d 1333 (1st Cir. 1977), the Board had ordered the reinstatement of a striker who told three job applicants, about twenty-five feet away from where forty to fifty strikers were picketing, that if they valued their lives, they should not enter the plant. Id. at 1336. The First Circuit found that the Board's "overt acts" test was too inelastic to reliably distinguish serious misconduct from protected activity. Id. Using the objective test, the court found that the striker's conduct would reasonably tend to restrain or coerce under the circumstances and that the conduct was not protected. Id. at 1336-37. The First Circuit stressed the importance of the surrounding circumstances and held that "[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker." Id. at 1336.

51. See HAGGARD, UNION VIOLENCE, supra note 5, at 326.


53. Id. at 27,417-18.
The striker had cornered a fellow employee and told him that he had better "watch out because they might burn his house or garage." In addition, the striker flagged down another employee's car and told the driver that "she was taking her life in her hands by crossing the picket line and would live to regret it." At the termination of the strike, the employer denied the striker reinstatement.

Following the "overt acts" test, the administrative law judge found that the striker's threats were not sufficiently serious to discharge him. The judge found that, because the conduct occurred in the early stages of a four-month strike, and because it was the type of misconduct that the Board had excused as trivial, the striker was entitled to reinstatement. The Board, however, reversed this holding and stated that it would abandon its "overt acts" test.

In *Clear Pine*, the Board found that absent violence, the "overt acts" test allowed abusive threats. It then equated an abusive threat to a type of restraint and coercion. Because restraint and coercion are prohibited elsewhere in the Act, the Board held that abusive threats should also be prohibited. The Board stated that the correct standard to determine whether verbal threats directed

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54. *Id.* at 27,417.
55. *Id.* at 27,416. This threat was also repeated on several occasions over the phone. *Id.* The nonstriking employee was also shoved around by other employees. *Id.* In addition, the employee was told that "he would have to go on strike." *Id.* Moreover, the striker made threatening statements concerning certain nonstriking employees which were over heard by a third union member who was planning to drop out of the union. *Id.*
56. *Id.*
57. *Id.* Another striker was also denied reinstatement because he had swung a club at a nonstriking employee, hit some trucks and a car with the club and threatened to kill a nonstriking employee after a car had backed up into the striker and knocked him over. *Id.* at 27,416-17. The driver of the car had backed the car up to avoid being blocked in by other strikers who were pounding on cars with clubs and trying to pull the drivers out. *Id.* at 27,417.
58. *Id.* The administrative law judge found that the first striker had made verbal threats of violence. *Id.* The judge found that the second striker had used a club-like object to hammer on vehicles leaving the plant. *Id.* The judge stated that the second striker had gone to the picket line "equipped and ready to engage in pugnacious behavior." *Id.*
59. *Id.* The judge noted that the threats of the first striker were not "followed up," with more acts of misconduct. *Id.* Similarly, the actions of the second striker were "limited to a single incident during the first week of the strike." *Id.* The judge concluded that these were "minor, isolated acts of the type that the Board has excused as trivial." *Id.*
60. *Id.* at 27,418.
61. *Id.* at 27,417. The Board noted that abusive threats are not privileged under section 8(c) of the Act as free speech. *Id.* (citing 29 U.S.C. § 158(c) (1982)).
64. 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 at 27,417.
Picket Line Misconduct

65. Id. at 27,418 (quoting NLRB v. W.C. McQuaide, Inc., 552 F.2d 519, 528 (3d Cir. 1977)).

66. 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 at 27,419. Each threat was considered sufficient to deny the striker reinstatement. Id. The Board noted that although the statement "that the hands of certain knife-grinding personnel should be broken" referred to employees other than the one who heard it, it still reasonably tended to coerce and intimidate the one who overheard it. Id. Similarly, each act of misconduct of the second striker was sufficient to deny reinstatement. Id. In the concurring opinion, Board Member Zimmerman did not rely on the threat made after the second striker had been knocked over. Id. at 27,422 n.6.

67. Id. at 27,417-18.

68. HAGGARD, UNION VIOLENCE, supra note 5, at 329. The author, however, regards the objective test as a very influential opinion in the area of picket line misconduct. Id. at 327. See also Cabot, The Third Circuit's New Standard for Strike Misconduct Discharges: NLRB v. W.C. McQuaide, Inc., 23 VILL. L. REV. 645, 645 (1978) (adoption of objective test is of great consequence in labor relations law); Prozzi, The NLRB Adopts New Standard for Assessing Strike Misconduct, NAT'L L.J. at 16 (Nov. 5, 1984) (Board change was long overdue).

69. For a list of cases where the application of the objective test resulted in a reversal of the decisions of protected conduct reached under the "overt acts" test, see supra note 14. On remand of Associated Grocers, however, the Board still found the striker was entitled to reinstatement, even under the objective test. 238 N.L.R.B. 871 (1978).

70. Prior to the Board and the First and Third Circuits' adoption of the objective test, the conduct involved in each case had been protected. See supra note 14. Accordingly, the Board and the courts should have only adopted the test prospectively. Contra NLRB v. Majestic Weaving Co., 355 F.2d 654, 860 (2d Cir. 1966) (Board adopted new rule resulting in monetary loss to employer).
exercise of the right to strike. Second, the test rejects long-standing agency rules by imputing the violent acts of some strikers to others in the absence of a finding of participation or ratification. Third, the objective test gives an employer broad discretion in deciding who to discharge by considering surrounding circumstances. Finally, the objective test equates two distinct factual situations by using the same test to determine union unfair labor practices and to determine the seriousness of an individual striker's picket line misconduct.

Commentators contend that the objective test reduces picket-line violence.\textsuperscript{71} If the test actually accomplishes this goal, however, it will do so by justifying dismissal for conduct which has not only been considered trivial, but which has also been considered permissible in the exercise of the right to strike.\textsuperscript{72} Thus, the objective test seriously restricts the exercise of the right to strike by justifying dismissal for conduct which is considered the natural outgrowth of a strike.\textsuperscript{73}

Although the main objective of the Act was to provide for the peaceful settlement of labor disputes,\textsuperscript{74} the United States Supreme

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\textsuperscript{71} Cabot, \textit{The Third Circuit's New Standard for Strike Misconduct Discharges: NLRB v. W.C. McQuaide, Inc.}, 23 \textsc{Vill. L. Rev.} 645, 656 (1978). Prozzi, \textit{The NLRB Adopts New Standard For Assessing Striking Misconduct}, Nat'\textsc{l} L.J. at 29 (Nov. 5, 1984) (objective test makes Act's policy encouraging peaceful resolution of labor disputes more meaningful). Violence, however, is not only expected during a strike, but it is considered the natural consequence of a strike. Republic Steel Corp. v. NLRB, 107 F.2d 472, 479 (3d Cir. 1939), \textit{modified}, 311 U.S. 7 (1940). It is questionable whether such conduct can be reduced by the application of the objective test especially because strike misconduct occurred since 1799. Nelles, \textit{The First American Labor Case}, 41 \textsc{Yale L.J.} 165, 176 (1931). Furthermore, a striking employee may not know that his conduct was unprotected until after a strike has terminated because it is then that all of the misconduct which occurred during the strike is taken into consideration. In fact, an employee may not even have notice that his misconduct was sufficiently serious to deny reinstatement because violent surrounding circumstances may have arisen after the employees acts of misconduct. See \textit{infra} note 107. See also H.N. Thayer Co., 115 N.L.R.B. 1591, 1605-06 (1956) (Murdock, Peterson, Members, dissenting) ("[w]ithholding reinstatement and back pay from the strikers who engaged in misconduct will be of little significance in deterring strikers from the rash acts which commonly arise in the heated atmosphere of a labor dispute").

\textsuperscript{72} Consider the administrative law judge's conclusion that the conduct was trivial, and was of the type which had been excused in the past. Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) \textsc{\$} 16,083 at 27,417 (1984). The Board, however, using the objective test, found that the conduct was serious picket line misconduct and denied reinstatement for each act of misconduct. \textit{Id.} at 27,419.

\textsuperscript{73} Erickson, \textit{Forfeiture of Reinstatement Rights Through Strike Misconduct}, 31 \textsc{Lab. L.J.} 602, 606 (1980) (violence is considered a natural outgrowth of labor disputes). See \textit{infra} note 19 and accompanying text.

\textsuperscript{74} H.R. Rep. No. 245, 80th Cong., 1st Sess. 6 (1947), \textit{reprinted in} 1 NLRB, \textsc{Legislative History of the Labor Management Relations Act, 1947, at 295-96 (1948)} [hereinafter cited as \textsc{Legis. Hist. LMRA}] (discussed in Haggard,
Court has allowed certain kinds of conduct to be protected from discharge.\textsuperscript{75} Similarly, confronted with the Act's provision for a right to strike and the documented history of labor violence, the Board and the courts determined that Congress had anticipated a certain amount of misconduct in the exercise of the right to strike.\textsuperscript{76} Therefore, the protection afforded certain types of misconduct illustrates that emotions run high during a strike and that a certain amount of impulsive behavior is expected.\textsuperscript{77} Otherwise, the guarantee of the right to strike would have no meaning or effect.

Impulsive behavior includes arguments with employers,\textsuperscript{78} spitting on company representatives,\textsuperscript{79} minor scuffles\textsuperscript{80} and verbal threats.\textsuperscript{81} Threats are the most basic type of impulsive conduct.\textsuperscript{82}

\textsuperscript{75} Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941) ("the right of free speech [embodied in the right to strike] cannot be denied by drawing from a trivial rough incident or a moment of animal exhuberance the conclusion that otherwise peaceful picketing has the taint of force.")

\textsuperscript{76} Id. See supra notes 19-21 and accompanying text.

\textsuperscript{77} See Coronet Casuals, Inc., 207 N.L.R.B. 304, 305 (1973) (citing Montgomery Ward & Co. v. NLRB, 374 F.2d 606, 608 (10th Cir. 1967)) (impulsive behavior can be expected), McDowell, NLRB Remediessupra note 14, at 137 (Fansteel and Thayer stand for the proposition that "emotions run high during a strike). See also Haggard, Union Violence, supra note 5, at 325 (the premise of the "overt acts" test is that emotions run high during a strike and misconduct is expected); B. Meltzer, Labor Law: Cases, Materials, and Problems 253 n.2 (2d ed. 1977) (quote of Andrew Carnegie) ("I would have the public give due consideration to the terrible temptation to which the working man on strike is sometimes subjected") (citing L. Wolff, Lockout 28 (1965)).

\textsuperscript{78} Coronet Casuals, Inc., 207 N.L.R.B. 304, 305 (1973) (citing NLRB v. Buitoni Food Co., 126 N.L.R.B. 767, 782-83 (1960), enforced, 298 F.2d 169, 174-75 (1962)). See also Associated Grocers of New England, Inc. v. NLRB, 562 F.2d 1333, 1335 (1st Cir. 1977) (conduct of one employee who made obscene gestures and hurled crude epithets at company supervisors was not serious enough to lose the protection of the Act).

\textsuperscript{79} Associated Grocers of New England, Inc. v. NLRB, 562 F.2d 1333, 1335 (1st Cir. 1977) (fact that striking employee spat upon company car as it crossed picket line would not justify denial of reinstatement).

\textsuperscript{80} Star Meat Co., 237 N.L.R.B. 908 (1979) (larger striker pushing smaller replacement about four or five feet was impulsive and reinstatement is proper); Coronet Casuals, Inc., 207 N.L.R.B. 304, 305 (1973) (minor scuffles) (citing NLRB v. Buitoni Foods Co., 126 N.L.R.B. 767, 782-83 (1960), enforced, 298 F.2d 169, 174-75 (1962)).

\textsuperscript{81} Coronet Casuals, Inc., 207 N.L.R.B. 304, 305 (1973) (abusive threats) (citing NLRB v. Terry Coach Indus., Inc., 166 N.L.R.B. 560, 563 (1967), enforced, 411 F.2d 612, 613 (9th Cir. 1969) and NLRB v. Efco Mfg., Inc., 108 N.L.R.B. 245, 250, 261 (1954), enforced, 227 F.2d 169, 174-75 (1st Cir.), cert. denied, 350 U.S. 1007 (1955)). Even if the objective test is not used, a verbal threat may still result in discharge. See supra text accompanying notes 35, 43-47. Furthermore, in NLRB v. Moore Business Forms, Inc., 574 F.2d 835 (5th Cir. 1978), a striking employee told a nonstriker who was attempting to return to work that "there's ways to keep you from it." Id. at 845. The Board dismissed the threat as mere "picket line braggadocio." Id. The Court of Appeals for the Fifth Circuit, however, reversed. The Fifth Circuit noted that "in all the violent behavior sur-
They are usually not premeditated and are not followed with physical action. These two considerations suggest that the speakers did not intend to follow through on the threatened action. The objective test, however, now takes threats out of the impulsive behavior category and equates them with battery, property damage and other forms of serious picket line misconduct. The "overt acts" test, on the other hand, struck an appropriate balance by protecting purely verbal threats while equating threats committed with overt acts as not protected. Although the objective test may be appropriate for some types of serious misconduct, it is not appropriate in dealing with purely verbal threats. Rather, threats should be considered merely conduct that is the natural consequence of the protected right to strike.

rounding this strike the threat really left nothing to the imagination." Id. The Fifth Circuit noted that before this threat had been made, glass, nails and pieces of metal had been thrown across the entrances of the plant, rocks, eggs and other objects had been thrown at nonstrikers, guns were fired at homes of nonstrikers and at company property and the plant had been bombed with dynamite. Id. at 838.

82. Impulsive behavior has been defined as "[a] spontaneous inclination of the mind prompting an immediate involvement in something not therefore in contemplation." BALLENTINE'S LAW DICTIONARY 595 (3d ed. 1969).

83. Threats are not the type of misconduct which is premeditated because they often occur on the picket line when there is little knowledge about who will be crossing the line. Threats against family members, however, take on a premeditated tone. See, e.g., NLRB v. Moore Business Forms, Inc., 574 F.2d 835, 846-47 (5th Cir. 1978) (threats to a nonstriker concerning the nonstriker's wife and children were unprotected and not ambiguous considering the violent surrounding circumstances); Federal Prescription Serv., Inc. v. NLRB, 496 F.2d 813 (8th Cir.) (striker justifiably denied reinstatement for threat that a striker's son "just may have an accident"), cert. denied, 419 U.S. 1049 (1974).

84. If a threat accompanies physical action, the striker would be denied reinstatement for the resultant physical violence. Trailmobile Div., Pullman Inc. v. NLRB, 407 F.2d 1006, 1008 (5th Cir. 1969). The striker would not be discharged, however, if the follow up action involved either very minor acts or conduct which was not inherently dangerous. Star Meat Co. v. NLRB, 237 N.L.R.B. 908 (1978), enforced, 640 F.2d 13 (6th Cir. 1980).

85. The Board has allowed reinstatement where threats were incredible and should not have been taken seriously. McDowell, NLRB REMEDIES, supra note 14, at 141. The courts of appeal have also considered the impulsive nature of the misconduct. See, e.g., NLRB v. Moore Business Forms, Inc., 574 F.2d 835, 845 (5th Cir. 1978) (picket line braggadocio); NLRB v. Hartman Luggage Co., 453 F.2d 178, 185 (6th Cir. 1971) (picket line rhetoric).

86. The objective test equates threats with other kinds of serious picket line misconduct because verbal threats as well as acts of serious violence, each justifies discharge. See supra text accompanying notes 38-40.

87. See supra text accompanying notes 38-40 for a discussion of the "overt acts" test.

88. The use of the objective test is appropriate to consider union unfair labor practice charges. See infra text accompanying notes 108-119.

89. See Indiana Desk Co., 56 N.L.R.B. 76, 79 (1944) (jostling on the picket line is expected and although it is not to be condoned, it is no warrant for a denial of reinstatement). See supra text accompanying notes 19-21, 72-73. To be sure, civil and criminal penalties are available to the victim even if the employee who committed the threat is reinstated. See generally HAGGARD, UNION
The second reason to reject the use of the objective test rests on the principle that each striker's eligibility for reinstatement is judged solely upon the individual striker's conduct. Acts of violence on the part of some striking employees should not be imputed to other union members in the absence of proof of participation, ratification, or agency. The "overt acts" test satisfied this principle by permitting the termination of a striker only after a consideration of that individual's overt acts. Conversely, the objective test fails to meet this principle because it considers all circumstances surrounding the making of a threat to determine if the striker lost the protection of the Act. The effect of the objective test is to

_VIOLENCE, supra note 5, at 463-82. See also Hart & Pritchard, The Fanstell Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board, 52 HARV. L. REV. 1275, 1319 (1939) (penalties other than discharge)._  

90. Coronet Casals, Inc., 207 N.L.R.B. 304, 321 (1973). _See Methodist Hosp. of Kentucky, Inc. v. NLRB, 619 F.2d 563 (6th Cir.) (penalties for violence require proof of unprotected activity by particular individuals), cert. denied, 449 U.S. 889 (1980); NLRB v. Moore Business Forms, Inc., 574 F.2d 835, 843 (5th Cir. 1978) ("mere proximity to the violence is insufficient to deprive . . . reinstatement"); ILGWU (B.V.D. Company) v. NLRB, 237 F.2d 545, 550 (D.C. Cir. 1956) (and cases cited therein) ("individual wrongdoing is a prerequisite to disqualification for reinstatement and back pay"); Republic Steel Corp. v. NLRB, 107 F.2d 472, 479 (3d Cir. 1939) (construing section 6 of the Norris-La Guardia Act, 29 U.S.C. § 106 (1932)) ("clear proof of actual participation in, or actual authorization of, such [unlawful] acts, or of ratification of such acts after actual knowledge thereof . . . is required"). _See also NLRA § 2(13), 29 U.S.C. § 152(13) (1982) (the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling")._  

91. Coronet Casals, Inc., 207 N.L.R.B. 304, 321 (1973). _See ILGWU (B.V.D. Company) v. NLRB, 237 F.2d 545, 550-51 (D.C. Cir. 1956) ("absent an agency relationship, an employee may not be charged with misconduct committed by others"); Mosher Steel Co. v. NLRB, 226 N.L.R.B. 1163, 1168 (1973) (reinstatement ordered by Board where isolated threats have been made but speaker had not engaged in any other violence), enforcement granted in part and denied in part, 568 F.2d 436, 441 (1978). See generally W. CONNOLLY, STRIKES, STOPPAGES AND BOYCOTTS 230-32 (1976) (general discussion of agency principles in labor law). A union is responsible for the acts of its agents based on traditional agency laws without any requirement of specific authorization. United Furniture Workers of America, 81 N.L.R.B. 886, 889 (1949). _But see Local 1023, United Transp. Union, 187 N.L.R.B. 406, 406 (1970) (Miller, Chairman, dissenting) (no agency relationship established absent proof that union representative was on scene when misconduct occurred or that there was a subsequent adoption or ratification)._  

92. For a discussion of the "overt acts" test, see _supra_ text accompanying notes 38-40.  

93. In NLRB v. W.C. McQuaide, Inc., 552 F.2d 519 (3d Cir. 1977), the Court of Appeals for the Third Circuit stated that the strike was marked by incidents of vandalism and harassment and then used these circumstances to conclude that a striker's threats were unprotected. _Id. at 528. In Associated Grocers of New England, Inc. v. NLRB, 562 F.2d 1333 (1st Cir. 1977), the Court of Appeals for the First Circuit noted that a serious threat may draw its credibility not from the physical gestures of the speaker alone but also from the presence of forty to fifty pickets in close proximity to the threat. _Id. at 1336. In Clear Pine Mouldings, Inc., 568 N.L.R.B. No. 175, 1984 NLRB Dec. (CCH) ¶ 16,083 (1984) the Board noted that the circumstances clearly showed that other strikers at
impute the misconduct of physically violent strikers to the strikers who merely express harmless verbal thoughts. Although the latter strikers are not legally accountable for these acts,\textsuperscript{94} they are still punished for acts in which they did not participate.

Prior to the adoption of the objective test, hypothetically, if two out of ten strikers on a picket line threw rocks at a company negotiator, the employer could not deny the other eight strikers reinstatement.\textsuperscript{95} Under the objective test, however, a non-rock-throwing striker, who made a purely verbal threat, could be denied reinstatement because of the surrounding circumstances.\textsuperscript{96} Denial of reinstatement would be possible even though strikers have "no affirmative duty to disavow misconduct which they did not initiate and with which they are not connected either directly or indirectly."\textsuperscript{97} Thus, the effect of the objective test is to deny the nonviolent striker his reinstatement rights based on another's act. This result is clearly in conflict with prior Board decisions.\textsuperscript{98}

Third, the objective test fails because it does not take into account the mixed motive discharge situations.\textsuperscript{99} In fact, the objective

the time were carrying tire irons, baseball bats, axe handles are were accompanied by dogs. \textit{Id.} at 27,419.

\textsuperscript{94} Imputed responsibility arises where the conduct of one person is attributed or charged to another because of the existence of a special relationship. \textsc{Ballentine's Law Dictionary} 595 (3d ed. 1969). Although the striker will not be legally responsible for those acts, he will still lose his job.

\textsuperscript{95} Absent an organized plan of action or participation, "the asserted misconduct of some identified, or unidentified strikers is not to be imputed to other strikers not shown to have specifically engaged in the misconduct alleged." Coronet Casuals, Inc., 207 N.L.R.B. 304, 321 (1973) (citing NLRB \textit{v.} Sea-Land Serv., Inc., 356 F.2d 955 (1st Cir. 1966)); Erickson, \textit{Forfeiture of Reinstatement Rights Through Strike Misconduct,} 31 LAB. L.J. 613-14 (1980).

\textsuperscript{96} Under the objective test, the third striker would be denied reinstatement if his threat proved sufficiently serious in light of the surrounding circumstances. Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 at 27,419 (1984). Under the "overt acts" test, however, the third striker would be reinstated because it did not meet the overt acts requirement. \textit{See supra} text accompanying notes 38-40.

\textsuperscript{97} \textsc{McDowell, NLRB Remedies, supra} note 14, at 138-39 (citing ILGWU (B.V.D. Company) v. NLRB, 237 F.2d 545, 550 (1956)).

\textsuperscript{98} The only justification for imputing the rock-throwing incident to the threatening striker would be through assumption of risk. Because the threatening striker made the threat, he assumes the risk that his threat will be interpreted in light of the surrounding circumstances. Stated another way, by walking onto the picket line, the striker assumes the risk of any adverse surrounding circumstances. This argument seems persuasive except for one problem: it is violative of the principle against imputed misconduct. There is no assumption of risk simply because one exercises an individual right to strike and walk the picket line along with fellow striking employees. \textit{See supra} text accompanying note 97. Furthermore, just because a striker is on the picket line, this does not mean that he is an agent of the union responsible for any of the acts attributed to the union. \textit{United Furniture Workers of America,} 81 N.L.R.B. 886, 891 (1949).

\textsuperscript{99} \textit{See generally} \textsc{Haggard, Union Violence, supra} note 5, at 346-350; Christensen & Svanoe, \textit{Motive and Intent in the Commission of Unfair Labor}
test increases the likelihood of a mixed motive discharge. Generally, the Board places great importance on a finding that the employer's action in discharging an employee is not actually based on the employee's participation in protected union activities. The true motivating cause of the refusal to reinstate must not be retaliatory. Indeed, it is considered an unfair labor practice for an employer to discharge a striker, not because of misconduct, but because of the employee's union status or participation in a strike. Finding the true motive of a discharge, however, can be a difficult task.

Under the "overt acts" test, the motive of the discharge is apparent. If there are physical gestures or other actions sufficient to lose the protection of the Act under the "overt acts" test, the discharge would seem properly based on the misconduct. The threat takes on a heightened tone and the seriousness of the conduct is discerned. A mixed motive for the discharge is either less likely or too hard to prove because of the seriousness of the misconduct. Under the objective test, however, there is no overt acts requirement. As such, when the striker is discharged, a mixed motive


100. HAGGARD, UNION VIOLENCE, supra note 5, at 346. Employer discrimination by use of pretextual or dual purpose discharges is treated as a violation of the section 8(a)(3) prohibition against discouragement of union activity. Id. The objective test, however, determines misconduct with reference to the restraint or coercion prohibition of 8(a)(1). Id. The difference between the use of these two sections is that motive, which need not usually be proved under 8(a)(1), is generally required under section 8(a)(3). Id.

101. Id. See Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083 (1980) (allocation of burden of proof between General Counsel and employer).


103. HAGGARD, UNION VIOLENCE, supra note 5, at 346 ("tricky business"). See NLRB v. Erie Resistor Corp., 373 U.S. 221, 228-29 (1963) (preferring one motive over another is a delicate task).

104. The "overt acts" test avoided many questions as to motive by raising the level of misconduct necessary to justify a discharge to the commission of a threat plus overt acts or gestures. For a discussion of the "overt acts" test, see supra text accompanying notes 38-40. If a denial of reinstatement was justified after an application of the "overt acts" test, the motive for the discharge would appear proper because the misconduct is so serious. See NLRB v. W.C. McQuaide, Inc., 220 N.L.R.B. 598, 507 (1975) ("substantial question" as to whether striker's threats motivated the discharge under "overt acts" test), enforcement granted in part and denied in part and remanded, 552 F.2d 519, 528 (3d Cir. 1977) (in context of violent strike, striker's threats unprotected under objective test).

105. See supra text accompanying note 104.
seems more likely because the individual striker’s misconduct is less serious and the discharge is based on a consideration of surrounding circumstances.\textsuperscript{106} Furthermore, the consideration of these inherently vague surrounding circumstances will frustrate any attempt to prove an unlawful mixed motive discharge.\textsuperscript{107} Hence, the adoption of the objective test will leave more room for doubt as to the true purpose of the discharge.

The final failure of the objective test is that it incorrectly equates union unfair labor practices\textsuperscript{108} with an individual striker’s misconduct.\textsuperscript{109} In determining whether a union has engaged in un-

\textsuperscript{106} For a discussion of the type of surrounding circumstances considered in prior decisions, see supra text accompanying note 93.

\textsuperscript{107} The true purpose of the discharge will not be easily proved. Because the existence of varying surrounding circumstances may justify a denial of reinstatement, employers will have great leeway in deciding who to discharge. See Cabot, The Third Circuit’s New Standard for Strike Misconduct Discharges: NLRB v. W.C. McQuaide, Inc., 23 Vill. L. Rev. 645, 645 (1978) (objective test “broadens an employer’s right to terminate”). The employer’s discretion is increased even further by the fact that the employer is not even required to discharge all employees who may have participated in the strike misconduct. The employer may refuse reinstatement to some and still retain others depending on need or a subjective evaluation of the evidence against certain allegedly misconduct employees. See generally NLRB v. Local 1229, IBEW, 346 U.S. 464, 474-75 (1953) NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333, 347 (1938).

The employer, however, will deny reinstatement to others and point to some inherently vague surrounding circumstances. Are these incidents which take place before during or after the commission of a threat? It is not yet clear but it seems to be all three. For a discussion of the variety of surrounding circumstances considered by the Board and the Court of Appeals for the First and Third Circuits, see supra note 93. Under the “overt acts” test, the striker’s commission of an overt act provides a clear justification for the employer’s action. The objective test falls in this respect. See also NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964) (allocation of the burden of proof between the General Counsel and the employer).

\textsuperscript{108} Union unfair labor practices are listed in NLRA §§ 8(b)(1)-(7), 29 U.S.C. §§ 158(b)(1)-(7) (1982). Section 8(b) provides that it is an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employee in their section 7 rights or (B) an employer in the selection of his labor representatives; (2) to cause or attempt to cause an employer to discriminate against an employee; (3) to refuse to bargain collectively with the employer; (4)(i) to induce or encourage any employee affecting commerce to engage in a strike or refuse to handle certain goods or (ii) to threaten, coerce or restrain any employer in an industry affecting commerce; (5) to require excessive initiation fees; (6) to cause or attempt to cause an employer to pay money or any other thing of value as an exaction for services which are not performed; and (7) to engage in picketing under certain enumerated situations. Id.

\textsuperscript{109} When the Court of Appeals for the Third Circuit adopted the objective test, the court simply borrowed the same test used to determine 8(b)(1)(A) violations. See Local 542, Int’l Union of Operating Eng’rs v. NLRB, 328 F.2d 850, 852 (3d Cir.), cert. denied, 379 U.S. 826 (1964) (quoted in W.C. McQuaide, Inc. v. NLRB, 552 F.2d 519 (3d Cir. 1977)). The objective test is also used to determine employer unfair labor practices under the “restraining or coercive” provisions of section 8(a)(1) of the Act. NLRB v. Triangle Publications, Inc., 500 F.2d 597, 598 (3d Cir. 1974) (objective test applied to employer interrogations); Rossmore House, 269 N.L.R.B. No. 198 (1983) (same). Although the statutory language of the Act would allow an objective test for union and employer unfair labor prac-
fair labor practices, the Board uses the objective test to look for acts which may reasonably tend to restrain or coerce. As such, the commission of purely verbal threats by a union agent has justified the finding of an unfair labor practice. There is, however, no such analogous language in the Act against the individual striker. The "overt acts" test, therefore, required a higher standard to justify the termination of a striker. Under this test, the verbal threat itself would not be enough; there would have to be accompanying overt acts to justify a denial of reinstatement.

Indeed, the legislative history of the 1947 amendments to the Act suggests that an individual striker's misconduct should be treated differently from union unfair labor practices. The original House version of the amendments proposed specific exemption from the employee's section 7 rights, any conduct which would amount to union unfair labor practices. The final version of the


112. See supra note 115 for the text of section 7. To be sure, the legislative history of the amendments makes it clear that an employee who joins the union in committing a union unfair labor practice can be discharged. See 93 CONG. REC. 7493, 7495 (1947) (statement of Rep. Lesinski), reprinted in, LEGIS. HIST. LMRA, supra note 15, at 911-12 (cited in HAGGARD, UNION VIOLENCE, supra note 5, at 320). See also United Furniture Workers of America, 81 N.L.R.B. 886, 891 (1949) (individuals acting as agents of union in commission of violent acts are unprotected).

113. See supra text accompanying notes 38-40 for a discussion of the "overt acts" test.

114. The commission of overt acts or gestures is not required to find a section 8(b)(1)(A) violation. See supra text accompanying note 112.


116. For the text of section 7, see supra note 15.

117. H.R. 3020, 80th CONG., 1st Sess. 19, 47 (1947), reprinted in LEGIS. HIST. LMRA, supra note 74, at 176, 204 (the original House bill would have prohibited from the employees section 7 rights any conduct constituting a union unfair labor practice or conduct involving the use of force, violence or threats) (cited in HAGGARD, UNION VIOLENCE, supra note 5, at 320). See also L. TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 81 (supp. 1950). Although the final version of the Act does not contain the prohibition against threats, the majority opinion in Clear Pine Mouldings, Inc., held that the legislative history of the Taft-Hartley Act suggested that threats should be prohibited. 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 at 27,420 (1984). Accord HAGGARD, UNION VIOLENCE, supra note 5, at 322. The concurring opinion, however, disagreed
Act, however, omitted the proposed change. In spite of this, the Board is now applying the same coercive standard against individual employees and unions as well. This is clearly inconsistent with the congressional intent as articulated in the legislative history of the Act.

A PROPOSED BALANCING TEST

The adoption of the objective test will have a broad impact on striker discharges by finding threatening conduct sufficient to justify a denial of reinstatement which has not been justified in the past. As previously shown, this test is not warranted because it

with the majority's interpretation of this history. Clear Pine at 27,420 (Zimmerman, Dennis, Members, concurring).

118. For the text of section 7, see supra note 15.

119. Compare Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 (1984) with Local 745, Int'l Bhd. of Teamsters, 240 N.L.R.B. 537 (1979). Another inconsistency is in the considerations which prompted Congress to provide for the prohibitions against union violence contained in section 8(b)(1)(A)’s “restrain or coerce” prohibition. These considerations are not present when the facts change to an individual striker. The prohibitions were based on considerations of the large amount of union members and union funds which could be involved to support picket line violence. See generally Haggard, Union Violence, supra note 5, at 319 (“[l]abor union violence against employees and employers alike was clearly one of the concerns of the Taft-Hartley Congress”). An individual striker, however, has no official stature in the union which would necessarily incite other employees to follow his violent lead. See United Furniture Worker of America, 81 N.L.R.B. 886, 891 n.16 (1949) (striikers incited into violent acts by union agents). If a striking employee has an official position with the union, any misconduct which restrains or coerces other non-striking employees would be an unfair labor practice. See NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1982). See also Local 745, Teamsters, 240 N.L.R.B. at 537 (union vicariously liable for threats of alternate steward). See generally Haggard, Union Violence, supra note 5, at 425 for remedies as to section 8(b)(1)(A) violations. The individual striker also does not have the large funds or other resources that a union has. See Comment, The Liability of Labor Unions for Picket Line Assaults, 21 U.C.L.A. L. Rev. 600, 618 (1973) (deep pocket argument for union liability). Although the objective test may be appropriate when applied to a union it should not be the same test used to determine if an individual striker has engaged in strike misconduct sufficient to justify a denial of reinstatement. See generally NLRB v. Local 639, Int'l Bhd. of Teamsters, 362 U.S. 274, 286 (1960) (section 8(b)(1)(A) designed to protect employees “from union organizational tactics tinged with violence, duress, or reprisal”); B. Meltzer, Labor Law: Cases, Materials and Problems 1 (1977) (“union power” defined among other things as the capacity to challenge the states monopoly of force). But see Helton v. NLRB, 656 F.2d 883 (D.C. Cir. 1981). (Board determination that section 8(b)(1)(A) applies only to threats of violence or economic coercion is not consistent with the plain meaning of Act, legislative history, or United States Supreme Court decisions). Furthermore, it is interesting to note that the Thayer Doctrine does not apply to unions if found responsible for strike misconduct. Haggard, Union Violence, supra note 5, at 380 n.33. Although the application of the Thayer Doctrine is different depending on who did the misconduct (i.e. an individual striker or a union agent), the test used to determine the sufficiency of the misconduct is the same.

120. See supra text accompanying note 67.
rejects longstanding rules of law, increases the likelihood of mixed motive discharge, and contravenes the legislative history of the Act. Furthermore, the objective test is not necessary because a less restrictive alternative to each problem is available.

The negative effect of the Board's adoption of the objective test can be lessened by the use of a balancing test to determine the appropriate penalty. This balancing test would not replace the objective test; rather, it would supplement the test. The function of the objective test, however, would be changed. Currently, the objective test determines the justification of an employer's denial of reinstatement. If the denial is justified, the employee's discharge is sustained. Under a balancing test, the objective test would only be used to determine if the employee's misconduct was sufficient to justify a penalty at all. If, however, the Board determined that the discharged employee's conduct did reasonably tend to restrain or coerce, this finding would not compel an affirmation of the em-

121. See supra text accompanying notes 71-98.
122. See supra text accompanying notes 99-107.
123. See supra text accompanying notes 108-119.
124. A better alternative than the adoption of the objective test would have been to retain the "overt acts" test. See supra text accompanying notes 87, 92, 104 and 113. Any proposal for a rejection of the objective test and a return to the "overt acts" test, however, has been effectively precluded by the appellate court's general rejection of the test. HAGGARD, UNION VIOLENCE, supra note 5, at 326. Likewise, any proposal for the Boards adoption of a different test or for the development and adoption of a new test is not realistic. First, the current Board has rejected the other tests used in this area. Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 (1984). Second, any changes in the Reagan dominated Board would be pro-management. Thus the Board would not feel constrained to lessen the impact of the objective test on the striking employees. For example, the international president of the largest affiliate of the AFL-CIO recently commented that the Board was no longer a "neutral body" or an "advocacy forum." 6 UFCW LEADERSHIP UPDATE No. 3 at 1 (July 1984) (statement of William H. Wynn, International President UFCW). Finally, although the United States Supreme Court had granted certiorari to consider the appropriate test to be used in this area, the Court remanded the case to the Board, at the Board's request, for a determination in light of Clear Pine. Georgia Kraft Co. v. NLRB, 258 N.L.R.B. 908, enforced, 696 F.2d 931 (11th Cir. 1983), remanded, 104 S. Ct. 1673 (1984) (citing Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 (1984)).
126. Id.
127. Under a balancing test, the objective test would first be used to determine whether the employee's conduct did reasonably tend to restrain or coerce. The Board would then conduct a balancing process to determine if the employer imposed penalty was appropriate.
128. Currently, even under the objective test, if conduct does not reasonably tend to restrain or coerce, no employer imposed penalty is appropriate. Id.
employer's denial of reinstatement. The balancing test would be used by the Board to determine if the employer's penalty was an appropriate punishment. If the Board determines that a suspension, and not discharge, would have been the appropriate penalty, the discharge would not be upheld.129

129. Once the Board determines that the employer should have suspended rather than discharged the employee, the Board could order a number of remedies. The Board is empowered under section 10(c) of the Act "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." NLRA § 10(c), 29 U.S.C. § 160(c) (1982). This power is "a broad discretionary one . . . for the Board to wield, not the courts." NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953). Accordingly, the Board can order back pay without reinstatement. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188-89 (1941) (Court recognizes the Boards broad remedial authority). Conversely, the Board can also order an employee reinstated without back pay. NLRB v. Republican Publishing Co., 73 N.L.R.B. 1085 (1947), enforced, 174 F.2d 474 (1st Cir. 1949), contempt decree, 180 F.2d 437 (1st Cir. 1950). As such, if the Board determines that the objective test was violated but that the employee was wrongly discharged or suspended, the Board can fashion an appropriate remedy.

A period of suspension in lieu of discharge should be the appropriate remedy. Minor picket line misconduct violative of the objective test may warrant a suspension until the filing of an ultimately successful complaint with the regional Board office. Misconduct which is more severe, yet which does not justify a discharge because of the application of the balancing test, may warrant a suspension until the Board adopts the administrative law judge's findings. This would be a longer suspension but warranted based on the misconduct. The differing periods of suspension reflect the striker's level of misconduct and the employer's reliance on the correctness of the denial of reinstatement. To be sure, the employer's reliance on the appropriateness of the penalty is weakened by either the administrative law judge's or the regional Board's finding of unlawful discharge. Thus, the employer assumes the liability for back pay for the long appeals process. Any ambiguity on the employer's part in determining the appropriate penalty is avoided by tailoring the type and period of suspension to the striker's level of misconduct. See Sure-Tan, Inc. v. NLRB, 104 S. Ct. 2903, 2816 (1984) (court of appeals exceeds authority in reviewing Board's remedial powers). But see Gourmet Foods, 116 L.R.R.M. 1105 (1984) (Board's remedial power does not include the issuance of non-majority bargaining orders); 116 L.R.R.M. at 1117 (Dennis, Member, concurring) (Boards remedial power must not infringe on other principles of the Act). Although relief under 10(c) is to be adapted to the particular unfair labor practice, any back pay award must represent only actual loss. Sure-Tan at 2813-14 (citing Phelps Dodge Corp., 313 U.S. 177, 198 (1941)). Thus, employees who have been wrongly terminated have a responsibility to mitigate losses. Id. For example, any subsequent earnings are deducted from the back pay award. Id. (citing Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1, 51 (1935), enforced, 303 U.S. 261 (1938)). Accordingly, if the Board determined that a striker's conduct, although violative of the objective test, warranted only a suspension and not discharge through the application of a balancing test, the Board could decide that a penalty less than reinstatement without back pay is appropriate. This is because of the fact that if the Board determines that a suspension is appropriate, the employee would not have any
A balancing test also provides a workable solution to determine serious strike misconduct. The factors involved in the balancing process either have been considered by the Board in past decisions\textsuperscript{130} or are easily applied.\textsuperscript{131} First, any provocation attributable to an employer’s unfair labor practice\textsuperscript{132} or other actions\textsuperscript{133} should be considered.\textsuperscript{134} The employer’s actions may have been so blatant that the striking employees were provoked into unprotected conduct by their own frustrations.\textsuperscript{135} A balancing test would take this fact into consideration and find that a lesser penalty should have actual loss for the period of suspension. Thus, the employee would not be entitled to any compensation for that period.

130. See infra text accompanying notes 134, 137, 142 and 148 for the various factors of the balancing test.

131. Now that the Board has thought it appropriate to consider all the surrounding circumstances relating to picket line misconduct, it is an easy and natural transition to consider all the circumstances which go into determining an appropriate penalty. Arbitrators conduct a complex balancing process to determine the appropriate penalty for strike misconduct. The criteria used to determine the appropriate penalty was enunciated by Arbitrator Holly in General Electric Co., as:

1. How serious was the offense in terms of injury to persons or damage to property?
2. Was the act provoked or unprovoked?
3. Was the act a premeditated one of aggression, or was it a spur of the moment reaction to an unanticipated situation?
4. Were remedies at law available for the offense, and, if so, were they exercised?
5. Was the conduct destructive of good employee-employer relations?
6. Was the conduct destructive of good community relations?
7. What will be the effect of the administration of the discipline?
8. Was the disciplinary action administered without discrimination?
9. Was the conduct and its results such that it would be unreasonable to expect that the employee could be reabsorbed into the work force?


132. Employer unfair labor practices are contained in NLRA § 8(a)(1)-(5), 29 U.S.C. § 158(a)(1)-(5) (1982). These types of practices were the only ones balanced under the Thayer Doctrine. See supra note 14.

133. The balancing test would not distinguish between unfair labor practice strikers or economic strikers as did the Thayer Doctrine. See supra note 14. The balancing test recognizes that provocation can occur in any strike and does not artificially distinguish based on the type of striker. See Davis Wholesale Co., 166 N.L.R.B. 999 (1967) (nonstriking employee provoked striking employee to violence); General Elec. Co., 45 Lab. Arb. 490, 492 (1965) (Gomberg, Arb.) (quoting General Elec. Co., 38 Lab. Arb. 1182 (1961) (Holly, Arb.)) (although the company has a legal right to keep the plant open, this decision creates an environment conducive to violence).

134. Under the balancing test used by arbitrators, the awards which bore on this point found that unprovoked acts were more serious than ones that were provoked. General Elec. Co., 38 Lab. Arb. 1182, 1185 (1961) (Holly, Arb.).

135. The provocation element was a major consideration in the development of the Thayer Doctrine. Local 833, UAW v. NLRB, 300 F.2d 699, 703 (D.C. Cir. 1961).
been imposed by the employer.136

A second factor takes into consideration the impulsiveness or "animal exuberance" type of misconduct long tolerated by the Board.137 For example, a harsher penalty is appropriate for premeditated misconduct occurring at the home of a nonstriking employee138 than for one which occurs on the picket line where the misconduct is more likely spontaneous.139 This factor reinforces the notion that some leeway for impulsive behavior should be permitted in the exercise of the right to strike.140 The objective test seriously restricts this right by finding justified discharges in traditionally protected areas. A balancing test would counteract this effect by finding that a suspension, and not a discharge, should have been imposed by the employer.141

A third factor for consideration includes the severity and frequency of the striking employee's misconduct.142 Minor picket line

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136. The provocation factor would allow for lesser penalties occurring in the early stages of a strike when tempers are at their hottest. In Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 (1984) the administrative law judge, in his decision to reinstate the strikers, took this factor into consideration and noted that the misconduct had occurred in the early stages of a four month strike. Id. at 27,417. To be sure, the employer's provocation is not sufficient to meet criminal law defenses or proximate cause arguments. HAGGARD, UNION VIOLENCE, supra note 5, at 357. It is, however sufficient to balance in determining the appropriate penalty.

137. See supra text accompanying notes 21, 32-33.

138. Strike misconduct occurring away from the picket line has not received favorable treatment by the courts. In Associated Grocers of New England, Inc. v. NLRB, 562 F.2d 1333 (1st Cir. 1977), the United States Court of Appeals for the First Circuit rejected a Board finding that “mere following” would not justify a denial of reinstatement. Id. at 1337 (two strikers followed supervisor home down a dark and lonely road). One consideration in this factor is the identity of the “victim.” For threats against family members see supra note 83. See also Montgomery Ward & Co. v. NLRB, 374 F.2d 606, 608 (10th Cir. 1967) (impulsive behavior is expected “when directed against non-striking employees or strike breakers”); Erickson, Forfeiture of Reinstatement Rights Through Strike Misconduct, 31 Lab. L.J. 602, 605 (1980) (noting that the employer should be the prime target of abuse). Accord Southern Florida Hotel & Motel Ass'n, 245 N.L.R.B. 561, 564 (1979) (hotel guests drawn into strike misconduct).

139. See supra text accompanying notes 78-85.

140. See supra text accompanying note 21. In Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 (1984), the administrative law judge considered the fact that the strikers threatening conduct was not accompanied by any further acts of misconduct in reaching his decision to reinstate the strikers. Id. at 27,417.

141. The balancing test utilized by arbitrators considers whether the employees' actions were premeditated or spontaneous. See supra note 131. Aggressive and premeditated conduct are viewed as more serious. General Elec. Co., 38 Lab. Arb. 1182, 1185 (1961) (Holly, Arb.).

142. The severity and frequency of picket line misconduct has been considered in other cases. See, e.g., Southern Florida Hotel & Motel Ass'n, 245 N.L.R.B. 561, 564 (1979) (conduct should be violent or serious to justify discharge); Advance Pattern & Mach. Corp., 241 N.L.R.B. 501, 501 (1979) (misconduct should be judged in light of severity and frequency); MP Indus., Inc., 227 N.L.R.B. 1709 (1977) (misconduct should be of such a violent or serious charac-
misconduct becomes more serious with repetition. Conversely, misconduct occurring in the early stages of a strike and not continually repeated, should receive favorable treatment. One threat, without further action, may not have actually coerced the threatened employee. The objective test, however, may lead to the result that the threatened employee was reasonably coerced, and therefore denying the striking employee reinstatement. A balancing test would consider the degree of actual restraint in determining the appropriate penalty.

Finally, the fitness of the employee for future service with the employer and other employees should be considered. If an enter as to render the employee unfit for future service). See generally Erickson, Forfeiture of Reinstatement Rights Through Strike Misconduct, 31 LAB. L.J. 602, 605 (1980) (an important factor to consider is the number of incidents the striker is involved in). The balancing test utilized by arbitrators considers the severity of the misconduct as the most important aspect of the test. See supra note 131. Furthermore, arbitrators distinguish misconduct directed against persons as more serious than acts directed against property. General Elec. Co., 38 Lab. Arb. 1182, 1185 (1961) (Holly Arb.).


Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 at 27,417 (1984) (focus of administrative law judge on fact that threats by discharged striking employee was not followed by any further misconduct).

The objective test does not focus on the actual effect of the threat. NLRB v. W.C. McQuaide, Inc., 552 F.2d 519, 528 (3d Cir. 1977) (that no one may have actually been coerced or intimidated is of no importance). The "victims fear" standard, however, looks to the actual effect on the victim. See supra text accompanying notes 44-45.

See supra text accompanying note 13. Although the Board abandoned the "overt acts" test, the Board stated that the existence of overt acts may increase the severity of verbal threats, but that the absence of such conduct should not preclude a denial of reinstatement. Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 at 27,417 (1984). Accord Associated Grocers of New England, Inc. v. NLRB, 562 F.2d 1333, 1336 (1st Cir. 1977). The absence of overt acts, however, should weigh in favor of reinstatement.

The Board has considered the existence or absence of actual coercion in applying the objective test. In Associated Grocers of New England, Inc. v. NLRB, 562 F.2d 1333 (1st Cir. 1977), the United States Court of Appeals for the First Circuit remanded to the Board the determination of whether a striker's statement to a job applicant, that "strike breakers traditionally met with violence," was unprotected. Id. On remand, the Board concluded that this statement was protected because it lacked a tendency to coerce, especially because the job applicant had not been actually coerced into not applying for the job. Associated Grocers of New England, Inc., 238 N.L.R.B. 871, 872 (1978).

Southern Florida Hotel & Motel Ass'n, 245 N.L.R.B. 561, 564 (1979) (citing MP Indus., Inc., 227 N.L.R.B. 1709, 1710 (1977)). See Berkshire Knitting Mills v. N.L.R.B., 17 N.L.R.B. 239, 392 (1939) (citing Republic Steel Corp., 9 N.L.R.B. 219, 392 (1938)) ("[w]e are unable to find that any one of the individuals against whom convictions have been recorded is not a suitable employee or that his or her reinstatement would tend to encourage violence in labor disputes"), modified, 139 F.2d 134 (3d Cir. 1943), cert. denied, 322 U.S. 747 (1944).
ployee who has committed some picket line misconduct can be put back to work without a disruption in the work force, he should be reinstated. If, on the other hand, the employee's reinstatement would tend to foster future acts of violence against the employer or other employees, then the appropriate penalty would be a discharge. Implied in this factor is the consideration of whether the reinstated employee, as a result of the penalty imposed, will be deterred from future acts of “self help” on the picket line. A balancing test, therefore, recognizes that not all misconduct can be condoned, but only justifies dismissal for serious strike misconduct.

Discharge has been considered such a severe penalty that it has been referred to as the “capital punishment” of industrial relations. As such, there is no reason why this severe penalty should not only be proportionate to penalties imposed for other types of strike misconduct, but also should be reserved for the most serious types of picket line misconduct. It is unfair for a striking employee who carries through on his threat to receive the same discharge penalty as an employee who merely threatens. The question of the fitness for future service of the employee is implicit in this balancing test. If the employee has a long and satisfactory work record prior to the strike, the penalty imposed for his misconduct may be proportionate to the misconduct. See supra note 131. The fitness for future service factor overlaps with the frequency and severity factor. The more frequent and more severe the conduct, the more likely the employee is unfit for future service. See Southern Florida Hotel & Motel Ass'n, 245 N.L.R.B. 561, 565 (1979).


149. Arbitrators utilize the fitness for future service factor in their balancing test. See supra note 131. The fitness for future service factor overlaps with the frequency and severity factor. The more frequent and more severe the conduct, the more likely the employee is unfit for future service. Southern Florida Hotel & Motel Ass'n, 245 N.L.R.B. 561, 565 (1979).


152. The United States Supreme Court has required that all criminal penalties be proportionate to the crime committed. See Solem v. Helm, 103 S. Ct. 3001 (1983) (life sentence under recidivist statute disproportionate for cashing fraudulent checks). In a proportionality review, the Court looks at three factors. First, the harshness of the penalty as compared with the crime. Second, whether more serious crimes are subject to the same or lesser punishment in the same jurisdiction. Third, the punishment imposed for the crime in other jurisdictions. Id. at 3010.

153. See supra text accompanying notes 132-150 for factors to consider in assessing the appropriate penalty.

154. Although one act of misconduct may be more serious than another, the fact that each can result in a denial of reinstatement does not necessarily mean that the less serious act is judged under an erroneous standard. It would seem appropriate, however, that the test used to determine the existence of misconduct is not the same test used to determine the penalty. This approach results in another per se rule similar to the one created by the “overt acts” test which was rejected in Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173, 1984 NLRB Dec. (CCH) ¶ 16,083 at 27,417 (1984). Currently, once conduct is found violative
Line drawing is not always easy because grey areas blur the lines distinguishing protected and unprotected conduct. The objective test has only two findings: protected and unprotected conduct. These findings are not adequate to deal with the grey areas. A balancing test, however, is adequate to deal with these grey areas. In fact, conduct which currently requires the consideration of surrounding circumstances to determine the severity of the strikers misconduct under the objective test, is the type of conduct most appropriate for a balancing test. A balancing test uses varying periods of suspension to determine the appropriate penalty for misconduct which approaches one line or the other.

The Board's determination that certain types of conduct only warrant a suspension is the most important aspect of a balancing test. Currently, given the broad consideration of surrounding circumstances, the employer may discount the possibility of a large back pay award and discharge the employee. The adoption of a bal-

of the objective test, any employer-imposed penalty will be sustained. See supra text accompanying note 13. Although the objective test may be used to find conduct sufficient to warrant a penalty, see supra text accompanying notes 125-129, a balancing test should be adopted to determine the appropriate penalty. See Gregg v. Georgia, 428 U.S. 153 (1976) (statute including bifurcated proceeding in capital cases, the first stage used to determine guilt and the second stage used to determine the penalty).


156. If a striking employee's misconduct was not sufficient to justify a denial of reinstatement without the consideration of surrounding circumstances, the misconduct is appropriate for a suspension without pay alternative.

157. Currently, the Board has avoided deciding reinstatement rights with reference to a suspension without pay alternative. Many decisions refer to the Board's power to award either reinstatement with full back pay or without back pay. See supra note 129. The Board, however, is not precluded from the suspension determination. The Act simply provides that the Board shall not order the reinstatement of any employee discharged or suspended for cause. NLRA § 10(c), 29 U.S.C. § 160(c) (1982). Logically, if an employee was discharged, but the Board determines that the misconduct only warranted a suspension, this employee has not been discharged for cause.

The importance of a suspension without pay alternative is shown by the acceptance of this alternative by labor arbitrators. Arbitrators frequently utilize the suspension without pay alternative when they believe that a denial of reinstatement was not appropriate. HAGGARD, UNION VIOLENCE, supra note 5, at 302 n.6. Notwithstanding the fact that an arbitration agreement may not expressly give the arbitrator this power, arbitrators usually infer this power from the common arbitration agreement requirement that any discharge be for "just cause." Id. There is no reason why the Board should not take similar action for varying periods. Through the adoption of a balancing test, the Board would recognize that various types of misconduct do not fit neatly into protected and unprotected categories. The balancing test can then be used to determine the appropriate penalty for conduct which falls into this middle ground.
ancing test, however, would have a limiting effect on the employer's broad discretion and force the employer to make a more reasoned choice as to the penalty. The increased recognition by the Board that a suspension and not termination should have been the appropriate penalty would permit the possibility of a large back pay award the deterrent effect it was originally intended to have. Accordingly, the employer would likely decide that a suspension, rather than discharge, is appropriate. The adoption of the objective test, with its confusing consideration of surrounding circumstances, makes the use of a balancing test to determine the appropriate penalty a necessity.

CONCLUSION

The Board has consistently held that the right to strike necessarily implies some leeway for impulsive behavior. The adoption of the objective test by the Board, however, leaves this principle in doubt. Although the main policy reason behind the objective test is a reduction in picket line violence, this goal may not be reached because the consideration of surrounding circumstances may not afford an individual notice that his misconduct sufficiently justifies his discharge until he is denied reinstatement. Furthermore, the Board's new position is unduly restrictive and not conducive to good industrial relations. Because the employer has such broad authority to discharge a striking employee, a balancing test should be developed to determine the appropriate penalty: discharge, sus-

158. For an argument against the employer's broad discretion in deciding reinstatement rights, see supra text accompanying notes 99-107.
159. See supra notes 129 and 157.
160. Although the adoption of the objective test broadens the employer's right to discharge, see supra text accompanying note 107, the use of a balancing test would limit this discretion. A Board determination that a discharge would not be upheld, even if the objective test was violated, would force the employer to reconsider the suspension alternative or be liable for large back pay awards.
161. An employer who suspends an employee for a longer period than was proper would of course be responsible for back-pay for the period that the employee was wrongfully suspended. Chevron U.S.A. v. NLRB, 672 F.2d 359, 360 (3d Cir. 1982) (objective test used to uphold a 10 day suspension for jumping onto a moving car after Board had ordered full reinstatement).
162. See supra text accompanying notes 21.
163. See supra text accompanying notes 71-89.
164. See supra note 71.
165. A major result of the objective test would be to prolong strikes by negotiating over a strike settlement agreement under which most of the strikers would not be discharged.
166. Although the adoption of a balancing test would result in putting more employees back to work, it should not be viewed as a condonation of violence. It is only a test to determine the appropriate penalty such that the objective test does not unjustifiably infringe on the protected right to strike. See supra text accompanying note 25.
pension, or no penalty. Otherwise, if any type of misconduct would justify a denial of reinstatement, the exercise of the right to strike would be unduly hampered.

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