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COLLABORATIVE PROBLEM-SOLVING RESPONSIVE TO DIVERSE LEARNING STYLES: LABOR LAW AS AN ACTIVE LEARNING EXPERIENCE

JEFFREY A. VAN DETTA†

I. INTRODUCTION

Labor law¹ is a discipline that few students who completed my Fall 2000 class, *Labor Law: Employee Rights, Employer Privileges In Non-Union And Union Workplaces*, are likely to practice upon graduation. That fact, however, does not mean that traditional labor law is not a highly useful component of a legal education.² Nor does the fact that less than ten percent³ of the current private-sector workforce is unionized suggest, as some might think, that labor law courses should be de-emphasized in the curriculum of the twenty-first century law school. To the contrary, as I endeavor to demonstrate in this article, labor law provides excellent learning opportunities for law students and their teachers. Those opportunities are presented in three principle areas:

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1. I define labor law to consist of the substance, practice, and procedure of union organizing, collective bargaining, labor arbitration, union-member relations, and union governance under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq., the Railway Labor Act, 45 U.S.C. § 151 et seq., and the Norris-LaGuardia Anti-Injunction Act, 29 U.S.C. § 101 et seq. Labor law courses should be carefully distinguished from more general survey courses in "employment law." See, e.g., SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* (West 2000) (including wage-hour law, benefits law, wrongful-discharge law), and courses dealing with employment discrimination as prohibited by the leading federal statutes such as Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Equal Pay Act of 1963, and the Americans with Disabilities Act of 1990. See, e.g., ROBERT BELTON & DIANNE AVERY, *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* (6th Ed. 1999). See generally, Jeffrey A. Van Detta & Dr. Dan R. Gallipeau: *Judges and Juries: Why are so many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response To Professor Colker*, 19 REV. LIT. 505, 576-77 & n. 198 (2000).

2. See, e.g., Wilson McLeod, *The Importance of Traditional Labor Law in the Legal Curriculum*, 43 J. LEGAL ED. 123 (1993); Robert L. Corrada, *A Simulation of Union Organizing in a Labor Law Class*, 46 J. LEGAL ED. 445 (1996).

3. E.g., SAMUEL ESTREICHER & STEWART J. SCHWAB, *FOUNDATIONS OF LABOR AND EMPLOYMENT LAW* (2000), Appendices A and B.

(1) administrative law principles; (2) applying standards of appellate review; and, most significantly, (3) an incredibly fertile platform for students to enhance their scholastic, bar, and practice skills through problem-solving in a collaborative learning environment.

What inspired me to search for such a multifaceted learning opportunity for my law students? The reason is quite simple. I am privileged to teach law students who will become the representative demographic of many graduating law-school classes of the twenty-first century.⁴ The hallmark of these students is their diversity: diversity in culture, race, national origin, sex, age, previous educational opportunities, and learning styles.⁵ Graduating these students to become practicing lawyers will shift an anachronistic paradigm that has seen far too many resources educating far too narrow a range of students to work in over-compensated areas of the legal profession that are already saturated, over-lawyered, and over-served.⁶ Although such diverse students have often been referred to as "at-risk," that label is usually *misunderstood* to denote some shortcoming in the student's ability.⁷ However, "at-risk" students are really those who are harmed by the traditional inflexibility of legal education to respond to students of diverse learning styles with appropriate, diverse teaching techniques.⁸

The law student in a diverse student population of the twenty-first century brings an entirely different set of cultural, life, and learning experiences to the classroom.⁹ Many of these students will become

4. The student population at the law school in which this labor law course was presented is approximately 40 percent African American and 10 percent Hispanic and members of other minority groups. In addition, many of the students are immigrants, and some students were trained as lawyers in their nations of origin, including Iraq, Romania, and Senegal.

5. See, e.g., Lee E. Teitelbaum, *First-Generation Issues: Access to Law School*, in PERSPECTIVES ON DIVERSITY IN AALS SPECIAL COMMISSION ON MEETING THE CHALLENGES OF DIVERSITY IN AN ACADEMIC DEMOCRACY (1997) (hereinafter AALS SPECIAL COMMISSION REPORT), available at <http://www.aals.org/teitelba.html>; Rachel F. Moran, *Introduction: The Dilemmas of Diversity*, in AALS Special Commission Report; available at <http://www.aals.org/moran.html>.

6. See, e.g., MICHAEL H. TROTTER, *PROFIT AND THE PRACTICE OF LAW* (1997); See also, Jeffrey A. Van Detta, *Lawyers As Investigators*, 24 J. LEGAL PROF. 261, 271 n.25, 357 n.392 (2000).

7. See Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T.M. COOLEY L. REV. 201, 204 & n.6 (1999).

8. *Id.* at n.6. Professor Randall notes that "at-risk" students can include "minority students, students from educationally and economically disadvantaged backgrounds, students with disabilities, students with non-writing backgrounds (i.e., art, music, engineering majors), and students with non-traditional family situations that impact their need for additional support." *Id.*

9. See Randall, *supra* note 8, at 211-212; See, also, RICHARD DELGADO, *WHEN EQUALITY ENDS: STORIES ABOUT RACE AND RESISTANCE* 198-222 (Boulder 1999). As AALS has recognized in its *Statement on Diversity, Equal Opportunity and Affirmative Action* (hereinafter, *AALS Diversity Statement*):

[E]quality of opportunity and diversity . . . are core values in legal education and in the legal profession. The objective reaches beyond simply ensuring access to all who are qualified. It

lawyers to serve historically underserved communities and under-represented groups.¹⁰ These students will not be served by the cookie-cutter approach that historically has dominated much of American legal education.¹¹ These students demand and deserve to be taught in a more responsive and responsible way.¹² These demands require law school professors to shift their focus to educationally decisive issues, such as teaching methodologies and learning styles. My students and my classroom experiences have taught me that as a law school professor, I am duty-bound to explore, consider, and innovate how to achieve the educational outcomes sought by my students, rather than how to somehow “change” my students to fit the traditional law-school learning paradigm to which I was exposed.¹³ It is this reality that defines my view of the mission of legal education for the diverse student population of the twenty-first century law school.¹⁴

seeks to increase the number of persons from underrepresented groups in law schools, in the legal profession and in the judiciary in order to enhance the perception of fairness in the legal system, to secure legal services to all sectors of society, and to provide role models for young people.

This AALS statement is available on the Internet at <http://www.aals.org/equal.html>.

10. *AALS Diversity Statement*, *supra* note 10.

11. Randall, *supra* note 8, at 206-209 (describing “the sytem’s quasi-religious adherence” to a homogenous teaching-evaluation style that “treat[s] students as interchangeable” as a “cultural compactor” that “diverts scarce resources from truly legitimate educational goals”). The obvious need to diversify the profession and, in response, diversify the style of legal education is not always so evident in its full implications to those who represent entrenched models of legal education. See, e.g., John E. Sexton, *NYU’s Dean Keynotes ABA’s Presidential Showcase Panel, THE LAW SCHOOL* 34, 43 (Autumn 2000) (reprinting Dean Sexton’s address “Thinking About the Training of Lawyers in the Next Millenium,” which appears to focus on the delivery of legal services by large, multi-national law-firms and multi-disciplinary practice organizations to international corporate clients).

12. See, e.g., Troy Duster, *What We Can Learn From Other Experiences in Higher Education*, in *AALS SPECIAL COMMISSION REPORT*, available at <http://www.aals.org/duster.html> (“to those who constitute the new and emerging critical mass of students, the calls for reform and curricular change are vital projects to give legitimate voice to the silenced and the ignored. With a level of moral authority and even indignation, they justify their demands and activities as imperatives to provide an arena for the expression of women and people of color. Moreover, their interests are not only in the content of curriculum but also in the staffing of faculty and administration and in the funding priorities of the institution. To these advocates of new agendas and new social and cultural identities, the emerging critical mass fueled by a new demography of student enrollment signals a welcome portent, a compelling change that is long overdue”); RICHARD DELGADO, *supra* note 10, at 207-208 (“Legal discourse and all the elements of legal culture – legal education, the bar exam, the rituals, robes, and esoteric jargon – all serve to conceal what is really going on – a series of result-oriented replications of the status quo.”).

13. See Randall, *supra* note 8, at 214 (observing that “[m]any law professors look at a student’s failure as evidence of the student’s lack of intellectual ability to be an attorney. Few professors take students’ failures as evidence of the failure of the educational process.”).

14. Others have recognized the need to re-examine a petrified pedagogy to achieve a teaching perspective in harmony with the diversity of students and their learning styles. See, e.g., Jill J. Ramsfield, *Is “Logic” Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. LEGAL EDUC. 157 (1997). Conversely, others have recognized that collaborative learning environments encourage students to develop the skills that have become crucial to twenty-first century lawyering. See, Elizabeth A. Reilly, *Deposing the ‘Tyranny of Extroverts’*:

In this article, I will share the experience my students and I enjoyed by tackling labor law with the goal of creating a positive learning experience that speaks to and strengthens the learning of a diverse student population with diverse learning styles. Section II discusses the methodology I used in selecting materials and preparing the lessons to realize the tri-partite set of opportunities I identified. In Section III, I discuss the approach to teaching substantive administrative law and appellate review principles through selected examples. Section IV describes the strong emphasis I placed on active learning experiences by students through a series of graduated, in-class writing opportunities, problem-solving classes, and classes in which problem-solving was combined with student collaboration to make oral presentations of their analyses. Section V discusses the emphasis I placed on understanding and correctly applying judicial standards of review in appeals originating in a federal administrative process. As a part of the Section V discussion, I present the unusual final examination I devised to tie together the principle course themes of substantive labor law, administrative law principles, standards of review, and active learning through problem-solving in a collaborative learning environment.

II. SELECTING MATERIALS AND PREPARING THE LESSONS TO REALIZE A TRI-PARTITE SET OF OPPORTUNITIES

The text used by the students was the classic casebook by Archibald Cox and Derek Bok.¹⁵ Many teachers who use this book are sorely tempted to structure their classes around a Socratic dissection of the main cases. Given the frequent doctrinal complexity of certain areas under the National Labor Relations Act (NLRA), this tendency is not surprising. However, this tendency does not lend itself to realizing the three opportunity areas I have identified in the Introduction.¹⁶ Therefore, I abandoned the Socratic order and teaching methodology sug-

Collaborative Learning in the Traditional Classroom Format, 50 J. LEGAL EDUC. 593, 594, 605-606 (2000) (citing the MacCrates Report's emphasis on communication skills, interpersonal skills, conflict management skills, and task management skills for practicing lawyers).

15. ARCHIBALD COX, ET AL., *LABOR LAW: CASES AND MATERIALS* (12th ed. 1996). My own comparison of this casebook with other entrants in the field established to my satisfaction that by a least a furlong, this remains the leading entrant in the field, as it was when I studied labor law with Professor Mary Helen Moses in 1985. I take this opportunity to thank Professor Moses for her outstanding teaching and 15 years of friendship, encouragement, and superb insight.

16. The Socratic method as frequently practiced in American law schools "treats students as interchangeable" and "as if prior education, experiences, background, learning styles, race, gender, class, culture, religion, and sexual orientation are irrelevant to learning." Randall, *supra* note 8, at 207-08. With most of the available teaching materials geared to the original Langdell contracts casebook, it is hardly surprising that many law teachers continue to "carry the current paradigm of law school teaching on through sheer momentum; while, like the emperor without clothes, we persist in pretending that all is well." See *Id.* at 209.

gested by the casebook. I substituted in its place a syllabus organized around a fictional labor-management relationship at Borders Bookstores.¹⁷ The syllabus was organized to reflect the stages in what the relationship between employees, employer, and a labor organization might be like from the time of initial organizing efforts, through collective bargaining, picketing, strikes, lockouts, arbitrations, union discipline, and lawsuits.¹⁸ Each lesson over a thirteen-week trimester was organized around specific objectives that were stated as a series of goals and questions in my syllabus.¹⁹

Thorough as the Cox casebook is, law students cannot live on it alone. It has long seemed to me that the best "container" for delivering the labor law (as well as many other substantive courses in a law school curriculum) in a context that is meaningful to students is through a business-school model. The "container" I designed is based on materials describing the players in a real-world business with a variety of labor relations issues. To that end, I provided the class with a custom-tailored set of materials, entitled *Borders Group, Inc.: A Case Study For In-Class Problem Solving*. Much like a business-school problem, this set of materials included extensive information available from the Borders web site about Borders Group, Inc., its store loca-

17. Borders is remarkable because it was, to the best of my knowledge, the first business to have the employees of one of its retail establishments organized by a union (the United Food & Commercial Workers Union, or "UFCW"), almost entirely over the Internet and by email communication. See, e.g., *Union Supporters at Borders Bookstores Rely on Internet to Communicate Message*, DAILY LABOR REPORT, Nov. 10, 1997, at CC-1; *First Borders Contract Standardizes Wage Rates*, DAILY LABOR REPORT, Nov. 10, 1997, at CC-2; *Workers at Borders Store and Warehouse Turn Down Union Representation by UFCW*, DAILY LABOR REPORT, Dec. 23, 1997, at A-8.

18. Specifically, my syllabus described the scope of the course as follows:

"Labor law" is not just about unions: it is about rights, obligations, and limitations that federal law creates that apply to NON-UNION as well as union workplaces. EVERYONE WHO IS AN EMPLOYEE, IS AN EMPLOYER, OR WILL HAVE CLIENTS WHO ALSO HAPPEN TO BE EITHER EMPLOYEES OR EMPLOYERS NEEDS TO THOROUGHLY UNDERSTAND THESE LAWS! The course will consist of a detailed study of the leading federal laws that govern employee rights to act together to improve their wages and other working conditions and define how employers may respond to such employee initiatives. The course will focus on the rights of both non-union and union employees under the Norris-LaGuardia Anti-Injunction Act, the National Labor Relations Act, the Labor-Management Relations Act (Taft-Hartley), the Labor-Management Reporting and Disclosure Act (Landrum-Griffin), and the Worker Adjustment and Retraining Notification Act (WARN). The course will also explore rights of non-union and union employees under relevant state law. We will explore how employees organize unions, how employers may lawfully oppose organization, the prohibition of unfair labor practices by employers and unions, the representation election process, the process of negotiating collective bargaining agreements (CBAs), grievance and arbitration procedures under CBA, the federal common law of labor relations, unlawful uses of economic pressure by employees and employers, and the preemptive scope of federal labor law. In this course, you will learn (1) the structure and function of these laws; (2) the justifications for and goals of these laws; and (3) practical approaches to representing employees, employers, and/or the government in matters relating to these laws.

19. The lesson organization and objectives are reproduced as Appendix A to this article.

tions, and the classifications of employees who work at Borders Stores²⁰; the elaborate information prepared by Borders outside counsel for management training on responses to union organizing (which apparently had been obtained by the United Food & Commercial Workers (UFCW) and posted on a United Kingdom labor union web site)²¹; news articles relating to successful organizing efforts by UFCW and the collective bargaining agreements negotiated with Borders by several UFCW locals²²; and extensive web site information regarding the UFCW²³, as well as the Industrial Workers of the World (IWW), which also has sought to organize employees at Borders stores.²⁴ Students found this case packet to be intriguing and very helpful to them in visualizing the business at issue, whether they were being asked to advise management (Borders), an individual employee, or a union (usually the UFCW). Moreover, because there are several Borders bookstores in the greater Atlanta metropolitan area, students had an opportunity to visit the premises, see the employees at work, and gain a much more thorough understanding of the problems posed in the course than students gain from traditional abstractions of concepts, such as the doppelgangers “Blackacre” or “Whiteacre” used in many property casebooks.²⁵

III. TEACHING SUBSTANTIVE ADMINISTRATIVE LAW PRINCIPLES THROUGH SELECTED LABOR LAW EXAMPLES

Labor law provides a very flexible vehicle to teach important legal concepts in addition to “pure” labor law. In particular, an understanding of administrative law principles and related preemption doctrines is crucial to the student’s ability to read any case involving the NLRA.

For example, in a case involving allegations that an employer committed an unfair labor practice (ULP), the aggrieved individual or union (the “charging party”) must file a written charge alleging the ULP with the appropriate Regional Office of the NLRB within 180 days. The Regional Office investigates the charge and takes evidence. If the Regional Office finds probable cause to believe that the employer (the “respondent”) violated the NLRA, a complaint is issued.

20. The Borders’ home website can be found at <http://www.Bordersstores.com>.

21. Anne Kubek, *Union Awareness Training for Borders Managers* (1999), at <http://www.labournet.net/ukunion/9912/Borders3.html>.

22. See *supra* note 20.

23. UFCW’s main website, at <http://www.wfcw.org>.

24. IWW’s unofficial home website, at <http://www.ufcw.org>; <http://iww.org>.

25. These terms give rise to one of the more (unintentionally) amusing entries in BLACK’S LAW DICTIONARY, which defines “Black acre” and “White acre” as “fictitious names used by the old writers to distinguish one parcel of land from another, to avoid ambiguity, as well as the inconvenience of a fuller description.” BLACK’S LAW DICTIONARY 116 (6th ed. 1991).

The complaint initiates an adversarial administrative process in which an attorney representing the NLRB's General Counsel tries the case for the government in an evidentiary hearing held before an Administrative Law Judge (ALJ). The ALJ prepares a written decision. Either the government or the respondent, or both, can appeal from the ALJ's decision by filing "exceptions" with the NLRB. The NLRB will either adopt the ALJ's decision, modify the ALJ's decision in some respect, or even substitute its own decision for the ALJ's decision, effectively rejecting it.²⁶

After the NLRB has issued its decision and order, the federal judiciary becomes involved in the process. NLRB decisions are not self-enforcing; therefore, the General Counsel usually files a petition for enforcement with the appropriate U.S. Court of Appeals. If the Court of Appeals grants the General Counsel's petition, the NLRB's order will be enforced by order of the Court of Appeals, backed by the power to impose sanctions for contempt.²⁷ On the other hand, a respondent may seek to overturn the NLRB's order by filing a petition for review.²⁸ In either case, administrative law dictates the standards of review that a Court of Appeals will apply to specific kinds of issues.

If a factual finding of the NLRB is challenged, the Court of Appeals must uphold the factual finding "if supported by substantial evidence on the record considered as a whole."²⁹ As to legal interpretation of the NLRA, the Supreme Court ruled early on in the Act's history that the "Act left to the Board the work of applying the Act's general prohibitory language in light of the infinite combinations of events which might be charged as violative of its terms."³⁰ Thus, the NLRB's interpretation of the NLRA will be upheld if it is "based on a permissible construction of the statute"³¹ and is rational,³² even if the Court would have formulated a different rule if it were the initial decision maker and even if the Board's decision represents a departure from the

26. See, e.g., *COX ET AL.*, *supra* note 16, at 102-08.

27. 29 U.S.C. § 160(e) (2000).

28. 29 U.S.C. § 160(f) (2000).

29. 29 U.S.C. §§ 160(e), 160(f) (2000). In essence, the Court of Appeals will not overturn the NLRB's choice between two equally plausible inferences from the facts if the choice is reasonable, regardless of whether the court itself might reach a different result if it were deciding the case *de novo*. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Mueller Brass Co. v. NLRB*, 544 F.2d 815 (5th Cir. 1977).

30. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

31. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

32. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) (holding that "the Board acted within its discretion in refusing to adopt a presumption" that strike replacement workers oppose the incumbent union on strike).

Board's prior policy.³³ If the NLRB adopts a new legal test to adjudicate whether an employer's conduct is lawful under the NLRA, the federal appeals courts will defer to the NLRB's expertise provided that it is a "reasonable policy choice." Moreover, the federal appeals courts accord the NLRB a very wide berth in choosing whether to apply a new legal test retroactively.³⁴ On the other hand, students must carefully distinguish between those appellate cases which declare that a certain provision of the NLRA is susceptible to one, and only one, reading,³⁵ and those cases which simply hold that the NLRB's interpretation is "a" reasonable interpretation, although others might have reasonably interpreted the provision differently.³⁶

Thus, cases decided under the NLRA provide a rich palette for painting administrative law and appellate review principles in vivid, active application. The Cox casebook is replete with numerous opportunities to explain and explore these principles. *NLRB v. Erie Resistor Corp.*³⁷ is a particularly wonderful example of a highly effective teaching tool for these concepts. Three different standards of appellate review of an NLRB decision were used simultaneously in reviewing an NLRB decision on a highly contentious issue. At issue in *Erie Resistor* was an employer's decision during an economic strike to offer "super-seniority" (i.e., adding 20 years to the length of a worker's actual service for purposes of future layoffs and recalls) to permanent replacement workers (who were lawfully hired to fill the jobs of striking workers)³⁸ and to those striking workers who crossed their union's picket line.

33. See *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 413 (1982); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975).

34. Compare *UFCW Local 150-A v. NLRB* (Dubuque Packing Co.), 1 F.3d 24 (D.C. Cir. 1993) (affirming NLRB's decision to apply retroactively a new, complex rule regarding whether an employer has a duty to bargain with a union over a partial relocation of bargaining unit work), with *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236 (1966) (NLRB declines to apply new rule regarding employer's obligation to file a voter eligibility list with the NLRB prior to a union election).

35. .g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (overruling the NLRB and holding that 29 U.S.C. § 157 affords non-employee union organizers virtually no access rights to the private property of an employer); *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (overruling the NLRB and holding that the term "employee" as defined in 29 U.S.C. § 152(3) does not include retired workers and therefore an employer has no duty to bargain over changes made in post-retirement medical benefits); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952) (rejecting NLRB's usurpation of power to declare a proposal for a labor contract provision to be a per se violation of the NLRA because "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements").

36. E.g., *Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95 (1985) (holding that NLRB reached "a" reasonable construction of 29 U.S.C. § 158(b)(1)(A) as prohibiting a union from fining members who have tendered resignations invalid under the union constitution).

37. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

38. See *NLRB v. Mackay Radio & Tele. Co.*, 304 U.S. 333 (1938).

After the strike, the union filed unfair labor practice charges alleging that the employer's "superseniority" scheme discriminated against workers based on loyal union membership in violation of 29 U.S.C. § 158(a)(3) (hereinafter "§ 8(a)(3)").³⁹ The NLRB found that, despite the employer's asserted motivation for adopting the scheme (to keep its plant open during the strike), the inevitable effect of the scheme violated the Act because it "would greatly diminish, if not destroy, the right to strike . . . and would run directly counter to the guarantees . . . that employees shall not be discriminated against for engaging in protected concerted activities."⁴⁰ The Court reviewed the NLRB's decision in what amounts to a tour-de-force of administrative law, simultaneously applying three different standards of review to each relevant aspect of the NLRB's decision. In an exhaustive analysis by Justice White, the Court upheld the Board's decision because: (1) the Board's explanation for its interpretation of the Act was not "inadequate, irrational or arbitrary;" (2) decision "did not exceed its powers or venture into an area barred by the" NLRA; and (3) the specific factual findings adopted by the Board were "a detailed assessment of super-seniority" that was "supported by substantial evidence."⁴¹

Erie Resistor is thus the kind of case in which students can see the operation of administrative law principles in a way that allows them to separate issues of agency competency from legal interpretations by an agency from the agency's factual findings in a particular case. Such cases provided a springboard for applying these principles as our class worked through numerous problems using the *Borders* case study. These principles were interwoven throughout our study during each stage of the semester. Having studied basic principles of administrative law and appellate review early in the semester, we were prepared to move on to problem-solving exercises in other substantive labor law areas that required the application of these basic principles in new contexts.

IV. ACTIVE LEARNING EXPERIENCES: PROBLEM-SOLVING AND STUDENT COLLABORATION

A. Using An Active Learning Model

Recently, Professor Gerald F. Hess provided an excellent survey of the rationales supporting, challenges facing, and techniques for implementing active learning experiences in law school classrooms – exper-

39. 29 U.S.C. § 158(a)(3) (2000).

40. *Erie Resistor*, 373 U.S. at 225-226.

41. *Id.* at 236.

iences through which students “make what they learn part of themselves.”⁴² My own teaching experiences have made me a zealous convert to the value of this approach to improving the academic performance of my students, significantly increasing their opportunity to pass a bar examination, and, in my view, most important of all, preparing them for the demands of competently investigating, analyzing, and rendering advice regarding clients’ real-world problems. As Professor Hess identified, the hallmarks of active learning experiences in the classroom involve students who are mentally participating in the lesson by reading, discussing, and/or writing, rather than passively receiving information; in-class lessons that emphasize the enhancement of each student’s ability to perform analysis, synthesis and evaluation; and teachers who emphasize in the classroom their students’ exploration of their own attitudes and values.⁴³ I designed significant portions of my labor law classroom experience with each of these objectives in mind.

B. *Active Learning Using Student Reaction To Video*

I incorporated regular in-class problem-solving exercises throughout the course of the semester.⁴⁴ One of the first exercises in the course was joined with a viewing of the now-classic documentary, *The Strike of '34*, concerning a massive organizing effort in the South by textile unions that precipitated a 500,000 employee mass strike, to which employers responded with murder, mayhem, firings, and permanent blacklisting. Not only did the video graphically dissect one of the most important events that lay behind the enactment of the NLRA in 1935, it also pointed up the failings of Northern labor unions to address issues of segregation and racial discrimination against African-American workers, despite the initial hope by intelligentsia, such as Langston Hughes in his *Open Letter to the South* (1932)⁴⁵, that the uniting of workers behind the union movement against discriminatory employers would transform race relations in the workplace:

42. Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401 (1999).

43. *Id.*

44. Some academics have observed that “[t]he problem method . . . has become much more common in the classroom.” Edith R. Warkentine, *Kingsfield Doesn’t Teach My Contracts Class: Using Contracts To Teach Contracts*, 50 J. LEGAL EDUC. 112, 116 & n. 7 (2000). However, my experience suggests that the use of the problem method varies considerably among law schools, as well as among faculty. It seems particularly unusual in many labor law courses. Professor Douglas Leslie, a labor law expert on Virginia’s faculty, uses the problem method to great effect in his courses, including contracts, property, labor law, and employment law. Information on Professor Leslie’s casefile method is available at <http://www.casefilemethod.com>, which may also be accessed through the Jurist website at <http://jurist.law.pitt.edu/resource.htm#Labor>.

45. LANGSTON HUGHES, *THE COLLECTED POEMS OF LANGSTON HUGHES* 160-161 (Arnold Rampersad, ed., New York Press, 1994).

I am the black worker,

Listen:

That the land might be ours.

And the mines and the factories and the office towers

At Harlan, Richmond, Gastonia, Atlanta, New Orleans;

The plants and the roads and the tools of power

Be ours:

Let us forget what Booker T. said,

“Separate as the fingers.”

Let us become instead, you and I,

One single hand

That can united rise

To smash the old dead dogmas of the past —

To kill the lies of color

That keep the rich enthroned

And drive us to the time-clock and the plow

Helpless, stupid, scattered, and alone — as now —

Race against race,

Because one is black,

Another white of face.

* * *

We did not know that we were brothers.

Now we know!

Out of that brotherhood

Let power grow!

* * *

Now we see

In union lies our strength.

Let union be

The force that breaks the time-clock,

Smashes misery,

Takes land,

Takes factories,

Takes office towers,

Takes tools and banks and mines.

Railroads, ships and dams.

Until the forces of the world

Are ours!

White worker,

Here is my hand.

Today,

We're Man to Man.

After viewing the documentary and discussing Hughes' perspective on the intersection of race relations and labor relations, I asked the class

to identify and list as many specific actions by the employers or the unions that would have constituted unfair labor practices under either §§ 8(a) or 8(b) after the NLRA became effective in 1935.⁴⁶ Students enjoyed this challenge to reflect on the documentary and to apply their expanding knowledge of the substantive provisions of the NLRA. For example, several of my more world-experienced and pragmatic students noted that among other things, they thought it would violate §§ 8(a)(1) and 8(a)(3) of the NLRA to “shoot strikers in the back” as they attempted to retreat from armed strike-breakers.⁴⁷ The students also recognized the failure of the unions in the 1930s textiles industry organizing to represent African-American workers fairly (and often at all), a realization that introduced our study of the judicially implied concept of the duty of fair representation. Indeed, in 1944, the U.S. Supreme Court recognized that the duty of fair representation implicitly and inexorably flowed from the status as the *exclusive* bargaining representative for *all* workers in its bargaining unit bestowed upon the union by the federal labor statutes.⁴⁸ At the end of this class experience, I reviewed each student’s list of labor law violations, and I awarded a labor law dictionary to the student who had correctly identified the greatest number of discrete NLRA violations discernible in *The Strike of ’34*.⁴⁹

C. *Active Learning Through Critiquing And Editing Client Documents*

In a subsequent in-class problem, I asked students to assume a client had just faxed to them several examples of anti-union propaganda and asked each of them to advise both a union-side and a management-side client as to whether those communications were protected under § 8(c) of the NLRA or whether they violated § 8(a)(1).⁵⁰ More importantly, I asked the students to edit the propaganda to make the

46. Although performed as a synchronous (i.e., classroom with instructor present) learning experience, this approach unites responsiveness to a number of learning styles, including those which are characterized by visual thinking, fantasy, evocative language, and “extroverted” learning styles that often are connected with intuitive thinking. Jayne Elizabeth Zanglein and Katherine Austin Stalcup, *Te(a)chnology: Web-Based Instruction in Legal Skills Courses*, 49 J. LEGAL EDUC. 480, 486 (1999).

47. 29 U.S.C. §§ 158(a)(1), (3) (2000).

48. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202 (1944) (“[T]he Railway Labor Act imposes upon the [union] . . . at least as exacting a duty to protect equally the interests of the members of the [bargaining unit] as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.”).

49. That dictionary, published by The New Press and distributed by W.W. Norton & Co., is R. EMMETT MURRAY, *THE LEXICON OF LABOR: MORE THAN 500 KEY TERMS, BIOGRAPHICAL SKETCHES AND HISTORICAL INSIGHTS CONCERNING LABOR IN AMERICA* (New York Press 1998).

50. 29 U.S.C. § 158(c), 158(a)(1) (2000).

necessary changes for their client's message to be lawful under the NLRA.⁵¹ I asked each student to prepare in class a letter to her client concisely setting forth their suggestions and reasoning. Students reacted very positively to this opportunity to engage in a client advice scenario. Moreover, as a writing and analysis exercise using a limited case file and limited time for analysis and expression, this exercise was one in a continuing series of efforts I have been incorporating into substantive courses to teach lawyering skills tested on the Multistate Performance Test (MPT) portion of the Georgia Bar Examination.⁵² Based on my anecdotal knowledge, the MPT has proven, for many

51. See COX ET AL., *supra* note 16, at 149-151 (Problems 1 – 3).

52. The MPT is developed and distributed by the National Conference of Bar Examiners (NCBE). In its rules describing the content of the Bar Examination in Georgia, the Georgia Board of Bar Examiners states that “[t]he Multistate Performance Test (MPT) shall consist of two 90 minute tasks, and the areas of law may involve any subject matter whether covered in the essay questions, Multistate Bar Examination or otherwise.” See *Rules Governing Admission To The Practice of Law In Georgia*, Part B, § 6.e, available at the Georgia Supreme Court, Office of Bar Admissions website, <http://www2.state.ga.us/courts/bar/barules.htm#PARTB>. The NCBE describes the MPT as “three 90-minute skills questions covering legal analysis, fact analysis, problem solving, resolution of ethical dilemmas, organization and management of a lawyering task, and communication.” See the NCBE web site, <http://www.ncbex.org/Tests/tests.htm>. NCBE describes the content of the MPT as:

designed to test an applicant's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an applicant's ability to complete a task which a beginning lawyer should be able to accomplish. The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the applicant is to complete is described in a memorandum from a supervising attorney. The File might also include, for example, transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, and lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.

The Library consists of cases, statutes, regulations and rules, some of which may not be relevant to the assigned lawyering task. The applicant is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law, and problems may arise in a variety of fields. Library materials provide sufficient substantive information to complete the task.

The MPT requires applicants to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for relevant principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; (6) complete a lawyering task within time constraints.

These skills will be tested by requiring applicants to perform one of a variety of lawyering tasks. Although it is not feasible to list all possibilities, examples of tasks applicants might be instructed to complete include writing the following: a memorandum to a supervising attorney; a letter to a client; a persuasive memorandum or brief; a statement of facts; a contract provision; a will; a counseling plan; a proposal for settlement or agreement; a discovery plan; a witness examination plan; a closing argument.

Id. NCBE emphasizes that “[t]he MPT is not a test of substantive knowledge,” but rather a test of “six fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills arise.” See http://www.ncbex.org/Tests/mpt_be1.htm. Not surprisingly, therefore, the MPT “[t]est specifications are based on the MacCrate Task Force's Statement of Funda-

students, to be the most challenging area of a bar examination. This is clearly because it is the most removed from the law school experiences of many law students.

D. *Active Learning Through In-Class Problem-Solving, Peer Review, and Oral Presentation*

In several of the complex and difficult areas of the course, I used a combination of techniques to enhance student comprehension of not only the material but also of the learning styles of their classmates and themselves. These combinations were focused on problem-solving through both written and collaborative learning experiences. These experiences were organized around an in-class sequence of written problem-solving, peer review of written solutions, and team collaboration for oral presentation of the solution — in terms of client advice — to the problem.

For example, the secondary boycott and recognitional picketing provisions under the 1947 Taft-Hartley Amendments⁵³ to the NLRA are very complex areas of labor law to which I applied the collaborative learning approach. A traditional Socratic or lecture approach to the area of secondary boycott and recognitional picketing law is probably the least effective way to build student comprehension and confidence.⁵⁴ The secondary boycott and recognitional picketing provisions present, perhaps, the most complex statutory provisions in all of federal labor law. The key to teaching this area to students requires recognition of two steps. First, it is essential to establish the real world context in which these unique statutory provisions came about. Indeed, few provisions of any law were more closely tied to real-world conduct than §§ 8(b)(4) and 8(b)(7)⁵⁵, which responded to a long history in which labor organizations enmeshed “neutral” em-

mental Lawyering Skills.” *Id.* NCBE has publicly released two problem files from the February 1997 MPT at http://www.ncbex.org/Pubs/MPT/1997/MPT_2-97_Test_1.pdf.

53. Labor-Management Relations Act of 1947, ch. 120, 61 Stat. 136 (1947), codified at 29 U.S.C. §§ 141-197 (2000).

54. Although it should be noted that recent research into the virtually verbatim transcription by 1870s Harvard Law School students of Christopher Columbus Langdell’s early classes suggests that Langdell, unlike many law teachers today, had actually read Socratic dialogues and treated his classes as essentially a mutual exploration between himself and the students, in which he regularly changed his views and admitted error during the course of class discussions. *See* Bruce A. Kimball, “Warn Students That I Entertain Heretical Opinions, Which They Are Not To Take As Law”: *The Inception Of Case Method Teaching In The Classrooms Of The Early C. C. Langdell, 1870-1883*, 17 *LAW & HIST. REV.* 57 (Spring, 1999). It is also apparent that Langdell was familiar with dialogues of Socrates as recorded not only by Plato, but also by another pupil, Xenophon, who, unlike Plato, reproduces Socrates’ actual, rather practical teachings and constructive questioning rather than employs him as a mouthpiece for the author’s own philosophic musings coupled with an unnatural, aggressive interrogation style. *See* XENOPHON, *CONVERSATIONS OF SOCRATES* (Tredennick-Waterfield trans. 1990).

55. 29 U.S.C. §§ 158(b)(4), 158(b)(7) (2000); *See* COX, ET AL., *supra* note 16, at 610-690.

ployees and businesses in their primary disputes with management and used picketing as a means of pressuring employers to recognize unions as the representatives of their employees without requiring a secret-ballot election. Second, once the factual nature of secondary and recognitional pressure problems is understood, students must have the active learning experience of recognizing factual scenarios to which §§ 8(b)(4) and 8(b)(7) may apply, and then of parsing and accurately applying the statutory language to those facts as presented by clients. An integral part of this second step is recognizing that clients often give attorneys only limited information. To meaningfully analyze the problem, students need to comprehend that, as attorneys, they may be presented with incomplete data sets by their clients. Thus, it is crucial in the § 8(b)(4) and 8(b)(7) areas for the students to formulate questions for the clients to obtain additional information needed for the analysis, and to be able to explain to the client why this additional information is necessary, as well as the consequences of the information in analyzing the lawfulness of a labor organization's conduct.

The complexity of §§ 8(b)(4) and 8(b)(7) and the objectives outlined above encouraged me to seek a different combination of teaching techniques. In selecting the teaching technique to use, however, I wanted to transcend what merely might communicate my class objectives; I sought to explore the material using the techniques that best reached the diversity of learning styles among my students.⁵⁶ In sharpening my thinking about learning styles, I have a debt to acknowledge to Professor Vernellia Randall, whose work in this area provides the clearest vision I have seen for teachers who seek to strategize about how to really *teach* their students.⁵⁷ As described in the following subsections, Professor Randall's explanation of four principal pairs of personality types identified in the Myers-Briggs test, allowed me to organize my teaching techniques both to address the different styles of my students (i.e., play to their strengths) and to encourage my students to expand their learning styles (i.e., create oppor-

56. See, e.g., Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213 (1998); Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. LEGAL EDUC. 402, 403 n.2, 414 (1998) (noting that most law schools teach to the "generic student" and thus "d[o] not adequately address ways in which learning is influenced by students' prior background and experiences"). Professor Terrell and his co-author echo Professor Lustbader's admonition in an observation originally made in the context of legal writers and their audience that is equally applicable to law teachers and their students: that the teacher should not "become a solipsist, creating an audience to suit *his* needs rather than adapting himself to *his audience*." STEPHEN V. ARMSTRONG & TIMOTHY P. TERRELL, *THINKING LIKE A WRITER: A LAWYER'S GUIDE TO EFFECTIVE WRITING AND EDITING*, 2-10 (New York 1992) (emphasis added).

57. Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students And Performance*, 26 CUMB. L. REV. 63 (1995).

tunities for my students to become stronger in modes of learning other than those where their strengths lay).

My approach to this problem set was to divide my three-hour class session into three discrete parts. First, students analyzed the problems and prepared a written response to client questions. Second, each student was paired with another student to exchange answers and provide an immediate critique, both as to substance and expression. Third, the remainder of the class was devoted to a collaborative learning experience.⁵⁸ In that experience, I divided the students up into "law firms." Each law firm was to reach consensus on what advice to deliver to their client and how that advice would be explained orally. I allowed the students a sufficient amount of time to confer, which they did with enthusiasm. Thereafter, I asked the law firms to engage me in a dialogue about the problem and their proposed advice. In that dialogue, I played the role of the client, the general counsel of Borders.⁵⁹ On some of the questions, I would "shop" the advice given by one team by posing related questions to other teams. This combination of direct and cross-dialogue enhanced the level of analysis, brought to the fore questions that clients were likely to ask that the students had not anticipated, and produced a greater depth of under-

58. Professor Warkentine has very effectively described the benefits of collaborative learning experiences in the classroom as a natural extension of active learning techniques:

Working alone makes students responsible for their own work. Bringing work product into the classroom and discussing it in small groups makes students responsible for their colleagues' work as well. First, within the small group, students must explain and perhaps defend their own choices and question or learn from colleagues' choices. Second, if the teacher requires each small group to produce a consensus draft [or oral opinion], students learn about compromising, convincing, and teamwork. Finally, if each group presents its work to the entire class, the students will receive additional feedback and usually see as many different solutions to the problem as there are groups.

Warkentine, *supra* note 45, at 118-119; See, also, Randall, *supra* note 8, at 201. Interestingly, Professor Reilly has used student teams in her Constitutional law courses to devise "complex hypothetical[s]", which served as the basis for the course's final examination. Reilly, *supra* note 14, at 594-595.

59. This permitted me to integrate other teaching methods into the classroom experience to tie up loose ends. On some topics, I would offer comments that provided more information or linked concepts that had not yet been joined in the team dialogue. On other topics, I would engage in a dialogue with a team about the facts and rulings of a particular case on which they needed to rely as the legal authority for their client's advice. For example, in advising a client who sought to have a labor arbitrator's award vacated in federal court, the students needed to rely on the standards articulated by the Supreme Court in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987). I asked the team working on this problem to explore the facts in *Misco* in detail, to articulate clearly the legal standard applied in *Misco*, to compare the facts in *Misco* to the facts in their problem, and to apply *Misco*'s legal standard as they articulated it to the arbitrator's award in their problem. See Randall, *supra* note 8, at 242 (noting that "a professor can use Cooperative Learning groups with lecture, case method, discussion method, or the problem method of teaching. Professors can also integrate the use of Cooperative Learning with socratic exchange.").

standing of each problem.⁶⁰ Taking other recent scholarship into account about differing law school learning experiences and expressive styles between male and female students, I ensured that my teams had a balance of female and male spokespersons. I designated several female students as the managing partners of law firms (i.e., student teams). This produced high-quality dialogue in which all of the female students actively participated.⁶¹

Each of the problems I used in the §§ 8(b)(4) and 8(b)(7) areas were tailored to specific contrasting pairings of learning styles described in Professor Randall's work. Those pairings are: (1) introvert and extrovert learners; (2) sensing and intuitive learners; (3) thinking and feeling learners; and (4) judgment and perception learners.⁶² I shall discuss each pairing below and illustrate each with one of the problems presented to my class. As Professor Randall notes, the traditional, white-male oriented legal educational model favors the introvert, intuitive, thinking, and judgment learning styles.⁶³ This creates homogeneity in the legal profession that disadvantages many in underrepresented groups and under-served communities.⁶⁴ In a brilliant linking of diversity to learning styles, Professor Randall observes that "the practice of law needs people who prefer acting without getting bogged down in reflection (extroverts); people who prefer giving attention to details, facts and reality of the situation (sensing); people who prefer making judgments based on the underlying value implica-

60. As Professor Zanglein and Ms. Stalcup have noted, sensing and intuition are two contrasting learning styles: "Sensing people take in facts or details, while intuitive people take in patterns and overviews." Zanglein & Stalcup, *supra* note 46, at 485. Quoting the pioneering work of Professor Vernellia Randall, Professor Zanglein and Ms. Stalcup observe that law teachers "should encourage collaboration between intuitive and sensing students: 'Intuitive types might gain a healthy respect for the sensing type's solid grasp of reality, while sensing types might be pushed to use their imagination, inspirations, and insights.'" *Id.* at 486 (quoting Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 89 (1995)). A variety of cooperative learning experiences are well described in David Dominguez, *Principle 2: Good Practice Encourages Cooperation Among Students*, 49 J. LEGAL EDUC. 386, 389-391 (1999).

61. See, e.g., Julie E. Buchwald, *Confronting a Hazard: Do Eating Disorders Plague Women in the Legal Profession?*, 9 SO. CAL. REV. L. & WOMEN'S STUD. 101, 109, 118-119 (1999) (stating "[a] less rigid Socratic questioning method and a more cooperative learning atmosphere emulating a system more like that of business school have emerged as women have become more fully integrated into the profession," an important first step toward "[g]etting to the point where the female perspective is valued"); see also Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994).

62. See Randall, *supra* note 57, at 79-97. In the absence of formal pre-testing using measures such as Myers-Briggs, team assignments are largely a combination of the professor's familiarity with each student's proclivities based on a combination of objective data and intuition. See, e.g., Reilly, *supra* note 14, at 596, n.5. In my own case, I was very familiar with the written and oral communication skills and analytic skills of most of the students in my Labor Law class, having previously taught them in three other courses.

63. Randall, *supra* note 57, at 102.

64. See, e.g., Van Detta, *supra* note 7, at 358 n.392.

tions (feeling); and people who prefer spontaneous and flexible environments (perceptive)."⁶⁵

1. Introvert/Extrovert Learners

The relationships between introvert learners and extrovert learners are best understood by reference to a diagram⁶⁶:

INTROVERT		EXTROVERT	
(eye-minded, learn by reading/writing; reflect before acting)		(ear-minded, learn by talking/experience; action-oriented)	
<u>Strengths</u>	<u>Opportunities</u>	<u>Strengths</u>	<u>Opportunities</u>
writing	speaking	speaking	writing
editing	debating	debating	think, master facts

In the first problem, my students were asked to respond to an urgent telephone call from Borders' regional manager. The regional manager reports that the Typesetters' Union is peacefully picketing five Borders stores in Atlanta. The picket signs read:

Don't Shop At Borders! Borders Continues To Sell Scribners Books.

Scribners Continues To Give Away Our Jobs To Cheap Scab Labor.

Boycott Borders Until Scribners Says "Uncle!"

The students are also told that the Typesetters' Union represents print employees at Scribners publishers in New York, and that Scribners has been contracting out bargaining unit work to non-union printers on Long Island. Scribners' right to subcontract under the collective bargaining agreement has been upheld in a recent arbitration. With these facts in hand, the students are asked to advise Borders as to the actions that Borders may take in response to the picketing.

This problem encourages both the introvert and extrovert learners to use their respective strengths and to practice skills in areas of opportunity. The introvert learner brings to the solution detail from the case and statute reading assignment preceding this class. The extrovert learner benefits from the introvert learner's reading and pre-class reflection. Conversely, the introvert learner may be challenged by the unfamiliar factual scenario and the pressure within the limited time-setting of the class to sort out all of the details she has learned and apply them to the concrete problem at hand to reach a solution. The

65. Randall, *supra* note 58, at 103.

66. See *id.* at 85. See, also, Reilly, *supra* note 14 at 593, n.6. Professor Reilly has noted that the usual dominance of extroverted students was *lowered* in her own collaborative learning experiments because all team members had incentive "to raise thought-provoking questions and to test their ideas in class" in order to progress toward the objectives demanded by the collaborative learning model. *Id.*

introvert learner benefits from the extrovert learner’s skill in learning and evaluating by discussing the problem, debating the options, and mutually arriving at an agreed upon analysis and course of advice. Moreover, both types of learners further benefit from the opportunity to review and edit a proposed written analysis of the problem prepared by the opposite style of learner.

2. Sensing/Intuitive Learners

A diagrammatic comparison of sensing versus intuitive learners would include the following characteristics:⁶⁷

SENSING		INTUITIVE	
(detail oriented, focus on reporting; facts observable through 1 of the 5 senses)		(pattern/inspiration oriented; looks for big picture, not details, works out meanings, possibilities, details subconsciously)	
<u>Strengths</u>	<u>Opportunities</u>	<u>Strengths</u>	<u>Opportunities</u>
starts with concrete examples, moves to theory in discrete steps	enhance accuracy of reading/writing skills	insight/perception of concepts	fact sensitivity encourage care with facts, details

For this pairing of contrasting learning styles, Professor Randall recommends “collaborative exercises in which intuitive students are paired with sensing students” so that “[i]ntuitive types might gain a healthy respect for the sensing type’s solid grasp of reality, while sensing types might be pushed to use their imagination, inspiration, and insights.”⁶⁸

One of the more difficult problems posed to my class provides just such an opportunity. Following up on the problem posed above, I asked the students to consider a subtle variation. Students were asked to assume that members of the Typesetters’ Union appear at forty Borders Stores in Georgia, Florida and California. The union members distribute handbills to customers and Borders employees as they enter and exit the stores. The handbills state:

Boycott Borders!! Borders Is Unfair To Hardworking Union Men And Women. Borders Is Stealing Their Jobs Away And Taking Food From The Mouths Of Their Babies! Borders Is Destroying Their Livelihoods And Getting Rich From It!!

I told the students that some Borders employees have refused to shelve books published by Scribners. Other Borders employees suspi-

67. Randall, *supra* note 57, at 87-89.

68. *Id.* at 89.

ciously call in sick. Customers are complaining about either the activity at the stores (“It’s annoying!”) or about Borders’ enmeshment in the dispute (“How can you pick on the little guy like that? From now on, we’re shopping at Amazon.com!”). The question that the Borders’ general counsel poses to the students’ law firm is: What can be done under federal labor law to stop this activity?

Although in appearance this is somewhat similar to the first problem, it is actually a deceptively difficult problem for students. This problem clearly demonstrates to sensing learners and intuitive learners, who collaborate, the strengths of one another’s learning styles. The sensing learner quickly absorbs the crucial details in discussing the problem with the intuitive learner: (1) the Typesetters’ communication has induced some employees to refuse to perform some of their duties and apparently other employees to refuse to come to work; (2) customers are reacting by complaining and taking their business elsewhere; and (3) the union is using handbills with a very provocative and misleading message that baldly states that the dispute is with Borders, when in fact the union’s dispute is with Scribners.

The sensing learner, building step-by-step upon what she has already mastered in the first Typesetters’ Union problem, sees serious potential violations of the NLRA. Indeed, the union’s activity here seems to fall squarely within § 8(b)(4)(ii)(B)’s prohibition against using threats, coercion, or restraints to enmesh a neutral (Borders) in a dispute between the union and the primary employer (Scribners) which has the effect of inducing any employee to refuse to handle any goods or to perform any service, where an object of that activity is to force the neutral to cease “using, selling, handling, transporting, or otherwise dealing in the products” of the primary employer.⁶⁹ Furthermore, in discussing the problem, the sensing learner usually leads the intuitive learner through § 8(b)(4)(ii)(B)’s famous “Publicity Proviso” to conclude that it does not protect the union’s actions here because, although the union is not picketing, its publicity does not appear to be “for the purpose of truthfully advising the public . . . that . . . products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer.”⁷⁰

69. 29 U.S.C. § 158(b)(4)(i)(B) (2000); *See, e.g.*, *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951).

70. 29 U.S.C. § 158(b)(4)(i)(B) (second proviso) (2000). The union’s publicity here also loses Publicity Proviso protection because it clearly “[h]a[s] an effect of inducing” an individual “employed by any person [here, Borders] other than the primary employer [here, Scribners] to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution [here, Borders].” *Id.* (bracketed text added).

The intuitive learner, however, is uncomfortable with the conclusion to which the sensing learner has guided her. The intuitive learner recognizes that the key concept of § 8(b)(4)(ii)(B) is the “coercive” nature of picketing a neutral employer. Thus, the intuitive learner raises this question with her partner: If the union is merely handbilling, should that be treated as if it were secondary picketing? The sensing learner then tends to parse the handbill language, building from the first Typesetters problem to point out the egregious effort that the language makes to enmesh Borders in the primary dispute between the union and Scribners, the primary employer. In their dialogue, however, the intuitive learner pulls together the concepts from the last two sections of reading from the Cox casebook. She helps to lead the sensing learner to the two key dichotomous concepts, handbilling versus picketing on one the hand, and coercion versus mere misrepresentation on the other.

Eventually, the two learners’ collaborative dialogue leads them to the seminal case that this problem illustrates, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*.⁷¹ In *DeBartolo*, the Supreme Court essentially exempted handbilling activity and the context of the handbills from any restriction under § 8(b)(4). The Court ruled that “[t]here is no suggestion that . . . leaflets ha[ve] any coercive effect on customers There [i]s no violence, picketing, or patrolling and only an attempt to persuade customers”⁷² Accordingly, through their joint efforts, the sensing and intuitive learners recognize that they must tell the client that § 8(b)(4) cannot help them end the handbilling activity at the Borders stores. However, as my student teams determined through their collaborative dialogues, Borders should: (1) be vigilant to watch for a transformation of the technically non-coercive handbilling into coercive picketing; and (2) should establish a lawful, consistently enforced non-solicitation, non-distribution policy to ensure that the non-employee handbillers do not have direct access to Borders’ private property.⁷³

3. Thinking/Feeling Learners

A comparison of the learning style associated with “thinkers” to that associated with “feelers” is composed of the following characteristics⁷⁴:

71. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988).

72. *Id.* at . 578.

73. *See NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *See, also, Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

74. Randall, *supra* note 57, at 91-94.

THINKING		FEELING	
(decisions made impersonally; based on <i>logical</i> cause/effect: OBJECTIVE TRUTH SEEKERS)		(decisions made based on judgments derived from personal/social <i>values</i> : SEEK CONSISTENCY WITH VALUES)	
<u>Strengths</u>	<u>Opportunities</u>	<u>Strengths</u>	<u>Opportunities</u>
sylogistic, analytic thinking	human factors, role of values in decisionmaking, art of communication	human factors, role of values, art of communication	use of sylogistic, analytic thinking and recognition of logical consequences

As Professor Randall's work suggests, "thinkers" need to be encouraged to "learn to appreciate the problems of people" and to avoid the tendency "to objectify and dehumanize" legal problems and process.⁷⁵ On the other hand, "feelers" need "activities that teach them to take into account the probable consequences of legal actions, especially where their own high value for the action makes it hard for them to see the probable negative outcomes."⁷⁶

A politically charged problem served as the springboard for collaborative dialogue and learning between my thinking and feeling learners. The scenario put to them in this problem starts with an urgent telephone call from an official of the International Brotherhood of Teamsters. It appears that the Teamster local that represents drivers of United Parcel Service (UPS) is refusing to deliver any books that were printed by Bertelsmann A.G., the German media and publishing giant.⁷⁷ The local union has instructed its members to refuse to handle any Bertelsmann books, many of which the union believes are printed at a facility in Serbia, until Serbia delivers up Slobodon Milosovich to the International War Crimes Tribunal in the Hague. No Bertelsmann books are being delivered to any U.S. booksellers by UPS drivers. The local union has publicly stated that its goal is to "persuade" UPS to stop accepting Bertelsmann shipments and to "persuade" U.S. book retailers not to stock Bertelsmann books. The students are asked to advise the Teamsters official whether the union has exposure under federal law to Borders and what remedies, if any, Borders has against the union.

In evaluating this problem, thinking students tend to focus quickly on categorizing the relevant players: Is UPS a primary or secondary

75. *Id.* at 94.

76. *Id.*

77. See, e.g., Suzanne Kapner & Laura M. Holson, *EMI Talking To Bertelsmann On Music Deal*, N.Y. TIMES, Nov. 11, 2000, at B1, B2.

employer? Is Borders a primary or secondary employer? Who is the primary dispute really with? Isn't the union's dispute really with the current government of Serbia? Isn't it the case that Serbia is, in these unusual circumstances, the primary object of the union's dispute? By contrast, feeling students are more often attracted to the moral and political high ground being taken by the local union members in this case. The feeling learners understand the ignominy of war crimes and sheltering war criminals. They tend to see the purpose of the boycott as not to restrain the business of or between UPS and Borders, but rather to free its members of the morally repugnant duty of delivering Serbian-produced goods. In addition, feeling learners see the broader political landscape of the union's efforts, perhaps atoning for earlier years in which unions seemed to ignore the human rights of minority group members in the United States. They are likely to characterize this scenario as a "political" dispute, outside of the Congressional purpose of § 8(b)(4) to prohibit coercion applied to obtain economic objectives.

This problem involves two very compelling, yet competing viewpoints: (1) the strictly logical interpretation of the secondary boycott provisions; and (2) the more policy-oriented view that the matter was political and thus beyond the scope of the secondary boycott provisions. In the classroom dialogue among the students, vigorous discussion ensued. The thinking learner was faced with compelling human-factor and values-based reasons for transcending literal statutory language. The feeling learner was faced with the inexorable logic of the paradigmatic application of the language of § 8(b)(4) to the facts here, just as to the facts in the typically less morally compelling case of unions applying indirect pressure.

Ultimately, both learners realized that the resolution of their competing views caused similar disagreement in the federal courts in *International Longshoremen's Ass'n v. Allied International, Inc.*⁷⁸ In *Allied*, the International Longshoremen's Association (ILA) refused to unload Russian cargoes in protest of the Soviet invasion of Afghanistan, and was sued by importers and ship operators alleging that the ILA's actions were a secondary boycott in violation of § 8(b)(4).⁷⁹ A U.S. District Court dismissed the action against the ILA, ruling that the dispute was political, not economic, and targeted the Soviet Union, not the importer or ship operator. However, the Supreme Court disagreed, rejecting the moral and values-based arguments and

78. *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212 (1982).

79. Neutral parties aggrieved by secondary boycott activity in violation of Section 8(b)(4) may not only file an unfair labor practice charge with the NLRB but may also and concurrently or independently file a lawsuit for damages against the union pursuant to Section 303 of the Taft-Hartley Amendments, 29 U.S.C. § 187 (2000).

instead adopting a strictly logical application of the literal language of § 8(b)(4):

As understandable and even commendable as the ILA's ultimate objectives may be, the certain effect of its action is to impose a heavy burden on neutral employers. And it is just such a burden, as well as widening of industrial strife, that the secondary boycott provisions were designed to prevent.

* * *

We would create a large and undefinable exception to the statute if we accepted the argument that "political" boycotts are exempt from the secondary boycott provision. The distinction between labor and political objectives would be difficult to draw in many cases. In the absence of any limiting language in the statute or legislative history, we find no reason to conclude that Congress intended such a potentially expansive exception to a statutory provision purposefully drafted in broadest terms.⁸⁰

Paraphrasing the language of Robert Jackson, I mentioned to my class that the Supreme Court is not final because it is infallible, but rather only *perceived as* infallible because it *is* final.⁸¹ Nonetheless, through analysis and discussion of this problem, both my thinking and feeling learners were empowered to bring their own strengths to bear on a difficult problem and to experience the benefit of acquiring the perspective of the opposite learning style.

4. Judgment/Perception Learners

The fourth and final contrasting learning pairs examined by Professor Randall are those whose mental process, hence learning process, is focused on judgments versus perceptions⁸²:

80. *International Longshoremen's Ass'n*, 456 U.S. at 223-25.

81. *See Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

82. Randall, *supra* note 57, at 98.

JUDGMENT		PERCEPTION	
(deal with outside world through thinking/feeling [pair #3 above]: organized, oriented to decision/closure: CONTROLLING)		(deal with outside world through sensing/intuition [pair #2 above]: flexible, spontaneous; gather facts to enhance understanding, not to control: OPEN-MINDED, ADAPTIVE)	
<u>Strengths</u>	<u>Opportunities</u>	<u>Strengths</u>	<u>Opportunities</u>
Learning in structured environments	Learning in spontaneous environments, driven by curiosity	Learning in spontaneous environments driven by curiosity	Learning in structured environments

Professor Randall's study suggests that judgment-oriented learners should be encouraged to formulate the practicing lawyer skills of framing questions to get at issues, and thereby avoid their "decid[ing] prematurely, on the basis of insufficient information, either that they are right or that there is nothing more to be done" in evaluating or solving a particular problem.⁸³ Conversely, perception-oriented learners "need practice in recognizing when it is time to be open, curious, and perceptive; and when it is time to stop looking and decide to act," — practice which can be provided by exercises (e.g., where there are intentional, but not fatal, ambiguities in the facts provided) to help the student identify those occasions "where seeking one more bit of information prevents a perceptive law student from making a legal connection that could have been made had the student been more decisive."⁸⁴

I designed a § 8(b)(7)⁸⁵ problem to focus in particular on the contrasting skills of judgment and perception-oriented learners. In that problem, Harbucks Harvesting has refused to recognize the United Farm Employees union (UFE) as the representative of its employees. Harbucks Harvesting provides bean sprouts used in the gourmet sand-

83. *Id.* at 98.

84. *Id.* at 98-99.

85. 29 U.S.C. § 158(b)(7) (2000) provides, in pertinent part, that unless a union is currently the certified representative of a targeted employer's workers, it will not picket that employer or any other employer with an object of forcing recognition if (A) the targeted employer has already lawfully recognized another union, (B) the NLRB has conducted a valid election within the last 12 months at the targeted employer, or (C) the union does not file an election petition with the NLRB "within a reasonable period of time not to exceed thirty days from the commencement of such picketing." A proviso to subsection (C) of this complex provision states that a union may picket or use other publicity to truthfully advise the public that a target employer does not employ its members or have a contract with it, unless the picketing induces others "in the course of [their] employment not to pick up, deliver or transport any goods or not to perform any services."

wiches served in the Borders café. Accordingly, UFE members have started picketing in front of several Borders stores in Atlanta. Some Borders employees are refusing to come to work when the pickets are there. Employees of Windborne Courier are also refusing to drive past the pickets to deliver overnight book shipments. Overnight book shipments between store locations is a featured service of Borders.

Borders' division president has asked that the picketing be stopped. Students must confront three questions: (1) have they been given enough facts to answer the client's question; (2) if not, what other facts do they need to evaluate the client's options; and (3) what defense might the UFE have for its conduct, and how might Borders rebut that defense?

Solving this problem requires a fusion of the judgment-oriented and perception-oriented learning styles. The judgment-oriented learner will come to the problem having read the structured materials in the Cox casebook and statutory supplement, having established for herself a framework to analyze the basic elements of § 8(b)(7).⁸⁶ This problem challenges students to use that knowledge in formulating the necessary questions to fill in the facts that I intentionally omitted from the problem. Seeking information is, of course, not so much of a challenge to the perception-oriented learner; bringing structure to the information gathered and closure to the information-gathering process are the principal challenges. This problem again plays to the strengths of both learning styles while encouraging learners of each style to see the value in developing strength in the complementary learning style.

By collaborating in their analysis and presentation of advice on this problem, my judgment-oriented and perception-oriented learners first identified four key questions that need additional factual development before the client can be properly advised:

1. Has the UFE been certified as the representative of Harbucks Harvesting employees through a secret-ballot election conducted by the NLRB? If so, § 8(b)(7) is inapplicable.
2. Did Harbucks Harvesting lawfully recognize another union? If so, § 8(b)(7) prohibits the picketing.
3. Had the NLRB held a secret-ballot election at Harbucks Harvesting regarding any union within the last 12 months? If so, § 8(b)(7) prohibits the picketing.
4. How long has it been since UFE started the picketing? Has the UFE filed a valid election petition with the NLRB within the 30 days after it started picketing? If so, § 8(b)(7) does not prohibit the picketing.

86. COX ET AL, *supra* note 16, at 591-609.

As to a possible defense for the union, the key question to be determined is: What exactly do the UFE's picket signs *say*? If they simply truthfully advise the public that Harbucks Harvesting does not employ members of the UFE and/or does not have a contract with the UFE, the picketing would appear to be protected under § 8(b)(7)'s publicity proviso. However, as the student teams quickly noted, the publicity proviso may not apply no matter what the UFE's picket signs say, because, Borders would argue, the UFE picketing has induced some Borders employees not to report to work and employees of Windborne Courier not to cross the picket line to make deliveries at Borders stores.

This problem was the most interesting of all that my students and I worked through in this active learning experience. It gave students a real taste of how a client may view the "important" facts of a problem very differently from how a lawyer may see the *legally* relevant facts. My students commented that they understood why the client supplied facts that emphasized the *impact* of the problem – picketing at the store, employees who do not report for work, deliveries that are not being made. These facts, the students observed, are the ones that reflect the immediate priorities of the client: stop the picketing, get the employees back to work, and clear the way for deliveries. Thus, my students concluded, it is very important for the lawyer to listen to these facts and to absorb what they say about the client's practical objectives for seeking legal advice. However, my students also emphasized that this problem helped them to understand that it was *their* job to know what facts are *legally* relevant and to formulate the questions they need to ask the client to obtain those facts. In this way, the judgment-oriented and perception-oriented learners come to recognize that it is important to understand the structure of the relevant legal rule, to be spontaneous and curious in obtaining the background facts that articulate both client objectives and legal possibilities, and to know when you have gathered enough facts to properly advise the client.

5. Reaction of All the Learners

Collaborative learning was new to my students. Accordingly, I knew at the outset of the semester that it would be very valuable to obtain continuous feedback from my students to determine whether the collaborative learning approach was working for them and what adjustments in the methodology might make the experience even

more effective for them.⁸⁷ I asked my students to reflect on how the collaborative problem-solving approach to our classes affected their educational experience. The students were uniformly enthusiastic and positive, bringing great reflection and insight to their classroom experience. Students responded to me through our email group, and I asked our faculty secretary to assemble their responses anonymously. A representative response was that collaborative problem-solving was quite valuable in digesting the reading materials and applying the principles from the case law to “real-life scenarios.” Students observed that, knowing beforehand that they would be applying their reading to work with their classmates, they began to read the pre-class assignments “very closely.”⁸⁸ Another very insightful respondent observed that the:

class approach you have initiated is an excellent thinking and oral skill building tool. I have noticed more overall class participation even when you have directed the post-exercise questioning to one specific person or team. This encourages students to read and be prepared for class, knowing that their group will be called on to answer. I feel motivated to help the group to resolve the issue.⁸⁹

Increased student participation by female students was also highlighted by student comments. A student with a different learning style also found value in the written portion of the collaborative experiences, observing that the collaborative problem-solving approach helped him realize that “what separates a good attorney from a great attorney is the ability to know how to conduct research and write well.”

A transfer student from a “first-tier” law school observed about the collaborative learning experience :

87. The idea of obtaining continuous student feedback throughout a course, although perhaps infrequently implemented in higher education, is not new. See, e.g., Eric W. Orts, *Quality Circles in Law Teaching*, 47 J. LEGAL EDUC. 425 (1997).

88. This confirms Professor Randall's observation that in a collaborative learning experience, students “perceive that they can achieve their learning goals if, and only if, all the members of the group also attain their goal.” Randall, *supra* note 8, at 245.

89. Once again, my students reactions confirmed Professor Randall's insights into collaborative learning:

With clear perceived positive interdependence, each student feels that she or he is part of a team and is responsible for the other group members. Students believe that they “sink or swim together.” Students have two responsibilities: to learn the assigned materials and skills, and to ensure that all members of their group have learned the material and skills. Positive interdependence promotes each group member's efforts for group success; and a situation in which each group member has a unique contribution to the joint effort because of his or her resources, role, or task responsibilities.

Randall, *supra* note 8, at . Similarly, “[p]romotive interaction,” a “trademark” of cooperative learning, “is a process in which individuals encourage and help each other's efforts to achieve, to complete tasks, to produce and to reach the group's goals.” *Id.* .

let me say that in a nutshell, I think it's great. I know that there were principles, statutes, and basic case law that needed to be covered in the first weeks of the course. But now that we have that under our belts, it makes class much more interesting when we can take what we've learned and apply it, essentially emulating what an attorney does every day. And I personally find that important points sink in better and stay with me longer when I am using them . . . instead of just reading and memorizing them.

A female student commented that collaborative learning exercises were a liberating approach for her in class that provided "a good example of the answer to that question you asked in class a few weeks ago about whether any of the female students felt intimidated about talking in their classes. It's the instructor who sets the tone for the class." In many classes at the law school conducted along traditional Socratic lines, this student observed, "females do fall victim to the 'good ole boy' bond that male students seem so easily to form with male instructors," a problem that she found happily absent from a collaborative environment that encouraged students of all learning types, genders, races, and ages to work together for common learning goals.

Another student summed up the overall class enthusiasm for the collaborative learning process by stating that the class would very much like to "continue this approach throughout the remainder of the semester."

V. BRINGING IT ALL TOGETHER THROUGH ACTIVE LEARNING: SUBSTANTIVE LABOR LAW, ADMINISTRATIVE LAW, AND APPELLATE STANDARDS OF REVIEW

The strands of the labor law course were brought together in a major writing assignment, distributed several weeks before the end of the term. Students were asked to prepare the majority opinion of a United States Court of Appeals in *NLRB v. Epilepsy Foundation of Northeast Ohio*.⁹⁰ The NLRB rendered a split decision in this case that overruled years of NLRB precedent. In sum, the NLRB majority found that Section 7 of the NLRA⁹¹ confers on an employee in a *non-union* workplace (i.e., in nearly 90% of American workplaces) the right to request to have a co-worker present at an investigatory interview demanded by the employer when the employee reasonably believes the interview might result in disciplinary action.⁹²

90. The National Labor Relations Board's 3-2 decision and order in this case are reported at 331 N.L.R.B. No. 92 (2000), enforcement granted in part, 268 F.3d 1095 (D.C. Cir. 2001).

91. 29 U.S.C. § 157 (2000).

92. This decision extended a similar right recognized for unionized employees by the U.S. Supreme Court in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). It is one of several decisions I distributed to my students that reflect an incredibly activist NLRB since John C. Truesdale be-

The problem asked each student to assume that she was the U.S. Circuit Judge assigned to write the majority opinion in a case before the Court of Appeals on the General Counsel's petition for enforcement of the NLRB's decision and order and on a cross-petition for review filed by the employer, the Epilepsy Foundation.⁹³ Each student had to decide whether to grant the General Counsel's petition to enforce the decision and order and to deny the Epilepsy Foundation's cross-petition for review, or whether to grant the Epilepsy Foundation's cross-petition for review and to deny the General Counsel's petition to enforce the decision and order. In the process of rendering this decision, each student was asked to explain carefully the reasons for her decision, including relevant case law and statutes,⁹⁴ as well as the reasons for rejecting other arguments. Although I did not distribute any of the actual briefs in the case (such as those filed with the NLRB in Washington), the relevant arguments (both legal and factual) were thoroughly set out in the NLRB's majority opinion by Chairman Truesdale and Members Fox and Liebman, and the "counter-arguments" were thoroughly set out in the partial dissents by Members Hurgten and Brame. To prepare the opinion, the students had to draw upon everything they had learned about the administrative law principles applicable to the agency determination process, the standards of review used by federal appellate courts in evaluating both legal and factual determinations by the NLRB, as well as substantive law.⁹⁵ The Instructions and Problem are set out in Appendix B to this article.

I encouraged the students to collaborate with one another as they explored the issues, considered the arguments, and worked their way

came Chairman in 1998. My students noted the irony that Chairman Truesdale's brief tenure has seen so many precedents reversed by the NLRB compared to the tenure of Chairman William B. Gould IV, a centrist who was unfairly maligned and mischaracterized by the Republican Congress as a "radical." See generally WILLIAM B. GOULD IV, LABORED RELATIONS: - LAW, POLITICS, AND THE NLRB - A MEMOIR (Boston 2000). I am currently preparing an article reviewing that book, and I discussed portions of the book extensively with my students for the illumination it threw on the difficult relations between the NLRB and a highly partisan Congress.

93. The procedures for obtaining review of a final NLRB order are described in 29 U.S.C. §§ 160(e), 160(f).

94. In addition to the NLRB's decision and order in *Epilepsy Foundation*, students were permitted to consult their casebook, statutory supplement, case supplement, the *Borders* Case Study, class notes, or any case handed out in the course. It was emphasized to students that the best resources would be the statutory supplement and the U.S. Courts of Appeals cases set out in the casebook. To further reinforce the students' comprehension of the procedural posture of an NLRB decision pending before a U.S. Appeals Court on cross-petitions, I advised students that they might consult the Library's copy of *HOW TO TAKE A CASE BEFORE THE NLRB* (ABA/BNA 6th edition & 1998 Supplement). Students were specifically admonished *not* to use any other sources (e.g., outside research, other Westlaw cases, law review articles, or other treatises), or any appellate court opinion that might be handed down in the *Epilepsy Foundation* case during the pendency of the assignment.

95. The Instructions and Problem are set out in Appendix B to this article.

through the analysis. I harbored no concern that the “opinions” I received from each of my “judges” would not be individualized work. In fact, the student work I reviewed reflected highly individualized approaches, yet a finished work product that was often more sophisticated than student papers I have graded in other courses. This, I believe, was due to the intellectual vetting process that students engaged in as they considered the problem and the various approaches to crafting a judicial opinion. In fact, it was evident that the collaborative problem-solving exercises assisted the students in approaching the final examination problem and made them comfortable with the collaborative approach to enhancing their own thinking.

I had evaluated many of the students in this Labor Law class in an earlier class in Employment Discrimination Law that I taught during the winter and summer trimesters. I did not use the collaborative learning approach in the Employment Discrimination Law class nor did I focus on problem-solving exercises, but I did require a similar final paper. That paper asked students to prepare a bench memorandum for a U.S. District Judge recommending the disposition of cross-motions for summary judgment in an employment discrimination law case. The quality of the papers in the Labor Law class were considerably higher than the quality of the papers in the Employment Discrimination Law class. Given the similarity of the subject matter, the final paper, the teacher, and the student population, I am persuaded by the objective information available to me that this improvement is primarily due to the collaborative learning and problem-solving approaches used in the Labor Law course.

The collaborative learning and problem-solving approaches resulted in improvements in three principal areas: (1) the ability of the students to succinctly state the facts of the case in a manner that foreshadowed and supported the analysis of the opinion; (2) the ability of the students to distinguish between a *de novo* approach to review and review under the correct deferential standards; and (3) the ability of the students to construct a logical, well-reasoned analysis of mixed issues of policy and law. The most striking improvements came in the quality and depth of the legal analysis, which overall displayed a surer grasp of logic and a better understanding of the substantive law to be applied.⁹⁶ Although I did not design a more elaborate methodology

96. A representative example of the Labor Law student paper that amply demonstrates these improvements is attached as Appendix C to this article. The paper of the student, Robert Diana, is remarkably prescient of the actual opinion and order entered in this case by the D.C. Circuit Court of Appeals on November 2, 2001, almost a year after the papers were submitted to me. *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001). Writing for the three judge panel, Judge Edwards enforced the Board’s extension of the Weingarten doctrine to non-unionized employment settings, but granted the employer’s petition for review

for mapping the effects of collaborative learning and problem solving on specific, pre-defined outcomes to be measured through the vehicle of a final paper, it is difficult to argue with the overall results, as reflected in Appendix C.⁹⁷

VI. CONCLUSION

As Professor Randall put it so well, “[t]he goal of legal education should be to help a diverse student body to achieve (that is, become lawyers), to develop positive interpersonal relationships, and to promote the psychological health of the students. These goals are reciprocally related — each influences the other.”⁹⁸ In developing a strategic plan to use labor law as a vehicle to deliver these student outcomes, it was necessary to look beyond the narrow goal of “teaching” labor law for its own sake. That is a narrow, traditional, “professor-centered” goal. Instead, as Professor Randall powerfully argues, legal education needs to reorient itself around a “student-oriented” goal. Accordingly, the strategic plan for my labor law course focused on enhancing student skill sets, recognizing a variety of learning styles, and constructing opportunities for students to recognize the strengths of their own learning styles and the mutual benefit of working with

to reverse the Board’s findings that the two charging parties had been fired for engaging in activity protected by Section 7 of the NLRA. The D.C. Circuit fundamentally disagreed with the NLRB’s characterization of the charging parties’ activity as “protected” and instead described their efforts to secure the discharge of their supervisor “plainly insubordinate behavior unrelated to the terms and conditions of employment.” Professor Reilly reports similar results from her own collaborative learning experiments, which are described in an article published after I completed this article and accepted this Journal’s offer of publication. Reilly, *supra* note 14, at 600-01.

97. Of course, the results of the collaborative learning problem solving approach can be measured in more objective detail. For example, the learning styles of the students in the labor law class would have been specifically identified by a pre-semester administration of the Myers-Briggs test. In addition, their final papers and grades in the course would have been specifically analyzed in light of their grades and papers in the Employment Discrimination Law course they previously took with me, as well as in light of their other grades and their written work in other courses. More detailed correlations might then have been developed between the course approach, the individual student’s learning style, the individual student’s previous performance, and the improvement in performance demonstrated by each student through the labor law course. This is a calibration process that I recommend to validate the results. For example, Professor Reilly has recently suggested a team selection methodology based on “gender, undergraduate major, law school grade point average” and grade in a first-year course (Torts) requiring substantially similar analytic skills. Reilly, *supra* note 15, at 596-97. Professor Reilly connects this team selection to a variety of skills acquisition measurements and collaborative evaluations, including interim team assessments by faculty; faculty monitoring of team progress; student self-assessment; and student preparation of “a reflective piece assessing their own collaborative skills and what they learned from the collaborative process”, which faculty evaluate “for thoroughness, thoughtfulness, and understanding of the for types of skills [i.e. communication, interpersonal, conflict-management, and task-management] required for and developed by collaborative learning.” *Id.* at 613.

98. Randall, *supra* note 8, at 222.

other students with differing learning styles. The classroom results suggest that this approach opens fertile ground for doing something meaningful to improve the effectiveness of legal education by using a student-oriented approach, rather than simply complaining about the inadequacies of legal education or about students who do not conform to the traditional "one-size-fits-all" classroom experience in law school. Continuous innovation in teaching methods and careful, strategic planning of the classroom experience centered on student learning styles are essential if legal education is to be of continued relevance and if the legal profession is to meet the many unfulfilled aspirations and needs of our diverse society.

**APPENDIX A:
SYLLABUS ORGANIZATION AND
CLASS OBJECTIVES**

WEEK 1 RUMBLINGS IN THE WORKPLACE, AND THE ROLE OF INJUNCTIONS

OBJECTIVES:

1. Learn the nature and scope of the basic federal labor laws
2. Learn the jurisdictional tests to determine whether particular employers or industries are covered by the federal labor laws
3. Learn the basic administrative role of the NLRB
4. Learn and apply the Norris-LaGuardia Anti-Injunction Act
5. Learn the protections and scope for employee self-help activity under the NLRA, regardless of whether the employees have a union
6. Define: what is a "union" (labor organization)?

WEEK 2 THE EMPLOYEES SEEK REPRESENTATION

1. Learn what employer actions interfere, restrain, or coerce employees in exercising their § 7 rights
2. Learn the limits of lawful restrictions on "solicitation" and "distribution" in the workplace
3. Learn about the mechanisms for union organizers to learn the identities of employees whom they seek to organize
4. Learn about secret-ballot elections and bargaining unit determinations by the NLRB
5. Learn about the administrative law principles of judicial review of NLRB representation cases

WEEK 3 PROPAGANDA WARS: THE UNION CAMPAIGN

OBJECTIVES:

1. Identify legal versus illegal statements by employers to employees regarding the exercise of their § 7 rights
2. Learn about threats of reprisal, misrepresentation of facts, inflammatory appeals, interrogation of employees, polling employees about their § 7 sympathies, employer-conferred benefits contemporaneous with union organizing,
3. Learn about union misconduct that violates employee § 7 rights
4. Identify when a company-sponsored action committee, work team, quality circle, roundtable, or similar management-employee group violates § 8(a)(2) ban on Company unions
5. Recognize limits on employer actions when confronted with rival unions both claiming to represent her employees

WEEK 4: BAD CONDUCT IN THE UNION CAMPAIGN, AND THE INEVITABLE UNFAIR LABOR PRACTICES

OBJECTIVES:

1. Understand the concept of “discrimination” that violates § 8(a)(3) under the NLRA
2. Learn the evidence relevant to § 8(a)(3) violations and the remedies available
3. Learn limited protections for supervisors under § 8(a)(3)
4. Understand and be able to apply the limited judicial review standards for administrative factual findings
5. Identify situations when the NLRB may order employers to recognize a union without a secret-ballot election
6. Identify situations when an employer may withdraw recognition from an incumbent union
7. Learn “contract-bar” rule
8. Learn “election-bar” rule
9. Learn “certification-bar” rule

WEEK 5 THE HONEYMOON IS OVER: THE CHALLENGE OF DELIVERING THE “GOODS” IN COLLECTIVE BARGAINING

Objectives:

1. Understand the principle of “exclusive representation” and its implications for representing the interests of members of discrete and insular minority groups
2. Understand the duties imposed by NLRA §§ 8(a)(3) and 8(b)(3) to bargain in good faith over terms and conditions of employment
3. Learn about the common subjects of collective bargaining
4. Understand the scope of the duty of the employer to disclose information to the union
5. Identify what “conduct” by the parties exhibits good-faith, versus bad-faith, bargaining

WEEK 6: STRIKING THE DEAL: PROPOSALS, CONCESSIONS, AND THE COLLECTIVE BARGAINING AGREEMENT

1. Understand the scope and significance of NLRA § 8(d)
2. Understand mandatory bargaining subjects, and the consequences for a bargaining issue to be characterized as mandatory
3. Understand permissive bargaining subjects, and the consequences for a bargaining issue to be characterized as permissive
4. Learn when “outsourcing” or “contracting out” work from bargaining unit employees is a mandatory bargaining subject

5. Learn when relocation of work from bargaining unit employees is a mandatory bargaining subject
6. Learn the extent of bargaining obligations over issues regarding retired employees
7. Understand the role of economic weapons (strikes by employees, lockouts by employers) in the collective bargaining process
8. Understand the concept of “impasse” in negotiations
9. Identify the remedies that the NLRB may impose for violating good-faith bargaining obligations

WEEK 7 OUT ON STRIKE!

OBJECTIVES:

1. Distinguish the rights of employees and of employers in an “economic strike” versus an “unfair labor practice” strike
2. When can economic striking employees be fired or disciplined?
3. What is a “permanent replacement” worker, and when can such workers be lawfully hired and retained?
4. Do striking employees have any right to be returned to work? When they do, how must the employer treat them to avoid violating § 8(a)(3)?
5. What issues are raised by employees who refuse to cross picket lines?

WEEK 8 BEYOND THE STRIKE: THE UNION TURNS UP THE HEAT, AND CROSSES THE LINE

Objectives:

1. Define “primary employers” and “secondary employers”
2. Distinguish primary economic pressure exerted on an employer from secondary economic pressure exerted on third-parties
3. Understand the §8(b)(4) limits on the use of secondary economic pressure
4. Distinguish picketing from handbilling and the consequences of each under § 8(b)(4) Distinguish picketing from appeals to consumers to boycott
5. Understand the “publicity provisos” to §§ 8(b)(4) and 8(b)(7)
6. Understand “hot cargo” agreements and the effect of § 8(e) on them

WEEK 9 LIFE UNDER THE CBA: GRIEVANCES AND ARBITRATIONS

Objectives:

1. Understand the concept of a “grievance”
2. Understand grievance procedures under CBAs
3. Understand the labor arbitration process
4. Learn how lawsuits under LMRA § 301 are used to enforce CBAs, including the obligation to arbitrate
5. Learn the scope of judicial review of an arbitrator’s award
6. Learn how federal court injunctions may be used to stop strikes over arbitrable issues (and the significance of a “no-strike” clause in a CBA)
7. How is a dispute handled if it is *both* a CBA violation *and* a ULP?

WEEK 10 LIFE AS A UNION MEMBER (PART I: FAIR REPRESENTATION)

Objectives:

1. Learn what rights an individual employee has to enjoy and enforce the “duty of fair representation” (DFR) against his/her union
2. Understand the union’s duty in negotiating the CBA and its relationship to the DFR.
3. Learn the DFR rights of an individual employee to have his/her grievance(s) processed by the union
4. How do employees assert breach-of-DFR claims?

WEEK 11 LIFE AS A UNION MEMBER (PART II: UNION SECURITY)

Objectives:

1. Learn when and how an employer and union may agree that union membership is a prerequisite to employment (i.e., a union-security clause)
2. Learn when and how an employer and union may agree that rather than union membership, payment of “core” financial support is a prerequisite to employment
3. Learn about the authorization for and scope of state “right-to-work” laws and how they affect union-security clauses
4. How do hiring hall agreements between unions and employers work?
5. When and how can the union and the employer use the CBA to give certain union officials preferred job status?

WEEK 12 FEELING THE WRATH OF THE UNION: UNION DISCIPLINE OF ITS MEMBERS

Objectives (questions for representing individual union members when the union subjects him or her to internal discipline):

1. What kinds of discipline may a union impose on members who violate the union constitution or properly adopted union resolutions, such as an authorized strike vote?
2. What limits do NLRA §§ 7 and 8(b)(1)(A) impose on internal union discipline?
3. What procedural rights does § 101(a)(5) of the LMRDA guarantee to union members before the union may lawfully discipline them?
4. Does NLRA § 8(b)(1)(A) authorize the NLRB to regulate the size or reasonableness of fines imposed by a union on a member?
5. Does NLRA § 8(b)(1)(A) prohibit a union from fining members who tender resignations that the union constitution provides are not valid?
6. How does a union member's unfettered right to resign from union membership relate to the union's authority to punish members without violating NLRA § 8(b)(1)(A)?
7. To what extent is an employee required by a union security agreement to assume financial "membership" (as permitted by NLRA § 8(a)(3)) subject to union discipline?
8. Can supervisors ever be the subject of union discipline and, if so, does NLRA § 8(b)(1) provide any protection to them from union discipline?
9. What protections from union-imposed "discipline" are available under LMRDA § 101 and under consistent bodies of state law as allowed by LMRDA § 103?
10. What is the scope of the provisos that provide exceptions to the otherwise broad scope of free expression by union members protected by LMRDA § 101(a)(2)?

WEEK 13 FEDERAL LABOR LAW PREEMPTION

Objectives:

1. Understand the doctrine of federal preemption generally
2. Understand the kinds of state laws that may be preempted by federal labor law
3. Learn the various theories of federal labor law preemption
4. Learn the areas of state law that federal labor law does not preempt
5. Understand the consequences when federal labor law preempts state law

APPENDIX B:
LABOR LAW: EMPLOYEE RIGHTS, EMPLOYER
PRIVILEGES IN NON-UNION AND
UNION WORKPLACES

PROFESSOR JEFFREY A. VAN DETTA

FALL TRIMESTER 2000
FINAL EXAMINATION

(Distributed October 17, 2000; deliver to Faculty Secretary, by 3 PM on Wednesday, December 13, 2000).

For your final examination, you shall write the *MAJORITY OPINION* of a United States Court of Appeals in *NLRB v. Epilepsy Foundation of Northeast Ohio*. The National Labor Relations Board's 3-2 decision and order in this case is reported at 331 N.L.R.B. No. 92 (July 10, 2000). You can locate and download or print this opinion from Westlaw using the citation 2000 WL 967066.

GENERAL INSTRUCTIONS: Assume that you are the U.S. Circuit Judge to whom the task has been assigned to write the majority opinion. The General Counsel has filed a petition for enforcement of the NLRB's decision and order. The employer, the Epilepsy Foundation, has filed a cross-petition for review of the NLRB's decision and order. You must decide whether to grant the General Counsel's petition to enforce the decision and order and to deny the Epilepsy Foundation's cross-petition for review, or whether to grant the Epilepsy Foundation's cross-petition for review and to deny the General Counsel's petition to enforce the decision and order. You must also carefully explain the reasons for your decision, including relevant case law and statutes. You must also address the arguments you are rejecting, and explain the reasons for your rejection of those arguments, including relevant case law and statutes. The arguments (both legal and factual) are very thoroughly set out in the NLRB's majority opinion by Chairman Truesdale and Members Fox and Liebman, and the "counter-arguments" are very thoroughly set out in the partial dissents by Members Hurgten and Brame.

SOURCES: In addition to the NLRB's decision and order in *Epilepsy Foundation*, you may consult your casebook, statutory supplement, and case supplement; the Case Study; your class notes, or any case I've handed out in the course. Your best resources will be the statutory supplement and the U.S. Courts of Appeals cases set out in

your casebook. Although it is not necessary, you may consult, if you wish, the Library's copy of *HOW TO TAKE A CASE BEFORE THE NLRB* (ABA/BNA 6th edition & 1998 Supplement). You may *not* use ANY other sources (e.g., outside research, other Westlaw cases, law review articles, other treatises, or any appellate court opinion that may be handed down in the *Epilepsy Foundation* case during the pendency of this assignment).

FORMAT: ALL opinions SHALL conform to these format rules, or they will be rejected for filing with the Clerk of the Court of Appeals (a/k/a Professor Van Detta):

1. Type font: 12-point. All opinions MUST be typewritten or word-processed in Courier, Courier New, Times Roman, or New Times Roman type font not smaller than 12 characters per inch.
2. Margins: 1-inch (top, bottom, sides) and justified
3. Pagination: page numbers at bottom center of each page
4. Spacing: Double-spaced
5. Page limit: 35 pages MAXIMUM!
6. DO NOT WRITE YOUR NAME ON THE OPINION! You will pick up blue books at our last class meeting. Write the blue book number on the examination. Keep your blue book number receipt; THAT WILL BE YOUR BLIND GRADE NUMBER. Turn in the opinion along with the blue book.

ELEMENTS: Each opinion SHALL be organized as follows:

1. **CAPTION:** Court name and caption of the case (you must figure out for yourself to what U.S. Court(s) of Appeals this case would go)
2. **STATEMENT OF FACTS:** VERY short and TO THE POINT (you need to create a summary of only the facts that you really need to explain the Court's decision; DO NOT JUST COPY THE FACTS FROM THE NLRB's OR ALJ's OPINION!). I would spend no more than 2 pages on this section.
3. **PROCEDURAL HISTORY:** Explain the steps below and explain how this case got to the court; identify the specific procedures and statutory sections relevant to those procedures. I would spend no more than 3 pages on this section.
4. **ISSUE(s):** Clearly state the actual issue(s) that the Court of Appeals is/are being asked to decide. Make sure you understand and incorporate the appropriate standard of appellate review applicable to each issue.

5. **ANALYSIS OF THE ISSUE(s):** See the General Instructions above
6. **CONCLUSION:** Here you will announce the actual disposition of the case. State how the Court is ruling on each of the petitions. What holding have you reached on each issue(s)? State it clearly here, with a very short summary of the reasons.
7. **ORDER:** On behalf of the Court, you need to explain the consequences for the parties of the disposition of each of the petitions. For example, what the next procedural steps in the case will be in light of the Conclusion (holding) that you reach.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EPILEPSY FOUNDATION OF	*
NORTHEAST OHIO	*
Petitioner,	*
	*
v.	* No. 00-6099/6250
	*
NATIONAL LABOR RELATIONS	*
BOARD	*
Respondent.	*
	*

On Petition for Review and Cross-Application for Enforcement of
an Order

Of the National Labor Relations Board

Nos. 8-CA-28169 and 8-CA-28264

Argued: November 13, 2000

Decided and Filed: December 13, 2000

Before: SOLOMON, KRUPANSKY, and BOGGS, Circuit Judges
Counsel Argued: Yul B. Dilbert, DILBERT & DILBERT LLP,
Cleveland, Ohio for Petitioner. John B. Badd, NATIONAL LABOR
RELATIONS BOARD, APPELLATE COURT BRANCH, Wash-
ington, D.C., for Respondent.

OPINION

I. STATEMENT OF FACTS

ALBIE SOLOMON, Circuit Judge. Petitioner Epilepsy Foundation of Northeast Ohio provides services to persons affected by epilepsy throughout northeast Ohio. In 1993, Petitioner was selected to conduct a 3-year demonstration project preparing teenagers with epilepsy for their ultimate transition from school to work. The project was funded by a grant from the National Institute of Disability and Rehabilitation Research (NIDRR). Dr. Ashrafur Hasan was hired by Petitioner to fill a position as a Transition Specialist on the project. Arnis Borgs was hired by Petitioner in June 1994 as a part-time coach and later became a full-time Employment Specialist. Borgs began work on the project in early 1995. Petitioner's Director of Vocational Services Rick Berger was Borgs' and Hasan's immediate supervisor on the pro-

ject. Berger in turn reported to Petitioner's Executive Director Christine Loehrke.

Beginning around August 1995, Hasan and Borgs together engaged in concerted activity pertaining to the working environment and the management of the NIDRR project. These activities included a "brown bag" lunch program, where employees regularly met to discuss matters of mutual concern, and formation of an "ethics" committee, which gave employees the opportunity to address problems related to employee relations and delivery of service to clients. During this period, both Hasan and Borgs experienced problems in their working relationships with Berger and Loehrke. Berger and Loehrke questioned the need for the meetings organized by Hasan and Borgs, and did not attend when the meetings were held. In addition, both Hasan and Borgs received verbal warnings, accusations of insubordination, and personnel file entries as a result of an incident involving the use of an interpreter.

On January 17, 1996, Hasan and Borgs prepared and submitted a memo to Berger and Loehrke concerning the NIDRR project. The memo reiterated a previous conversation they had with Berger, stating that his supervision of the program operations performed by Hasan and Borgs was "not required." After learning that Berger and Loehrke were not happy with the memo, Hasan and Borgs submitted an eight-page memo on January 29 elaborating upon the reasons for the January 17 memo. On February 1, 1996, Berger informed Hasan and Borgs that Loehrke wanted each of them to meet individually with her and Berger. Borgs offered to meet with Loehrke alone, but refused to meet with both Berger and Loehrke. After Loehrke refused Borgs' offer, Borgs requested Hasan's presence at the meeting. After Loehrke refused Borgs' request, Borgs reiterated his refusal to meet with both Berger and Loehrke. Borgs was then sent home for the day. The next day, Borgs met with Loehrke and Jim Wilson, Petitioner's Director of Administration. At that meeting, Borgs was notified of his termination. A termination letter was provided, stating the reasons for his termination as failing to build constructive work relationships with management personnel, resistance to accepting performance goals, unwillingness to accept supervision, and gross insubordination for his refusal to meet with Berger and Loehrke on February 1.

Hasan did meet with Berger and Loehrke on February 1. At the conclusion of the meeting, Hasan received a written warning stating that the January 17 memo constituted gross insubordination and any further acts of misconduct or insubordination would result in immediate discharge. On March 13, 1996, Berger provided Hasan with a list

of his written performance objectives for the coming year, and requested Hasan's review and sign-off. Hasan subsequently refused to sign off on the objectives. On March 25, 1996, Hasan was notified by Loehrke of his termination. On March 29, he was given a letter signed by Loehrke stating that he was being terminated for his conduct over previous nine months, refusal to accept supervision on NIDRR project, and various confrontations with staff members. Loehrke later testified that Hasan's refusal to sign the statement of personal project objectives provided by Berger on March 13 constituted gross insubordination, and was the specific reason for Hasan's termination.

II. PROCEDURAL HISTORY

After their respective terminations, Arnis Borgs filed charges against Petitioner on April 10, 1996, Ashraful Hasan following on May 13, 1996. The Regional Director, Region 8, National Labor Relations Board, issued a consolidated complaint on November 14, 1996, alleging that Petitioner had violated § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158 (1999), as amended. Petitioner filed a timely answer denying any violation of the Act. Allegations of additional unfair labor practices not subject of this opinion were also made against Petitioner.

Petitioner and the General Counsel submitted briefs, and a hearing was conducted in Cleveland, Ohio, on April 15-17, 1997, at which all parties were provided full opportunity to provide testimony, perform cross-examination of witnesses, and present other evidence.

On January 2, 1998, Administrative Law Judge Scully issued his decision, finding that Petitioner did not engage in unfair labor practices in the reprimands and discharges of Borgs and Hasan.

Respondent General Counsel made two specific allegations of violations pertaining to the discharge of Borgs. The first allegation was that Petitioner discharged Borgs in retaliation for prior concerted activities by Borgs which resulted in a reprimand. Finding an unfair labor practice by Petitioner for the reprimand related to these events, the judge raised the inference of a retaliatory discharge of Borgs. The judge then applied the principles set forth in *Wright Line, A Division of Wright Line, Inc. and Bernard R. Lamoureux*, 251 N.L.R.B. 1083 (1980) to the facts of the case. Under *Wright Line*, the General Counsel has burden of proving that employee's conduct protected by § 7 was substantial or motivating factor in discharge. If proven, the burden shifts to the employer, who may still avoid a violation by proving that the discharge was for job-related reasons. The judge subsequently concluded that Borgs would have been discharged anyway, and therefore his discharge was lawful. The basis for this conclusion was that

Borgs' discharge centered around the 1/17/96 memo, representing Borgs' gross insubordination for refusing to comply with a direct order to submit to Berger's supervision, thus providing Petitioner valid justification for the discharge. The judge ruled the 1/17 memo as not protected activity, therefore allowing Petitioner to discharge Borgs for cause.

The second allegation was that Petitioner unlawfully discharged Borgs because he was denied the right to be represented by a fellow employee, Hasan, at an investigatory interview that he reasonably believed could result in disciplinary action against him. See *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). The judge applied the prevailing Board holding on point as described in *E.I. DuPont & Co. De Nemours and Walter J. Slaughter*, 289 N.L.R.B. 627 (1988), which restricts *Weingarten* rights to employees in unionized workplaces requesting the presence of a union representative. Therefore, the judge ruled that Borgs' refusal to meet with Berger and Loehrke was not protected, and was gross insubordination for which he could be properly disciplined under the Act.

On the issue of Hasan's reprimand and discharge, the judge found insufficient evidence to support the allegation that Petitioner harbored animus toward Hasan based on protected, concerted activity, therefore discharging him for unlawful reasons. As in Borgs' case, the judge concluded that the 1/17/96 memo was not protected activity. In addition, there was sufficient evidence of several incidents not involving protected activity where Hasan demonstrated insubordinate and/or disruptive behavior, providing sufficient cause for his ultimate discharge.

The General Counsel filed exceptions to the judge's ruling, and the full Board considered the decision in light of the exceptions. On July 10, 2000, the Board reversed the judge's findings with respect to the reprimands and discharges of both Borgs and Hasan.

The Board first examined the circumstances surrounding Borgs' discharge. The key issue in this analysis was whether Borgs was lawfully discharged because he was denied the right to be represented by a fellow employee, Hasan, at the investigatory interview that he reasonably believed could result in disciplinary action against him. Although the Board concluded that the judge correctly applied relevant Board precedent in his conclusion, the Board found such precedent to be inconsistent with the rationale articulated in the *Weingarten* decision. Consequently, the Board overruled that precedent, finding that *Weingarten* also applied in a nonunion setting. The Board cited a return to its previous holding in *Materials Research Corporation and Steve*

Hochman, 262 N.L.R.B. 1010 (1982), therefore ruling Borgs' discharge an unlawful violation of § 8(a)(1) of the Act.

The Board next examined the circumstances surrounding Hasan's discharge. The key issue in this analysis was whether the 1/17/96 memo was protected activity. In contrast to the judge's focus on the specific content of the memo in his conclusion, the Board considered the memo in the context of surrounding facts and circumstances. Finding the 1/17 memo to be "inextricably intertwined" with the 1/29 memo, the Board concluded that the 1/17 memo was a clear attempt by Borgs and Hasan to raise issues related to their conditions of employment, and therefore protected activity. Citing circumstances pertaining to Hasan's reprimand and ultimate termination, the Board also concluded that the Petitioner bore animus toward Hasan as a result of such protected activity, and this animus was the motivating factor in his discharge. Applying the principles of *Wright Line* to the facts, the Board concluded that Petitioner had not shown that Hasan would have been discharged in the absence of protected activity, and therefore Hasan's discharge was a violation of § 8(a)(1) of the Act.

Accordingly, the Board ordered the reinstatement of Borgs and Hasan to their former jobs with full back pay. Subsequent to this ruling, Petitioner applied for review of the Board's ruling by this Court, and Respondent applied for enforcement of the Board's order.

III. ISSUES PRESENTED

1. Whether the principles set forth by the Supreme Court in *N.L.R.B. v. J. Weingarten* should be extended to employees in nonunionized workplaces.
2. Whether the Board abused its discretion in the determination of an Epilepsy Foundation unfair labor practice in the discharge of Arnis Borgs.
3. Whether the Board abused its discretion in the application of the *Wright Line* holding in the determination of an Epilepsy Foundation unfair labor practice in the reprimand and discharge of Dr. Ashraful Hasan.

IV. STANDARD OF REVIEW

In reviewing an order issued by the Board, the Court must accept the Board's finding of fact "if supported by substantial evidence on the record considered as a whole," 29 U.S.C. § 160(f) (1999). The Board's primary responsibility is to apply the general provisions of the Act to the complexities of industrial life. The Board is "one of those agencies presumably equipped and informed by experience to deal with a specialized field of knowledge, whose findings within that field

carry the authority of an expertness which courts do not possess and therefore must respect.” *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). Where the Board’s construction of the Act is reasonable, it should not be rejected “merely because the courts might prefer another view of the statute.” *Pattern Makers’ League of North America v. N.L.R.B.*, 473 U.S. 95, 105 S.Ct. 3064, 87 L.Ed.2d 68 (1985).

We review the Board’s ultimate determination generally for abuse of discretion. “Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including that body of evidence opposed to the Board’s view.” *Universal Camera*. However, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron, U.S.A. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

V. EXTENSION OF *WEINGARTEN* RIGHTS IN A NONUNION SETTING

Our examination of this issue begins with a review of the prevailing legal authority on this matter. The *Weingarten* Court held that an employee who reasonably fears that an investigatory interview may result in disciplinary action has the right to have a union representative present at the interview. The employer may not deny the request, and may not subject the employee to adverse treatment for refusing to attend unassisted. However, the employer has the right to refuse to bargain with the employee or assistant, and retains the right to altogether refuse to conduct the interview. In addition, the employer is free to discipline the employee for the conduct in question without an interview. The Court’s underlying rationale for their holding was grounded in a literal interpretation of § 7 of the Act, protecting “concerted activities for the purpose of mutual aid or protection.” 29 U.S.C. § 157 (1999). The factual background in *Weingarten* involved a unionized employee, working under a collective bargaining agreement, requesting the presence of a union representative. The Court did not, however, specifically limit its holding to a union setting, leaving for interpretation whether or not the *Weingarten* rule applied in a nonunion setting.

The Board first addressed this issue in *Materials Research Corporation and Steve Hochman*, 262 N.L.R.B. 1010 (1982), finding that the *Weingarten* rule applies in a nonunion setting. The Board concluded

that the presence of a nonunion coworker is concerted activity for mutual aid, and therefore derived from and protected under § 7.

The Board reversed *Materials Research* in *Sears, Roebuck and Co.*, and *International Union Of Electrical, Radio And Machine Workers*, AFL-CIO-CLC., 274 N.L.R.B. 230 (1985). The Board specifically rejected the *Materials Research* reliance on § 7, concluding that extending the *Weingarten* right to nonunion workers interferes with; (1) the operation of the exclusivity principle of § 9(a) of the Act, which provides that the employer is required to bargain only with a majority representative, and (2) the employer's freedom to deal with its non-represented employees on an individual basis.

The Board reconsidered *Sears*, and modified its stance in *E.I. DuPont & Co. De Nemours and Walter J. Slaughter*, 289 N.L.R.B. 627 (1988). The Board maintained its posture that *Weingarten* rights do not apply in nonunion settings, but did not rule out other interpretations. Although the Board based this ruling on a conclusion that the Act does not compel a finding that *Weingarten* rights are applicable only in unionized workplaces, it would not specifically return to the *Materials Research* holding. The Board provided significant rationale for this conclusion, grounded in practical considerations. First, the Act's purpose to redress the balance of power between labor and management is less significant in nonunion setting. Second, in a non-union setting, the employee representative has no obligation to represent entire group's interests, therefore it is less likely that the representative's presence will safeguard the group's interests. Third, it is less likely that a nonunion employee representative would have skills equivalent to a union representative. Fourth, assertion of the *Weingarten* right in a nonunion setting could be more detrimental to the employee if the employer decided to forego interview altogether. Subsequently, in returning to the *Materials Research* holding in the matter of *Arnis Borgs*' discharge, the Board has come full circle on this issue.

We agree with the Board's ruling reinstating the principles set forth in *Materials Research*, and uphold the extension of employee rights under *Weingarten* to a nonunion setting. Our holding today is reached after careful examination of both the statutory, practical, and equitable considerations of this issue.

To begin, the Act provides that "employees shall have the right to self-organization, to form, join, or assist labor organizations." 29 U.S.C. § 157 (1999). Section 2(5) of the Act defines a labor organization where (1) employees participate, (2) the organization exists, at least in part, for the purpose of "dealing with" employers, and (3) these dealings concern "conditions of work" or other statutory sub-

jects, such as grievances, labor disputes, wages, rates of pay, or hours of employment. *Electromation, Inc.*, 309 N.L.R.B. 990 (1992). Section 7 of the Act further provides employees the right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” *N.L.R.B. v. City Disposal Systems*, 465 U.S. 822, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984). The very essence of these provisions suggest actions of more than a single employee (concerted, collective, mutual), and considers actions of two or more employees that of a “labor organization” under certain circumstances. The situation at issue (Borgs requesting the presence of Hasan at an investigatory interview where Borgs reasonably believed the interview could lead to disciplinary action) clearly falls within the parameters suggested by §§ 2(5) and 7. Further, there is no language contained in those sections making a clear distinction between a union and nonunion setting. Therefore, it is reasonable to conclude that § 7 of the Act does not specifically preclude protection of the aforementioned activity in a nonunion setting.

Residing within the statutory parameters of protected activity in this situation, there are numerous practical considerations for our holding. First and foremost, the presence of a nonunion assistant at the investigatory interview provides the affected employee with a reasonable possibility of similar aid and protection to that provided by a union assistant in a union setting. The nonunion assistant acts as a corroborating witness to the interview, thus discouraging management unfair labor practices. The nonunion assistance helps equalize the balance of power between the employer and employee, which is commonly imbalanced toward the employer in a nonunion setting. Further, the presence of a third party in the interview provides the possibility of enhanced communication between the affected parties. Employees are provided with reasonable assurances of possible aid in future similar situations, as the benefit of the nonunion assistant becomes “mutual” throughout the work location.

Throughout the previous case law and vigorous dissents to prior holdings on this issue, several consistent arguments against the implementation of this rule have emerged. These arguments center on the availability of the option of a nonunion assistant in *every* like situation for *every* employee in *every* work location. Whereas a union assistant in a union setting is generally a standard feature of the collectively bargained discipline process, it is argued that the nonunion representative is not motivated to act for all employees. He is not assured to possess the expertise or special knowledge to provide meaningful assistance to the employee under investigation. Further, the presence of the nonunion representative further complicates the matter for the af-

affected employee. To these arguments, we state that there is a measure of validity to them in some, but not all cases. We venture to say that these occurrences are all within the realm of reasonable possibility. However, the general detrimental effects outlined by these arguments are speculative at best. The benefits of this rule clearly outweigh the detriments. From a clearly practical standpoint, the availability of the option to the nonunion employee supercedes any detrimental arguments that have not been shown to be reasonably expected in most like situations, and is an imperative § 7 right that must be afforded to every employee whenever possible. Whether circumstances allow the employee to take full benefit of the option is of secondary importance.

From an equitable standpoint, the rule that we announce today clearly provides nonunion employees the same protection as unionized employees under the Act. In our view, this rule upholds the purpose of § 7. We recognize the numerous arguments imputing collective bargaining issues and implications into this situation. These arguments underscore our strong desire to clear the smoke away from this issue, erase the blur brought about by the union/nonunion distinction.

In his dissent to the Board's ruling on Borgs and Hasan, Member Hurtgen argues that it is clear that the Court in *Weingarten* did not envisage rights to representation in nonunion setting, and that the issue centered on existence of collective bargaining agreement. Therefore, we would be precluded from extension of this holding into a nonunion setting. In our view, however, this right is not, should not be, and does not need to be dependent on collective bargaining agreement. Member Hurtgen also argues that *Weingarten* makes several clear references to union setting. The *Weingarten* court provided a ruling applicable to the issue presented, which happened to include a collectively bargained work relationship between the employer and employees. The *Weingarten* court was not asked to determine the applicability of their rule to an environment different from that presented, and they did not do so. However, it should be noted that although the opportunity presented itself, the *Weingarten* court did not specifically preclude rights in nonunion setting. Therefore, we conclude that there is nothing in *Weingarten* specifically precluding us from the ruling which we render today.

Member Hurtgen also warns that under the Act, an employer in a nonunion setting is completely free to deal with an employee on an individual basis, and that our rule will compromise that long-standing right. To those arguments we say that prior to our ruling, the Board blurred the line between union and nonunion settings. We announce a narrow holding today, applicable to a single specific situation only. To

impute such far-reaching implications into our holding as Member Hurtgen has overstated the application of the rule, and injects it into situations clearly not mandated by this Court.

In his dissent to the Board's ruling on Borgs and Hasan, Member Brame argues that this ruling creates a representational right in employees who have not chosen to be represented. Although true, it also must be noted that in no situation is the employee forced to invoke this right. Further, it is hardly reasonable to conclude that the right to representation in an investigatory interview may be correlated to the full suite of "representation" rights that Member Brame implies, such as union affiliation, representation elections, collective bargaining agreements, contract-mandated grievance procedures, etc. In our view, Member Brame's argument unreasonably stretches our holding into ramifications clearly not intended by this Court.

Member Brame also cites a conclusion that this rule creates a "hybrid" relationship between management and employees, whose existence justified solely by the § 7 call for employee mutual aid and protection. "It is a relationship of potential cost and limitations for the employer which exists without reference to other applicable provisions of the Act; one that exercises its powers without being subjected, in any way, to the responsibilities imposed upon other entities that exercise such powers, and it is a relationship to which the employer must render deference without being provided the normal safeguards which would otherwise be available." 331 N.L.R.B. 92 (2000). This is an argument which, in our view, again imputes an unreasonable scope of application into a narrow holding. This admittedly altered relationship between employers and employees requires employers to deal differently with employees for purposes of a single clearly-defined situation (investigatory review) as opposed to all other terms and conditions of employment. In our view, this holding provides a rule no different than those applicable to nonunion employers under various state and federal laws, such as those under OSHA and/or Title VII, for example. A nonunion employer is not completely free from adherence to any rules with respect to the terms and conditions of employment. He must be aware of a myriad of responsibilities to his employees. To plead that our rule presents a conundrum of confusion for the employer, as Member Brame suggests, is unreasonable.

In summary, the rule we announce today is in concert with the spirit and intent of the rights provided under the Act. This rule is easily understood to the reasonable employer and employee alike. It is applicable to a single, well-defined situation only. Its practical application is easily administered, does not present practical detriments, and also allows for either party to pursue a course of action without invok-

ing it. Most importantly, the benefits of this rule outweigh the detriments, providing employers and employees yet another opportunity to settle differences pertaining to terms and conditions of employment without judicial intervention.

VI. THE DISCHARGE OF ARNIS BORGS

The Board's opinion stated that "the judge found that the Respondent discharged Borgs for his persistent refusal to comply with Loehrke's directive to meet alone with her and Berger." 331 N.L.R.B. 92 (2000). This conclusion limited the Board's focus pertaining to Borgs' termination, and directly resulted in the Board's finding that Borg's termination was unlawful. We find that the Board erred in this reasoning by disregarding additional reasons for Borgs' termination, which therefore distorted the Board's analysis of the lawfulness of the termination.

The Board's conclusion is partly true – Borgs' refusal to meet alone was a factor in his termination, but not the only stated factor. The termination letter provided to Borgs documented three additional specific reasons - failing to build constructive work relationships with management personnel, resistance to accepting performance goals, and unwillingness to accept supervision. The 1/17 memo was cited as an example of the last reason.

The judge found that Petitioner indeed unlawfully disciplined Borgs for engaging in protected activities not part of this action, and raised the inference of a retaliatory discharge for Borgs participation in those protected activities. However, the judge applied the *Wright Line* analysis, and concluded that Petitioner established that it would have discharged Borgs even in the absence of the aforementioned protected activities on his part. The Board consequently reviewed this finding, and improperly focused their analysis on a single factor – Borgs' refusal to meet alone, and based their conclusion on that factor alone. Therefore, the Board's conclusion was not reached based on a proper application of the prevailing law, and must be reversed. Today we have determined that one of the four given reasons for Borgs' termination was in fact protected activity. The additional factors for the termination put forth by Petitioner to Borgs are on their face reasonable, and raise the presumption of validity. Nevertheless, the question remains as to whether Borgs would have been discharged anyway based on certain activities clearly stated by Petitioner. The Board erred in not examining these factors and integrating them into a *Wright Line* analysis to determine whether Borgs' termination was lawful.

We hereby reverse the Board's finding that Borgs' termination was unlawful, and remand to the Board for review in accordance with the principles stated above.

VII. THE DISCHARGE OF ASHRAFUL HASAN

As was the case with Borgs, Petitioner provided Dr. Ashraful Hasan a termination memo signed by Christine Loehrke. Loehrke's memo cited the specific reasons for the discharge as Hasan's refusal to accept supervision on NIDRR project, and various confrontations with staff members. At the hearing, however, Loehrke testified that Hasan was terminated for his refusal to sign a statement of personal project objectives given to him by Berger. Loehrke characterized Hasan's actions in this incident as willing and defiant, constituting gross insubordination and justifiable grounds for discharge.

Both the judge and the Board focused on the issue of whether the 1/17 memo was protected activity as the pivotal issue in their analysis of Hasan's discharge. This is because the General Counsel alleged that Loehrke harbored animus toward Hasan based on the 1/17 memo, leading to his discharge. Counsel proffered the memo as protected activity, therefore making the discharge unlawful. The judge's conclusions were based on a literal examination and interpretation of the memo, with the resulting finding that nothing within the four corners of the memo could be construed as protected activity. The Board, however, evaluated the memo in a much broader context than the judge to arrive at its conclusion that the memo constituted protected activity, and therefore rendering Hasan's termination unlawful. We reverse the Board's findings and deny enforcement of their order to reinstate Hasan. The Board's analysis erred in three ways as described below.

The Board first erred in their analysis of the 1/17 memo, and their conclusion that it constituted protected activity. The Board correctly relied on the rule set forth in *Caterpillar, Inc.*, 321 N.L.R.B. 1178 (1996), stating that an attempt by employees to cause the removal of their supervisor is protected when "it is evident that [the supervisor's conduct] had an impact on employee working conditions." However, the Board erred by imputing meaning into the memo that cannot possibly be reasonably concluded. There is no showing in the memo of any reasons for Borgs' and Hasan's dismissal of Berger's supervision. There is no elaboration in the memo of the specific impact of Berger's supervision on Borgs' and Hasan's working conditions. There was simply the statement that Berger's supervision was no longer required. The Board states the obvious in concluding that Berger's supervisory conduct had an impact on Hasan's working conditions – this statement

is essentially true for any employer/supervisor relationship. What the Board failed to show is where in the memo the impact is “evident,” as specifically stated in *Caterpillar*. In our view, it is unreasonable to conclude that such brief and simple wording held any greater meaning than the employees’ dismissal of their supervisor’s oversight, and it is therefore an abuse of the Board’s discretion to conclude as such.

The Board furthered their error in their conclusion that the 1/17 and 1/29 memos were “inextricably intertwined,” and therefore should be viewed in the context of protected activity. In our view, the Board again impermissibly expanded the scope of the analysis. Nowhere in the record was the 1/29 memo mentioned as a factor in Hasan’s discharge. It was admittedly drafted by Borgs and Hasan as a reaction to their realization that the 1/17 memo had angered Loehrke. In addition, Borgs and Hasan also waited a full twelve days to draft the memo. Given these facts, we agree with the judge’s conclusion that the 1/29 memo was after-the-fact damage control. We do not agree with the Board’s imputation of the 1/29 memo into the “meaning” of the 1/17 memo. Their action creates a standard that has no discernable limit, a slippery slope which would be difficult if not impossible to adjudicate. We therefore conclude that the Board overextended its reasoning that the 1/17 memo was protected, and rule that the 1/17 memo was unprotected activity.

Given our holding that the 1/17 memo was unprotected activity, we now focus on the additional reasons the Board relied on in their conclusion that Petitioner’s animus toward Hasan was the motivating factor in Hasan’s discharge. The Board determined that concerns raised by Loehrke over Hasan’s conduct over the nine months prior to termination included Hasan’s protest of written warnings being placed into his and Borgs’ personnel files. The Board further characterized this activity as protected, and noted that the judge reached the same conclusion. What the Board failed to mention was that the judge found no evidence to support an inference of Petitioner’s animus based on Hasan’s protected activity “to the extent that it would violate the law in order to put a stop to the activity.” 331 N.L.R.B. 92 (2000). The judge specifically noted that Hasan’s involvement in these activities and the flap over the comments placed in his personnel file were “remote in time and unrelated to the events that lead to his discharge.” *Id.* The Board proffers no reasoning for a completely opposite finding to the judge. It is not reasonable to depart so radically from the judge’s finding and accept the Board’s finding without substantive reasoning put forth to provide justification. Accordingly, we hold that the Board abused its discretion in this finding, and reiterate our holding that Hasan was not discharged in retaliation for protected activity.

The Board committed a third error in their application of the *Wright Line* analysis to conclude that Petitioner failed to sustain his burden that Hasan would have been discharged even absent his protected activity. The Board rested their finding on three conclusions; first, that the discharge was linked to protected activity, second, that Hasan's refusal to sign the statement of performance objectives was not the specific reason for the discharge, and third, that Loehrke's actions demonstrate a disingenuous motive for the discharge. The first conclusion fails due to our aforementioned reasoning. On the second conclusion, the Board, after viewing favorable facts and circumstances very broadly, suddenly shifts to a narrow focus. The facts of this case show a clear pattern of conduct by Hasan leading him to the tenuous precipice of discharge – the stated act, although arguably minor, was the final push. Viewed in this context, it is not unreasonable to conclude that the stated reason for Hasan's discharge was viable and sincere. This leads to the Board's third conclusion. Viewed in light of a long pattern of problems in their employment relationship, it would be perfectly reasonable for Loehrke to view Hasan's refusal as the "last straw." "Absent a showing of anti-union motivation, an employer may discharge an employee without running afoul of the law for a good reason, a bad reason, or no reason at all." *Mueller Brass Co. v. N.L.R.B.*, 544 F.2d 815 (5th Cir. 1977). No order of the Board shall require the reinstatement of any individual or the payment of any back pay if such individual was suspended or discharged for cause, and this applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity. *N.L.R.B. v. Local 1229, IBEW*, 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195 (1953). The Board's attempt to convolute these occurrences into an invalid discharge is unsupported by either the facts or reasonable inferences.

The Board also failed to include additional clearly stated reasons for Hasan's termination into their *Wright Line* analysis. The record clearly shows that the 1/17 memo was not the only evidence of Hasan's refusal to accept supervision. The judge's findings specifically cited Hasan's "continued" refusal of supervision, thus reinforcing one of Petitioner's documented reasons for the discharge. Also cited was Hasan's various confrontations with staff members, a fact that supported by the judge's findings. The Board ignored these reasons in their analysis, dismissing them altogether without any explanation, reasoning, or stated facts. This is an abuse of the Board's discretion, leading to their clearly erroneous conclusion that Hasan was unlawfully discharged.

In summary, we hold that the Board erred in both their conclusion that the 1/17 memo was protected activity, and their application of the *Wright Line* test to the facts of this case. Because the memo in question is held to be unprotected concerted activity, and because the Board's findings of fact with respect to the reasons for Hasan's discharge were clearly erroneous, we hereby set aside the Board's finding that Hasan was unlawfully discharged. Hasan was discharged for good and sufficient cause. Insofar as the Board's order requires reinstatement and back pay for him, enforcement is denied.

VIII. SUMMARY AND CONCLUSIONS

The Court upholds the Board's ruling extending *Weingarten* rights to employees in nonunion settings. The Court finds the Board's conclusions as a lawful interpretation, consistent with the intent of Section 7 of the Act.

The Court reverses the Board's finding that Arnis Borgs was unlawfully discharged, and remands for an appropriate determination under a proper application of the principles enumerated in *Wright Line*, *A Division of Wright Line, Inc. and Bernard R. Lamoureux*, 251 N.L.R.B. 1083 (1980). The Court finds that the Board abused its discretion in its application of the facts in their *Wright Line* analysis.

The Court sets aside the Board's finding that Dr. Ashraful Hasan was unlawfully discharged, and deny Board enforcement of their reinstatement order. This finding is based on our determination that the Board erred in both their conclusion that the 1/17 memo was protected activity, and their application of the *Wright Line* test to the facts of this case.

We emphasize that we do not overturn an NLRB decision lightly, nor do we reach a different decision from that of the Board based on credibility determinations alone. Neither do we intend to usurp the proper authority of the Board. We give its decision due deference, but we cannot affirm a decision when an improper standard of law has been applied, and where important factual findings are not supported by substantial evidence in the record as a whole.

IX. ORDER OF THE COURT

The Petitioner, Epilepsy Foundation of Northeast Ohio, Cleveland, Ohio, its officers, agents, successors, and assigns, shall cease and desist from interfering with, restraining, or coercing employees in;

1. Their representation rights as described in this opinion, and
2. Exercise of any other rights guaranteed them by Section 7 of the National Labor Relations Act.

The Respondent, National Labor Relations Board, its officers, agents, successors, and assigns, shall;

1. Rescind their order to Petitioner Epilepsy Foundation of Northeast Ohio, Cleveland, Ohio to reinstate Arnis Borgs to his former job with Petitioner, pending an appropriate determination based on our remand order.
2. Rescind their order to Petitioner Epilepsy Foundation of Northeast Ohio, Cleveland, Ohio to make Arnis Borgs whole for any loss related to his discharge by Petitioner, pending an appropriate determination based on our remand order.
3. On remand, adjudicate the discharge of Arnis Borgs for an appropriate determination under the standards set out in this opinion.
4. Rescind their order to Petitioner Epilepsy Foundation of Northeast Ohio, Cleveland, Ohio to reinstate Dr. Ashraful Hasan to his former job with Petitioner.
5. Rescind their order to Petitioner Epilepsy Foundation of Northeast Ohio, Cleveland, Ohio to make Dr. Ashraful Hasan whole for any loss related to his discharge by Petitioner.