RANDELL WAREHOUSE OF ARIZONA: SURVEILLANCE, COERCION, AND THE UNIONIZATION CAMPAIGN

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In this note, Brent G. Tabacchi, examines the implications of the Randell Warehouse of Arizona *decision on the use of surveillance in the context of unionization campaigns. Both the federal courts and the National Labor Relations Board (NLRB) have struggled with the tension between an employer and union's use of surveillance during a unionization campaign and the rights of the employees.* Randell Warehouse of Arizona*, meant to clarify the issue, has instead created greater uncertainty.*

The author begins by exploring the roots of the National Labor Relations Act (NLRA) and its prohibition of employer interference with an employee's ability to participate in union activities. Such legislation was necessary as the common law did not adequately protect employees or foster the sluggish economy. Section 7 of the NLRA provided employees the right to self-organize and, more importantly, section 8 provided definitive protection of this right making it an unfair labor practice for an employer to interfere with the employee's section 7 rights. Later, the Taft Hartley Act put the same constraints on unions as the NLRA had placed on employers.

Next, the author examines the NLRB's more difficult task of applying the new legislation in the workplace and developing tests to determine what type of conduct constituted a violation by employers and unions. Following NLRB precedent that created a presumption of a violation for certain forms of union photography, the Randell Warehouse of Arizona *decision further complicated the issue by dichotomizing the treatment of union and employer exploitation of photography in the context of unionization campaigns. In the majority, though heavily criticized, decision, the NLRB makes broad presumptions concerning the effect and operation of surveillance in the workplace to justify its disparate treatment. This author argues that these presumptions are too broad to be effective, fair, or realistic.*

Ultimately, the author recommends that the board apply an "under the circumstances" approach to surveillance in the context of unionization campaigns. Such a test, argues the author, will provide a fair and flexible analysis to cases involving alleged violations of section 8 of the NLRA. When using this approach, the Board merely asks whether, under the particular circumstances of this case, the questioned conduct tended to coerce or tended to interfere with the

employee's exercise of his rights. This inquiry serves to promote the interests of the worker without unduly trammeling union and employer prerogatives.

I. INTRODUCTION

The National Labor Relations Board (the Board or NLRB) has continually grappled with the analytical difficulties accompanying one discrete area of labor law—the use of surveillance in the context of unionization campaigns. Under the terms of the National Labor Relations Act[1] (Act or NLRA), "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all such activities."[2] The federal courts and the NLRB have struggled with whether employer and union use of surveillance during a unionization campaign inherently interferes with these employee rights.[3] For the past decade, the Board, in particular, has hinted that both employer and union surveillance do in fact constitute a presumptive violation of the Act.[4] During the summer of 1999, the NLRB attempted to provide a definitive answer to this question through its decision in *Randell Warehouse of Arizona*.[5]

However, marked with bitter disagreement among its panel members,[6] the *Randell* opinion has merely served to complicate the matter. Under the *Randell* decision, the Board has dichotomized its treatment of union and employer surveillance.[7] In particular, the NLRB, through application of a burden-shifting scheme, treats management's use of surveillance as a presumptive violation of the Act.[8] In contrast, the *Randell* majority declined to attach a similar presumption to analogous union conduct.[9]

This note explores the rationale underlying the *Randell* dichotomy, as well as the Board's preoccupation with surveillance as a presumptive violation of the Act. While employer and union surveillance in the context of unionization campaigns raises unique considerations for the

1. 29 U.S.C. §§ 151–169 (1994).

2. *Id.* § 157.

3. *Compare, e.g.*, United States Steel Corp. v. NLRB, 682 F.2d 98, 101 (3d Cir. 1982) (rejecting the proposition that the use of surveillance alone constitutes a presumptive violation of the NLRA), *and* F.W. Woolworth Co., 310 N.L.R.B. 1197, 1198 (1993) (Oviatt, M., dissenting in part) (rejecting Board's adoption of a presumptive rule concerning employer exploitation of photography), *with* Nat'l Steel & Shipbuilding Co. v. NLRB, 156 F.3d 1268, 1271 (D.C. Cir. 1998).

4. *See F.W. Woolworth Co.*, 310 N.L.R.B. at 1197; Pepsi-Cola Bottling Co., 289 N.L.R.B. 736, 736 (1988).

5. 328 N.L.R.B. No. 153, 1999 WL 554239, at *1 (July 27, 1999).

6. *See id.*, 1999 WL 554239, at *1–*7 (setting forth the majority opinion); *id.* at *8–*17 (setting forth the concurring opinion of Member Brame); *id.* at *25–*27 (setting forth the dissenting opinion of Member Hurtgen).

7. *See id.* at *3–*5.

8. *See id.* at *5. The Board has not characterized its *Randell* opinion as creating a burden-shifting scheme. The characterization is that of this author.

9. *See id.*

courts, these factors should not give rise to the *Randell* dichotomy and its burden-shifting scheme. These standards do not reflect the legislative intent behind the NLRA and its subsequent amendments. Moreover, the *Randell* dichotomy fails to strike the adequate balance between the rights of the individual employee and those of the union as a collective.

As such, this note calls for the Board to apply an "under the circumstances" approach[10]—the method used to analyze other alleged section 8 violations[11]—to this type of surveillance case.[12] Part II of the note traces the origins of sections 7 and 8 of the NLRA and its subsequent amendments. In addition, this portion of the note explores the controversy surrounding the application of these statutory provisions to the use of surveillance during unionization campaigns—a debate that ultimately culminated in the *Randell* decision. Part III then examines the reasoning that underlies the majority opinion in *Randell*. In particular, this section explores the relationship between the Board's rulings and the original intent behind the NLRA. Based on this analysis, part IV calls for the NLRB and the federal courts to expand the scope of the "under the circumstances" test to include section 8 violations involving the use of surveillance.

II. BACKGROUND

A. Enactment of the NLRA

In response to the economic stagnation caused by the Great Depression, Congress enacted the NLRA, dramatically altering certain facets of the relationship among employers, employees, and labor organizations.[13] Specifically, sections 7[14] and 8 of the Act targeted employer conduct that "restrained, coerced or interfered"[15] with an employee's ability to participate in union activities.[16] The federal government recognized that discord between labor organizations and management only hindered the potential for national economic recovery from the Depression.[17] In particular, employers' interference with and resistance to unionization efforts frequently served as a catalyst for animosity between labor and management.[18] As the Supreme Court noted, "[e]xperience

10. *See* United Parcel Serv. v. NLRB, 41 F.3d 1068, 1071 (6th Cir. 1994).

11. *See id.*

12. *See* Randell Warehouse of Ariz., Inc., 328 N.L.R.B. No. 153, 1999 WL 554239, at *10–*21 (July 27, 1999) (Brame, M., concurring in the result) (listing various factors that the Board should consider when assessing the coercive potential of surveillance).

13. *See infra* notes 14–33 and accompanying text.

14. *See* Wagner Act, ch. 372, § 7, 49 Stat. 452 (1935).

15. *See id.* § 8.

16. *See id.* § 7.

17. *See* Nat'l Mar. Union v. Herzog, 78 F. Supp. at 146, 155 (D.D.C. 1948) (stating that a union's "lack of [economic] power produced industrial unrest; and that strikes and other manifestations of such unrest interfered with the free flow of commerce").

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

has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace."[19] Thus, if Congress could curb employer interference with unionization activities, "industrial peace" could potentially produce economic prosperity.

Before passage of the NLRA, the common law provided Congress with little assistance in subduing union and employer animosities.[20] While the common law empowered an employee to join a labor organization,[21] those engaged in unionization found little other legal protection for their activities.[22] In particular, employers could freely dissuade employee membership in unions through the use of economic and physical threats.[23] Moreover, "[t]he prohibitions against interference by employers with self-organization of employees were not only unknown, they were obnoxious to the common law."[24] The employer's low cost of interfering with unionization activities only enhanced antagonism with labor organizations.[25] Through the NLRA, Congress intended to discourage employer meddling in labor activities, thereby fostering "maintenance and furthering of industrial amity."[26]

Two provisions of the new statute accomplished what the common law could not. Foremost, section 7 of the Act reaffirmed the employee's common law right to join a union.[27] Specifically, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations."[28] More importantly, however, section 8 provided definitive protection for these aforementioned rights.[29] The law stated that "it shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 157."[30] By tempering an employer's zeal to disrupt unionization efforts, the federal government believed it had provided the "industrial peace" necessary to secure economic growth.[31]

19. *Id.* at 42. For a discussion of the constitutional implications of *Jones & Laughlin*, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 157 (4th ed. 1991).

20. *See* Agwilines, Inc. v. NLRB, 87 F.2d 146, 150 (5th Cir. 1936).

21. *See Nat'l Mar. Union*, 78 F. Supp. at 151.

22. *See Agwilines, Inc.*, 87 F.2d at 150.

23. *E.g.*, NELSON LICHTENSTEIN, THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR 86 (1995) (describing Ford Motor Company's "bloody" crackdown on the UAW).

24. *Agwilines, Inc*., 87 F.2d at 150.

25. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937).

26. *Agwilines, Inc.*, 87 F.2d at 150.

27. *See* Wagner Act, ch. 372, § 7, 49 Stat. 452 (1935).

28. *Id.*

29. *Id.*

30. *Id.*

31. *See generally* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding NLRB's ruling against employer interference with labor organization).

Although by 1947 the United States had emerged from the throws of the Great Depression, Congress began to recognize a grave flaw in the NLRA.[32] The legislation had only curtailed the disruptive activity of one potential instigator—employers. Labor organizations, on the other hand, remained far afield from the enforcement provision of section 8.[33] Employees possessed no guarantee that they could refrain from participation in union activities.[34] While section 7 provided an affirmative right to engage in union conduct, the statute forced the anti-union employee into the arms of the common law. Union leaders maintained that "[t]here may be here and there a worker who for certain reasons . . . does not join a union of labor. . . . It is his legal right, and no one can or dare question his exercise of that legal right."[35] Yet, unions frequently "questioned" this right through the use of physical force and economic pressure aimed at the dissident.[36]

The Taft-Hartley Act sought to remedy and amend the oversights of the NLRA.[37] As the legislation's sponsor, Senator Taft, stated:

> I cannot see any difference [between union and employer coercion]. If a man is invited to join a union, its members ought to be able to *persuade* him to join, but if they should not be able to persuade him they should not be permitted to interfere with him, coerce him or compel him to join the union.[38]

In this vein, Congress amended section 7 to read, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations . . . *and shall also have the right to refrain from any or all such activities*."[39] Moreover, the legislator expanded section 8 to prohibit union conduct that "restrain[s] or coerce[s] employees in the exercise of their rights guaranteed in section 157."[40] Congress had "equalized" labor organizations and employers in the sense that neither party could coerce an employee engaged in or refraining from union activities.

B. Traditional Coercion Test

Congress intended the broad language of sections 8(a)(1) and 8(b)(2) to deter a host of employer and union conduct that could potentially interfere with an employee's section 7 rights.[41] To achieve this goal,

32. *See* NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1018 (1947).

33. *See* Wagner Act, ch. 372, § 8, 49 Stat. 452 (1935).

34. *See id.* § 7.

35. Samual Gompers, Address to the Council of Foreign Relations (Dec. 10, 1918), *in* AMERICAN FEDERATIONIST, Feb. 1919.

36. *E.g.*, NLRB v. Donnelly Garment Co., 330 U.S. 219, 231 (1947) (recounting employee "testimony related to the offensive aspects of . . . unioniz[ation] efforts").

37. *See* NLRB, *supra* note 32, at 1018.

38. *Id.* at 1027 (emphasis added).

39. Taft-Hartley Act, ch. 120, Title I, sec. 101, 61 Stat. 136, 140 (1947) (emphasis added).

40. *Id.*

41. *See* NLRB, *supra* note 32, at 1018.

the federal courts and the NLRB have developed a flexible yet fair approach to cases involving alleged violations of section 8. Specifically, courts will conclude that management breaches the mandates of section 8(a)(1) when "the employer's conduct *tends* to coerce or *tends* to interfere with employees' exercise of [section 7] rights."[42] The federal judiciary applies an identical test to determine whether a union complies with the comports of section 8(b)(1).[43] Flexibility and fairness enter into this test through two distinct methods.

First, the language of this coercion test could potentially touch numerous types of employer and union conduct. The Board, or the courts, need merely find that the questioned conduct has a tendency to coerce an employee engaged in section 7 conduct.[44] Thus, an employer or a labor union may violate the statute without actually coercing a worker.[45] In essence, the language of the test provides the judge with the flexibility to "hedge his bet." Although unsure of the actual coercive tendency of the conduct, a judge may still find a violation of the statute. Seemingly, a court could conclude that truly innocuous conduct possesses the potential to coerce an employee.

However, a second consideration mitigates this potential danger. Before determining if conduct has a tendency to coerce, the court will "consider[] the total context in which the questioned conduct occurs."[46] Essentially, a union or employer violates section 8(a)(1) or 8(b)(1) when, under the totality of the circumstances, its activity has a tendency to interfere with section 7 activities.[47] A judge will not assess the conduct in the abstract. By focusing on the actual circumstances under which the alleged coercive conduct occurred, courts generally avoid designating certain forms of activity as per se violations of the statute.[48] As such, the accused may rebut the contention that its conduct had a tendency to coerce by pointing to the circumstances under which the activity occurred.[49]

C. Surveillance as a Coercive Activity

Photography and videotaping often serve legitimate and pressing functions for both unions and employers. For example, surveillance tapes may capture employees vandalizing the facility or engaging in an

42. United Parcel Serv. v. NLRB, 41 F.3d 1068, 1071–72 (6th Cir. 1994) (emphasis added); *see also* Clock Elec., Inc. v. NLRB, 162 F.3d 907 (6th Cir. 1998).

43. *See* Pepsi-Cola Bottling Co., 289 N.L.R.B. 736, 736 (1988).

44. *See* NLRB v. Colonial Haven Nursing Home, Inc., 542 F.2d 691, 701 (7th Cir. 1976).

45. *See id.*

46. *United Parcel Serv*., 41 F.3d at 1071.

47. *See id.*; Pepsi-Cola Bottling Co., 289 N.L.R.B. at 736 (describing union violation of section 8 of the NLRA).

48. *E.g.*, United States Steel Corp. v. NLRB, 682 F.2d 98 (3d Cir. 1982).

49. *E.g.*, *id.*

illegal picket.[50] These videotapes possess invaluable evidentiary value for the employer.[51] A labor organization may also photograph employees enjoying themselves during a union-sponsored picnic[52] and use the photos to promote the benefits of unionization.[53] While the Board has deemed these instances of "surveillance" harmless,[54] the cases still demonstrate the potential danger associated with photography. The same permanence that rendered surveillance indispensable in these aforementioned scenarios poses serious problems in the context of unionization campaigns. An employee caught on film refusing a union leaflet or attending a labor rally during the unionization drive potentially casts a cautious vote at the ballot box. In such a situation, "the requisite laboratory conditions [for the election] are not present and the experiment must be conducted over again."[55]

The photograph's seemingly inherent potential to coerce has complicated the analysis of alleged section 8 violations involving surveillance. As previously mentioned, an employer or union violates section 8 when its "conduct *tends* to be coercive or *tends* to interfere with employees' exercise of [section 7] rights."[56] Thus, the question confounding the Board and the courts is whether the use of photography *always* has a tendency to coerce employees participating in unionization campaigns or other protected section 7 activities.[57]

1. The Pepsi-Cola *Rule—Union Photography as a Presumptive Violation*

Traditionally, the Board has recognized two distinct scenarios involving unions using photography to observe individuals engaged in section 7 activity. Most importantly, the Board's ruling in *Pepsi-Cola Bottling Co.*[58] established that "absent a legitimate explanation" from the union, its use of photography to monitor section 7 activity would constitute a presumptive violation of the NLRA.[59] Moreover, in cases in which

50. *See* Larand Leisurelies, Inc. v. NLRB, 523 F.2d 814, 818–19 (6th Cir. 1975) (involving employer use of photography to capture alleged illegal picketing on tape).

51. *See id.* at 819 (stating that "[p]hotographing of pickets does not violate Section 8 (a)(1) of the Act where the photographs are taken to establish for purposes of an injunction suit that pickets engaged in violence").

52. *See* Nu Skin Int'l, Inc., 307 N.L.R.B. 223, 224 (1992).

53. *See id.* (stating that union photography at picnic did not violate section 8 of the Act).

54. *See Larand Leisurelies, Inc*., 523 F.2d at 819 (stating in dicta that the use of photography would not have violated the Act if the pictures had been introduced into evidence during an injunction hearing); *see also Nu Skin Int'l Inc.*, 307 N.L.R.B. at 224–25 (finding the union's use of photography "innocuous").

55. *In re* Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948) (stating that the use of photography disrupted election proceedings).

56. Clock Elec., Inc. v. NLRB, 162 F.3d 907, 917 (6th Cir. 1998) (emphasis added).

57. *See* Belcher Towing Co. v. NLRB, 726 F.2d 705, 708 (11th Cir. 1984).

58. 289 N.L.R.B. 736 (1988).

59. *Id.* at 737.

the union accompanies its surveillance with explicit threats directed at an employee, the Board will always find a violation of section 8.[60]

The Board has interpreted its ruling in *Pepsi-Cola* as creating a presumption of illegality around certain forms of union photography.[61] In *Pepsi-Cola*, on the day before a certification election, participants at a union rally allegedly videotaped several Pepsi-Cola employees accepting leaflets from the Teamsters.[62] Several "employees questioned whether the purpose of the picture taking was for future retaliation."[63] On the following day, the union won the election by two votes.[64] In seeking to set aside the election results, Pepsi-Cola alleged that the union's videotaping had "intimidated employees, interfered with the employees' free choice, and made a free and fair election impossible."[65] In agreeing with Pepsi-Cola, the Board stated that "[a]bsent any legitimate explanation from the Union [for videotaping employees], we find that employees could reasonably believe that the Union was contemplating some future reprisals against them."[66]

Although the panel stressed that they had assessed the Teamster's conduct "under the circumstances,"[67] subsequent opinions read *Pepsi-Cola* as creating a per se rule with regard to union surveillance.[68] In essence, the union's mere use of photography or videotaping constitutes a prima facie violation of the NLRA.[69] However, if the union offers a "reasonable, objective justification for video surveillance [that] mitigates its tendency to coerce,"[70] then the labor organization may rebut this presumptive violation of the statute.[71] Unlike other cases involving alleged violations of section 8, the union cannot quell the allegations by relying solely on the circumstances under which the questioned conduct occurred.[72] Thus, the labor organization must assert some affirmative reason for engaging in the surveillance.

Only six years earlier, the Third Circuit had expressly rejected the Board's attempt to create a presumption concerning the use of photog-

60. *See* Mike Yurosek & Son, Inc., 292 N.L.R.B. 1074, 1074 (1989) (finding that union threats directed at employees constituted a violation of section 8).

61. *See id.* at 1074; *see also* Randell Warehouse of Ariz., Inc., 328 N.L.R.B. No. 153, 1999 WL 554239, at *3 (July 27, 1999).

62. *See Pepsi-Cola Bottling Co.*, 289 N.L.R.B. at 736.

63. *Id.*

64. *See id.*

65. *Id.*

66. *Id.* at 737.

67. *Id.*

68. *See* Mike Yurosek & Son, Inc., 292 N.L.R.B. 1074, 1074 (1989) (basing the opinion in part on the rule announced in *Pepsi-Cola*); Randell Warehouse of Ariz., Inc., 328 N.L.R.B. No. 153, 1999 WL 554239, at *3 (July 27, 1999) (overruling the *Pepsi-Cola* presumptive rule).

69. *See* Randell Warehouse of Ariz., Inc., 1999 WL 554239, at *12 (Brame, M., concurring in the result) (indicating that the Board may construe videotaping as a presumptive violation of the NLRA).

70. Nat'l Steel & Shipbuilding Co. v. NLRB, 156 F.3d 1268, 1271 (D.C. Cir. 1998).

71. *See id.*

72. *See id.* at 1271–72.

raphy to observe section 7 activities.[73] In *United States Steel Corp. v. NLRB*,[74] the Third Circuit reviewed an administrative law judge finding that "unless petitioner provided a legitimate justification, its picture taking constituted a violation of section 8(a)(1)."[75] In overruling the administrative law judge's and Board's analysis, the court admonished that a "case by case decision making [was needed] when examining alleged section 8(a)(1) violations."[76] The Third Circuit emphasized that "[s]urveillance by itself . . . does not violate the Act."[77] Rather, a court can only determine whether the conduct actually coerced or had a tendency to coerce an employee by focusing on the actual circumstances of the alleged violation.[78] Forty years of case law seemed to have dictated this result.

Subsequent Board opinions not only sided with the outcome of the *Pepsi-Cola* ruling but also created permutations of its analysis. For instance, the ruling of *Mike Yurosek & Son, Inc.*[79] applied the *Pepsi-Cola* standard to set aside an election that had been tainted by union photography of a labor rally.[80] The union failed to proffer a legitimate explanation for its surveillance.[81] Moreover, at least one Board member emphasized that the union accompanied its surveillance with overt threats directed at the employees.[82] Despite the Third Circuit's vehement resistance to the *Pepsi-Cola* standard, several circuit courts have adopted the presumption propounded in that decision.[83]

2. *The* Woolworth *Rule—Employer Photography as a Presumptive Violation*

The Board quickly extended its per se rule concerning photography to employers as well.[84] In *F.W. Woolworth Co.*,[85] the Board stated that "[it] has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate."[86] Specifically, F.W. Woolworth videotaped and photographed employees distributing union literature to

73. United States Steel Corp. v. NLRB, 682 F.2d 98, 101 (3d Cir. 1982).
74. 682 F.2d 98 (3d Cir. 1982).
75. *Id.* at 100.
76. *Id.* at 101.
77. *Id.*
78. *See id.*
79. 292 N.L.R.B. 1074 (1989).
80. *Id.*
81. *Id.*
82. *See id.*
83. *See* Clock Elec., Inc. v. NLRB, 162 F.3d 907, 917–18 (6th Cir. 1998); Nat'l Steel & Shipbuilding Co. v. NLRB, 156 F.3d 1268, 1271 (D.C. Cir. 1998).
84. *See* F.W. Woolworth Co., 310 N.L.R.B. 1197, 1197 (1993).
85. *Id.*
86. *Id.*

customers.[87] The employees did not physically obstruct access to the store or otherwise intimidate shoppers.[88] As such, the Board concluded that Woolworth could offer no legitimate explanation for its surveillance of the employees' section 7 activities.[89] Because "the pictorial record keeping tends to create fear among employees of future reprisals,"[90] the employer violated section 8 of the NLRA.[91]

Once again, the specter of *United States Steel Corp.* haunted the Board. In a vehement dissent, Member Oviatt stated that "photographing of employees is not per se unlawful."[92] Rather, the dissenter felt that the Board should have focused its analysis on the particular circumstances of this case.[93] Specifically, the employees had sought to publicize their dispute with management through the use of local media outlets.[94] While recognizing that "picture taking by a third party [does not] necessarily justif[y] picture taking by an employer . . . this is a significant factor to be considered in determining whether an employer's photographing of employees would tend to interfere with, restrain or coerce employees."[95] Although the employer could not offer a reason for the surveillance, other factors may have diminished the videotape's ability to coerce. The Board and several circuits continue to dismiss such arguments.

While the Board and courts frequently find that employees violate section 8(a)(1) under the *Woolworth* analysis, management can still avoid a violation by offering a legitimate reason for its use of photography. The circuit courts, in particular, have recognized several legitimate rationales for videotaping employees engaged in section 7 activities.[96] Foremost, "an employer's legitimate security interests may justify its use of surveillance cameras, even if they happen to capture protected activities."[97] Moreover, if an employer takes photographs for evidentiary reasons, such as photos "taken to establish for purposes of an injunction suit that pickets are engaged in violence,"[98] management does not violate the Act.[99] Although the *Woolworth* presumption does not create an insurmountable burden for employers, the courts have circumscribed legitimate explanations for such conduct.

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 1198 (Oviatt, M., dissenting in part).
93. *Id.*
94. *Id.*
95. *Id.*
96. *See* Nat'l Steel & Shipbuilding Co. v. NLRB, 156 F.3d 1268, 1271 (D.C. Cir. 1998).
97. *Id.*
98. Larand Leisurelies, Inc. v. NLRB, 523 F.2d 814, 818 (6th Cir. 1975).
99. *See id.* (stating in dicta that the use of photography would not have violated the act if the pictures had been introduced into evidence during an injunction hearing).

D. Randell Warehouse of Arizona

In the summer of 1999, the Board further fueled the uncertainty surrounding the presumption established in *Woolworth* and *Pepsi-Cola.* Although various Board panels and circuit courts disputed the application of these standards,[100] those adopting the rule applied it with uniformity to both employers and unions.[101] *Randell* abandoned this position and dichotomized the treatment of union and employer exploitation of photography in the context of unionization campaigns.[102]

In *Randell*, union officials photographed employees rejecting or accepting union leaflets as they left their place of employment.[103] The labor organization justified the activity as a means of "showing transactions that are taking place" within the union.[104] Specifically, the Board stated that "[w]e therefore overrule *Pepsi-Cola* and reject its premise that union photographing or videotaping of employees engaged in protected activities during an election campaign, without more, necessarily interferes with employee free choice."[105] However, the Board found that the union had numerous legitimate reasons for using photography in this context.[106] Thus, while employers remained subject to the *Woolworth* standards, unions no longer had to offer a specific rationale for their exploitation of surveillance in the context of a unionization campaign.[107]

According to the Board, three factors drove them to abandon the presumption of coercion with respect to union exploitation of photography during unionization campaigns. First, the Board stressed that photography served as a method by which labor organizations could identify potential supporters.[108] With union resources dwindling, labor organizations must employ the most cost-efficient methods of accessing worker sentiment.[109] Second, because the union lacked established economic ties to the workers, labor's use of photography during an election campaign could not inherently coerce the workforce.[110] In contrast, "an employer, unlike a union, has virtually absolute control over employees' terms and conditions of employment."[111] Thus, use of surveillance by management would send a clear message to workers—vote against the union or suffer retaliation. Finally, in creating this dichotomy, the Board emphasized

100. *See* cases cited *supra* note 3.
101. *E.g.*, *National Steel & Shipbuilding Co*., 156 F.3d at 1271–72.
102. *See* Randell Warehouse of Ariz., Inc., 328 N.L.R.B. No. 153, 1999 WL 554239, at *4 (July 27, 1999).
103. *Id.* at *1.
104. *Id.*
105. *Id.* at *4.
106. *See id.*
107. *See id.* at *5.
108. *Id.* at *4.
109. *Id.*
110. *See id.*
111. *Id.* at *5.

that other areas of labor law provided disparate treatment for identical employer and union conduct.[112]

However, the majority decision did not satisfy the entire panel sitting in the *Randell* case. In particular, although concurring in the result, Member Brame argued that the dichotomy espoused by the majority was flawed.[113] Specifically, the rationales underlying the majority opinion failed to satisfy the mandates of the case law created under the NLRA.[114] According to the concurring opinion, the Board never considered whether the rationales supporting the dichotomy also mitigated the coercive tendencies of surveillance.[115] Again calling on *United States Steel Corp.*, Brame suggested that the Board abandon its presumptive rule as to both union and employer photography.[116] Thus, the general test for coercion, i.e., whether the alleged conduct had a tendency to coerce under the circumstances, would govern surveillance cases as well.

In contrast, the final member of the Board panel vehemently disagreed with any attempt to abandon the presumptive rules with regard to either employers or their union counterparts. Although agreeing with Member Brame that "whether photographing is objectionable should be judged by a uniform standard, irrespective of whether the photographing is by a union or employer,"[117] Member Hurtgen believed that "resolution of those issues [was] not necessary to the disposition of this case."[118]

Yet, resolution of these legal issues—the creation of presumptions and legal dichotomies in the context of unionization campaigns—will become essential to the disposition of future cases. For the past decade, the Board has attempted to refine its analysis concerning the use of surveillance during organization drives.[119] The federal courts have only offered a lukewarm response to these efforts.[120] Due to this ambivalence, the Board's attempt at creating a clear standard in the form of a presumptive rule has not been wholly successful. The *Randell* decision has further convoluted this issue. As such, understanding the rationale underlying the *Randell* opinion proves essential in clarifying the uncertainty surrounding the use of surveillance during unionization campaigns.

112. *See id.*
113. *Id.* at *9 (Brame, M., concurring in the result).
114. *See id.* at *16.
115. *See id.* at *18.
116. *Id.* at *24 (Brame, M., concurring in the result).
117. *Id.* at *27 (Hurtgen, M., dissenting).
118. *Id.*
119. Pepsi-Cola Bottling Co., 289 N.L.R.B. 736, 736 (1988); *see also* F.W. Woolworth Co., 310 N.L.R.B. 1197, 1197 (1993).
120. *Compare* United States Steel Corp. v. NLRB, 682 F.2d 98, 101 (3d Cir. 1982) (rejecting the proposition that the use of surveillance alone constitutes a per se violation of the NLRA), *with* Nat'l Steel & Shipbuilding Co. v. NLRB, 156 F.3d 1268, 1271 (D.C. Cir. 1998).

III. ANALYSIS—THE *RANDELL WAREHOUSE OF ARIZONA* RATIONALES

The Board's opinion in *Randell Warehouse of Arizona* further galvanized the dispute surrounding application of a per se rule in surveillance cases involving unionization campaigns. Specifically, the Board refused to consider union use of videotaping (to observe employees engaged in section 7 activities) as a presumptive violation of the NLRA.[121] The Board offered two distinct rationales for abandoning its presumptive rule with regard to union conduct. First, the Board reasoned that union surveillance constitutes a legitimate method for identifying potential supporters.[122] Thus, creation of a presumptive prohibition on union surveillance would undercut labor's efforts to organize an ever shrinking base of potential members.[123] Second, the Board contended that the economic ties found between employer and employee are absent in the union-employee relationship.[124] Therefore, according to the Board's logic, this lack of definitive financial ties neutralizes any inherent coercive tendencies found in union observation of section 7 activities.[125] According to the *Randell* majority, this reasoning supported other dichotomies in NLRB treatment of identical union and employer conduct.[126] Thus, the Board was merely extending its disparate treatment of union and employer conduct into the area of surveillance.[127] To assess the validity of the *Randell* decision, these rationales must be examined in light of the statutory history and purpose behind the NLRA and its subsequent amendments.

A. Legitimacy—Does It Inherently Render Union Surveillance Noncoercive?

In abandoning application of a presumptive rule to union surveillance, the Board focused in part on the legitimacy of this conduct.[128] Although the Board did not explicitly define legitimacy, the word appears to mean union (or employer) conduct designed for some purpose other than intimidating workers during the unionization campaign.[129] Identifying the purpose behind surveillance could serve an important role in ferreting out conduct that tends to interfere with an employee's section 7 activities.[130] However, contrary to the implications of the NLRB's opin-

121. *See* Randell Warehouse of Ariz., Inc., 328 N.L.R.B. No. 153, 1999 WL 554239, at *7 (July 27, 1999).
122. *Id.* at *4.
123. *Id.*
124. *Id.* at *5.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at *3.
129. *Id.* (indicating that intent to intimidate played crucial role in the Board's more critical scrutiny of employer surveillance).
130. *Id.*

ion, the mere legitimacy of the union's conduct does not necessarily negate its coercive tendencies. While the Board appears to place a premium on union prerogatives,[131] the NLRA mandates that the employee's section 7 rights remain the central focus of this inquiry.[132] Although the legitimacy of union or employer conduct may serve as an important element in determining whether an employee has been coerced, it should not be the determining factor in this analysis.

According to the NLRB, labor organizations possess several legitimate reasons for using surveillance in the context of unionization campaigns.[133] In particular, the union may use photography or videotaping to gauge workers' reaction to unionization efforts.[134] Over the past three decades, membership in labor organizations has declined rapidly.[135] In 1973, twenty-four percent of the United States' workforce belonged to some form of union.[136] By 1998, this number had slumped dramatically to just under fourteen percent.[137] With a smaller membership, a union draws fewer dues—the central source of the labor movement's income. As union membership and resources dwindle, surveillance could provide labor organizations with a cost-effective means of identifying potential supporters.[138] Having captured the reaction to unionization efforts on tape, the organizer could then decide whether to pour scarce union resources into this particular plant. Although the union could presumably achieve similar results through other means,[139] surveillance appears to fit within the Board's definition of a legitimate activity.[140]

Yet, under the current version of the NLRA, the simple legitimacy of the union's conduct does not ensure protection of an employee's section 7 rights.[141] As originally drafted, Congress designed the NLRA to promote, if not protect, union prerogatives.[142] With the legislation's fo-

131. *See id.* at *4 (describing ways in which a cash strapped labor movement could use surveillance).

132. *See* 29 U.S.C. § 157 (1994) (discussing only employee's rights and prerogatives).

133. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *4 (describing the noncoercive uses for which a union could use photography).

134. *See id.*

135. *See* WEI-CHIAO HUANG, ORGANIZED LABOR AT THE CROSSROADS 1 (1989); *see also* MARICK F. MASTERS, UNIONS AT THE CROSSROADS: STRATEGIC MEMBERSHIP, FINANCIAL, AND POLITICAL PERSPECTIVES 5–6 (1997).

136. *See* Timothy Burn, *Unions Halt Decline in Membership: Weigh Organizing Illegal Immigrants*, WASH. TIMES, Jan. 20, 2000, at A1.

137. *See id.*

138. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *5.

139. For instance, the union organizer could take a poll at the facility in an effort to gauge the support for the unionization drive. Although the Act prohibits interference with an employee's section 7 rights, it does not require employers to engage in conduct with the least potential to coerce the workforce. *See* 29 U.S.C. § 157 (1994).

140. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *5. The Board did not appear particularly concerned whether the legitimate reason serves as a veiled disguise for illegal conduct.

141. *See* 29 U.S.C. § 157 (1994).

142. *See* Wagner Act, ch. 372, § 7, 42 Stat. 452 (1935). During the debates over the Act, Senator Wagner repeatedly emphasized that the law's drafters had designed the bill to provide the widest possible protection for union activities.

cus squarely on the right to unionize, labor organizations possessed broad discretion in how best to achieve their goals.[143] However, the Taft-Hartley amendments to the NLRA shifted congressional focus away from the objectives of the labor movement to the rights of the individual worker.[144] As Senator Taft emphasized, workers possess the right not only to organize but also to refrain from any and all such activity.[145] Regardless of how an activity may benefit a labor organization, the employee's section 7 rights must remain the central focus of the Board's inquiry. As such, while surveillance may serve some useful function in assisting unionization efforts, this fact should not play a paramount role in determining if videotaping violates the mandates of the NLRA. In part, the *Randell* decision appears to miss this distinction.

Although adopting an "under the circumstances" approach with regard to union videotaping, the Board appears to go further in its ruling.[146] In particular, the Board appears to indicate that the legitimacy of union surveillance rebuts the conduct's inherent coercive tendencies in *most* instances.[147] Because of this presumption, the NLRB seems willing to give labor organizations greater discretion in their use of surveillance.[148] The message appears clear—the Board will not closely scrutinize union surveillance allegedly designed to identify potential supporters.

This notion runs contrary to the legislative intent underlying the Taft-Hartley amendments to the NLRA. Currently, the Act tells the Board and the courts to focus on the employees' reaction to union and employer conduct; the labor organization's intent to coerce, though possibly relevant, does not control the inquiry.[149] In particular, the legitimate reasons allegedly driving union surveillance do not wholly prevent interference with an employee's "right to refrain from any or all" unionization activities.[150] In many circumstances, the seemingly innocuous use of videotaping will influence the outcome of a certification election.[151] Wary employees may not fully believe that the union has utilized surveillance solely to gauge support.[152] For example, employees may fear that the union will use the recorded material to target dissidents after the cer-

143. *See supra* Part II.A.

144. *See* NLRB, *supra* note 32, at 1018.

145. *See id.*

146. *See* Randell Warehouse of Ariz., Inc., 328 N.L.R.B. No. 153, 1999 WL 554239, at *7 (July 27, 1999).

147. *See id.* at *5.

148. *See id.*

149. *See* NLRB, *supra* note 32, at 1018 (indicating that Congress designed section 7 to protect and promote rights of employees).

150. 29 U.S.C. § 157 (1994).

151. *E.g.*, Pepsi-Cola Bottling Co., 289 N.L.R.B. 736, 737 (1988). Although the union assured workers that they did not intend to use the surveillance for retaliatory purposes, several employees testified that they did not believe the union's contention. *See id.* at 736. Although unclear whether the union intended to intimidate the employees, the Board found the surveillance did in fact influence the outcome of the certification election. *See id.*

152. *See supra* note 151 and accompanying text.

tification election. As such, workers may embrace the union cause as a way to fend off future reprisals. Under these circumstances, an employee may feel coerced without any intention on the part of a labor organization or employer to interfere with the employee's section 7 rights.[153] Thus, although the legitimacy of union (and potentially employer) conduct should play some role in this analysis, the Board's apparent reluctance to thoroughly scrutinize union surveillance appears misguided.

B. Economic Relationships—Do They Render Surveillance Coercive?

Not content to rest its dichotomy on a single premise, the Board offered a second rationale for the *Randell* opinion—the economics of the employment relationship.[154] The Board views the employment relationship as a chain, crafted of wages and benefits, that binds employer and employee.[155] As the threat of unionization approaches, the employer manipulates the chain to draw the workers into management's fold.[156] Specifically, the employer may subtly threaten to sever the link altogether.[157] In the Board's view, employer surveillance constitutes such a covert economic threat.[158] Fearing that the company will use surveillance to single out union loyalists for later discharge, workers may refrain from unionization activities.[159] Thus, the employer's superior economic position could create an inherently coercive environment around its use of surveillance.[160] In contrast, the Board alleges that a similar bond between employee and union does not exist.[161] Devoid of any substantial relationship with the workers, union surveillance could not constitute a presumptive violation of the statute—at least in the Board's opinion.[162] The NLRB has used this economic dependency argument to justify disparate treatment of employers and unions in contexts other than surveillance.[163] Yet, the Board's analysis oversimplifies the complex economic

153. *See supra* note 151 and accompanying text.

154. *See* Randell Warehouse of Ariz., Inc., 328 N.L.R.B. No. 153, 1999 WL 554239, at *7 (July 27, 1999).

155. *See id*. The Board did not specifically refer to the employment relationship as a "chain" or "link." Rather, the author feels that this is an appropriate analogy to use in explaining the Board's position on these economic factors.

156. *See id*. at *60.

157. *See* F.W. Woolworth Co., 310 N.L.R.B. 1197, 1197 (1993). In *F.W. Woolworth*, the Board construed employer surveillance of picketers as such an economic threat. *See id.*

158. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *7.

159. This seems to be the implication of the Board's discussion of employer economic control over the workforce. *See id.* at *6.

160. *See id.* at *7.

161. *See id.*

162. *See id.*

163. *E.g.*, Kusan Mfg. Co. v. NLRB, 749 F.2d 362, 365 (6th Cir. 1984) (prohibiting employers from polling workers when polling is coercive and affects the election); Offrier Elecs., Inc., 127 N.L.R.B. 991, 992 (1960) (same); Canton, 127 N.L.R.B. 513 (1960) (indicating that union visits to home of employees is generally permissible); *see also* Peoria Plastic Co., 117 N.L.R.B. 545, 545–47 (1957) (forbidding employer visits to the home of employee during unionization campaign).

relationship that develops between the union and the workforce.[164] This bond, like that between employer and employee, may render union surveillance inherently coercive in certain circumstances. However, while these various relationships do exist, the presence of sections 7 and 8 of the NLRA may diminish these bonds' impact on an employee's reaction to surveillance.

1. The Economic Realities

The Board correctly recognizes the pervasive economic control that an employer exerts over its employees. In general, the doctrine of employment-at-will governs the relationship between employer and employee.[165] Thus, absent some statutory prohibition, the company may discharge its workers without cause.[166] This creates a paradox—the chain binding employer and employee is at once weak and strong. The bond is tenuous in that the company may dissolve the link at any time by terminating the employee, closing the facility or altering the terms of employment. Yet, because employees depend on the employer for wages and benefits, most workers attempt to strengthen the bond with management by minimizing activity that could threaten the employment relationship. As unionization could trammel on the company's prerogatives, this event poses one threat to the relationship.[167] According to the Board, the existence of this situation inherently deters employees from embracing unionization efforts.[168] Add employer surveillance cameras into this environment and employees would never feel as though they could participate in unionization activities.[169]

Specifically, employees may interpret the presence of a surveillance camera as a subtle message from the employer[170]—"participate in unionization activities and we will dissolve this economic relationship." A video camera would provide an unwavering corporate presence during the organizational drive. Some individuals might refrain from participating in unionization activities for fear that the company will "catch" them supporting the drive, thereby damaging their tenuous economic relationship with the employer.[171] For instance, in the future, the company may pass over for a promotion those workers caught on camera accepting a union leaflet. With employees bearing this in mind, the surveillance camera will drive the half-hearted union supporter into the arms of the

164. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *17 (Brame, M., concurring in the result) (criticizing what he terms the "union as impotent outsider" theory).

165. *E.g.*, Balla v. Gambro, Inc., 584 N.E.2d 104, 104–07 (1991) (noting that, in most instances, "an employer may discharge an employee-at-will for any reason or for no reason [at all]").

166. *See generally id.* (describing public policy exceptions to the doctrine of employment-at-will).

167. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *5, *7.

168. *See id.* at *5–*6.

169. *See id.*; *see also* F.W. Woolworth Co., 310 N.L.R.B. 1197, 1197 (1993).

170. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *5.

171. *E.g.*, F.W. Woolworth Co., 310 N.L.R.B. 1197, 1197 (1993).

company.[172] Thus, this scare tactic could coerce workers into refraining from exercising their section 7 rights.[173] In true Orwellian fashion, Big Brother's constant presence could deter deviation from the party line.

As the NLRB failed to recognize, economic relationships may exist beyond the simple exchange of labor for wages and benefits.[174] In particular, the union's role as bargaining agent creates strong economic ties between the labor organization and its membership.[175] While this latter relationship is absent during the unionization campaign, an astute worker recognizes that a vote for the union will give rise to this bond. This economic link may give rise to the same potential dangers that drove the Board to prohibit employer surveillance during unionization campaigns.[176]

Labor organizations possess subtle, yet strong economic relationships with their membership. In particular, unions play a vital role in selecting which grievances to file,[177] which individuals to place in apprentice programs,[178] and which members to permit to bid on a job opening. In essence, the local union could perpetually keep a member in a particular job, thereby freezing his salary and opportunities to advance. Moreover, during contract negotiations, labor organizations frequently will trade the number of union jobs available in the facility for increased benefits, overtime or the like.[179] Although some members will benefit from such an arrangement, this negotiating strategy renders other workers expendable.[180] The prospective union member recognizes that the labor organization will now control these aspects of the employment relationship. Given that the union will control advancement and training, some workers may refrain from speaking out against unionization for fear of economic reprisal.[181] As such, the mere existence of this potential economic bond may deter workers from voicing their opposition to unionization.[182]

172. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *5.

173. *See id.* at *7.

174. *See id.* at *15–*17 (Brame, M., concurring in the result) (criticizing what he terms the "union as impotent outsider" theory).

175. *See* MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 379–81 (1988).

176. *E.g.*, *Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *17 (Brame, M., concurring in the result).

177. *E.g.*, Goodman v. Lukens Steel Co., 482 U.S. 656, 656–89 (1987) (Powell, J., concurring in part and dissenting in part) (noting that "unions are afforded broad discretion in the handling of grievances").

178. *E.g.*, United Steel Workers of Am. v. Weber, 443 U.S. 193, 197–99 (1979) (describing a contract agreement in which a union set aside a number of positions in apprentice programs for certain individuals).

179. For a general discussion of negotiating strategies and collective bargaining, see LLOYD G. REYNOLDS ET AL., LABOR ECONOMICS & LABOR RELATIONS 439–530 (10th ed. 1991).

180. *See id.*

181. *E.g.*, Pepsi-Cola Bottling Co., 289 N.L.R.B. 736, 736 (1988). In *Pepsi-Cola*, workers testified that the presence of union surveillance cameras led them to believe that the union planned future reprisals against anti-union employees.

182. *See id.* at 737. The Board overturned the results of a certification election due to the presence of union surveillance. Specifically, the union had won the election by only a handful of votes. The Board felt that the surveillance may have deterred workers from expressing their true sentiment

Under these conditions, union surveillance produces results similar to those that led the NLRB to condemn employer videotaping. In particular, the workers realize that the union will, in large part, control their ability to advance within the company.[183] Union surveillance may serve as subtle reminder that the labor organization will not tolerate dissent.[184] Whether in the form of a photograph or videotape, surveillance will provide the union with a permanent record of those individuals who vocally objected to the certification efforts.[185] This video archive not only provides a constant union presence during the certification drive but also will allow the labor organization to single out dissidents for future reprisals.[186] For instance, the union may subtly punish the dissident by preventing him from bidding on a new job within the company. Knowing that the union will possess hours of surveillance tapes, workers may refrain from expressing any anti-labor sentiments during the unionization campaign for fear of reprisal.[187] This is precisely the situation that gave rise to the Board's prohibition of employer surveillance during unionization campaigns.

2. *Negating the Economic Relationship: The Buffer Effect of Sections 7 and 8 of the NLRA*

While emphasizing the coercive economic relationship between employer and employee, the Board failed to consider the implications that sections 7 and 8 of the NLRA bear on that bond.[188] As the legislative intent behind the NLRA made clear, Congress enacted section 7 to empower workers in the face of this economic disparity.[189] In large part, the existence of section 7 has nullified the economic coercion element that underlies the Board's *Randell* opinion. Absent this factor, surveillance operates as a far less ominous presence during the course of the unionization campaign. As such, videotaping may interfere with an employee's section 7 rights in some but not all circumstances.[190] This fact could largely undermine not only the *Randell* decision but also any application of a broader presumptive rule.

about the election. Given that certain voices may have been repressed, the Board could not allow the election results to stand. *See id.* at 736–37.

183. *See supra* notes 178–82 and accompanying text.

184. *E.g.*, *Pepsi-Cola Bottling Co.*, 289 N.L.R.B. at 736.

185. *E.g.*, *id.*

186. *E.g.*, *id.* at 736–37.

187. *E.g.*, *id.*

188. *See* Randell Warehouse of Ariz., Inc., 328 N.L.R.B. No. 153, 1999 WL 554239, at *5 (July 27, 1999). When discussing the implications of the economic bond between employer and employee, the Board never considered the effect the NLRA would have on that relationship. *See id.*

189. *See* NLRB, *supra* note 32, at 1018.

190. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239 *8–*17 (Brame, M., concurring in the result).

At one time, the economic chain binding employer and employee effectively negated unionization efforts.[191] Under the common law, a company's threat to terminate workers for associating with a labor organization could easily dissuade unionization.[192] Employees had no recourse if terminated for organizing their co-workers.[193] Before the dawn of the NLRA, this economic coercion effectively suffocated the voice of the workforce.[194] However, congressional enactment of section 7 provided a devastating blow to the brute economic force wielded by employers.

Congress designed section 7 to diminish the strength of the employer's economic hold over its workforce.[195] Specifically, this section vested certain definitive rights in employees such as "the right to self-organization, to form, join, or assist labor organizations."[196] Furthermore, by forbidding employer interference with those rights, Congress prevented companies from terminating workers for their participation in union activities.[197] Hence, the existence of the NLRA has empowered the worker.

If an employee recognizes that he possesses the right to unionize, he also understands that union and employer economic clout, even if coupled with surveillance, is merely bravado. Some workers will realize that a company cannot terminate them for organizing the unionization drive.[198] Likewise, an astute employee knows that the union cannot punish him for opposing the labor organization during the unionization campaign.[199] Because of this awareness, some workers will continue to exercise their section 7 rights despite union and employer posturing. Although the economic clout of both union and employer has the *potential* to coerce employees, section 7 prevents it from *automatically* coercing the workforce.[200]

The NLRB has ignored this reality when assessing the coercive potential of surveillance.[201] As discussed above, the NLRB largely based application of its per se rule with regard to employer surveillance on the rationale of economic coercion.[202] Specifically, the Board seems to view

191. *See supra* notes 17–23 and accompanying text.
192. *See supra* notes 17–23 and accompanying text.
193. *See* Agwilines, Inc. v. NLRB, 87 F.2d 146, 150 (5th Cir. 1936).
194. *E.g.*, LICHTENSTEIN, *supra* note 23, at 48 ("Most strikes still ended in defeat and disarray and there were precious few employers who actually negotiated with employees . . . .").
195. *See* 29 U.S.C. § 157 (1994); NLRB, *supra* note 32, at 1018.
196. 29 U.S.C. § 157.
197. *See id.* § 158 (prohibiting activities that interfere with section 7 activities).
198. *E.g.*, Randell Warehouse of Ariz., Inc., 328 N.L.R.B. No. 153, 1999 WL 554239, at *8–*17 (July 27, 1999) (Brame, M., concurring in the result).
199. *See id*. at *22–*24 (Brame, M., concurring in the result) (indicating that in the factual situation before the Board, the employees would recognize that the union surveillance could not harm the workforce).
200. *See* United States Steel Corp. v. NLRB, 682 F.2d. 98, 101 (3d Cir. 1982).
201. *See, e.g.*, *Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *1–*7.
202. *See supra* notes 166–88 and accompanying text.

surveillance as an extension of this economic coercion. The NLRB is concerned that surveillance serves as a possible economic threat in some situations.[203] Thus, employees may refrain from exercising their section 7 rights because they fear that the employer or union will use the tapes to identify dissidents.[204] Having located "problem" employees, the employer may, at some future time, sanction the worker.[205] However, the existence of the NLRA may alter the employee's reaction to surveillance.

Once armed with their section 7 rights, the worker's world view may change. As the Board noted in *Randell*, surveillance need not always have a nefarious purpose.[206] Because the NLRA strictly prohibits interference with section 7 rights,[207] employees may not always view surveillance as an effort to discourage or encourage unionization. Rather, workers may accept the employer's or union's explanation for having engaged in surveillance at face value.[208] Sections 7 and 8 diminish the coercive capacity of surveillance by assuring the worker that his rights exist and are protected.[209] The presumptive rule and *Randell* dichotomy fail to account for this situation.

In reality, various factors will influence an employee's reaction to surveillance during unionization campaigns.[210] For example, the particular idiosyncrasies of the workforce as well as the reason behind the surveillance will dictate whether an employee feels coerced by a video camera.[211] As the Third Circuit indicated in *United States Steel Corp.*, "case by case decision making [is required] when examining alleged section 8(a)(1) violations."[212]

IV. RESOLUTION

Rather than creating arbitrary dichotomies and broad presumptions, the Board and federal courts should analyze employer and union surveillance through an "under the circumstances" approach.[213] This test has routinely provided a fair yet flexible analysis to cases involving al-

203. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *5.

204. *E.g.*, Pepsi-Cola Bottling Co., 289 N.L.R.B. 736, 736 (1988).

205. *E.g.*, Belcher Towing Co. v. NLRB, 726 F.2d 705 (11th Cir. 1984).

206. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *5 (discussing the legitimate reasons why a union might engage in surveillance).

207. *See* 29 U.S.C. § 158 (1994).

208. *E.g.*, *Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *1–*7.

209. *See* 29 U.S.C. § 157 (providing workers with the right to unionize or refrain from any or all such activities); *id.* § 158 (forbidding interference with section 7 rights).

210. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *20–*21 (Brame, M., concurring in the result) (listing various factors that the Board should consider when assessing the coercive potential of surveillance).

211. *See id.*

212. United States Steel Corp. v. NLRB, 682 F.2d. 98, 101 (3d Cir. 1982).

213. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *17–*22 (Brame, M., concurring in the result).

leged violations of section 8 of the NLRA.[214] When using this approach, the Board merely asks, under the particular circumstances of this case, did the questioned "conduct tend[] to coerce or tend[] to interfere with the employee's exercise of [section 7] rights."[215] This inquiry serves to promote the interests of the worker without unduly trammeling union and employer prerogatives.

Foremost, this methodology vigorously protects the rights of employees as mandated by the NLRA. In particular, the "under the circumstances" approach prohibits conduct that "tends to coerce or tends to interfere with the employees' exercise of [section 7] rights."[216] The intentions of the party conducting the surveillance do not control this portion of the inquiry. Rather, the Board considers how the surveillance might affect the exercise of section 7 rights.[217] Thus, the NLRB may cast its net wide—even prohibiting conduct that the employer or union did not design to coerce the workforce.[218]

Yet, this test avoids the overreaching of the broader presumptive rule. While surveillance has the *potential* to coerce in the context of the unionization campaign, this tactic does not automatically interfere with an employee's section 7 rights. As such, the presumptive rule unnecessarily hampered all noncoercive uses for surveillance.[219] In contrast, before deeming surveillance coercive, a court using the "under the circumstances" approach would consider the factual context in which the activity occurred.[220] At this time, the legitimacy of the union as well as employer conduct may serve an important function.[221] In particular, the legitimate nature of the surveillance—to identify union supporters or to prevent destruction of company property—could serve as a mitigating factor *on a case by case basis*.[222] Unlike the implications of the *Randell* opinion, legitimacy does not automatically neutralize the coercive aspects of surveillance.[223] Rather, the individual predilections of a workplace will dictate whether the legitimate nature of the surveillance negates its coercive potential.[224]

Thus, even if the union or an employer can offer a myriad of legitimate reasons for surveillance, the calming effect these justifications will have on employees will vary from situation to situation. Legitimacy of

214. *See supra* notes 42–50 and accompanying text.
215. United Parcel Serv. v. NLRB, 41 F.3d 1068, 1072 (6th Cir. 1994).
216. *Id.*
217. *See supra* notes 45–46 and accompanying text.
218. *See supra* notes 45–46 and accompanying text.
219. *See* Randell Warehouse of Ariz., Inc., 328 N.L.R.B. No. 153, 1999 WL 554239, at *1–*7 (July 27, 1999) (describing the legitimate uses for surveillance).
220. *See supra* notes 47–50 and accompanying text.
221. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *20 (Brame, M., concurring in the result) (listing various factors that the Board should consider when assessing the coercive potential of surveillance).
222. *See id.*
223. *See id*. at *5–*6.
224. *See supra* notes 47–50 and accompanying text.

conduct should not shield a party from the Board's fullest scrutiny.[225] Rather, in some situations, a justification for surveillance may serve to diminish the conduct's coercive capacity.[226] The Board's assumption in *Randell*—a glut or dearth of legitimate reasons will automatically impact an employee's sentiment towards surveillance—is simply erroneous.

V. CONCLUSION

Although well intentioned, the *Randell* dichotomy does not advance the purpose underlying the NLRA. By focusing on the legitimacy of union surveillance, the NLRB placed the prerogatives of labor organizations above the rights of the individual worker.[227] Moreover, the *Randell* opinion fails to recognize that unions and their membership enjoy a complex economic relationship analogous to that found between employer and employee.[228] Yet, the existence of these financial bonds does not create an inherently coercive air around employer and union surveillance. Rather, the particular predilections of a workforce determine whether surveillance has a tendency to interfere with section 7 activities.[229]

As such, the Board should adopt an "under the circumstances" approach to analyze the coercive tendencies of surveillance in the context of unionization campaigns. This test reflects the intent behind the NLRA in that the workers remain the central focus of the Board's inquiry.[230] At the same time, the NLRB may afford some consideration to the legitimate nature of the activity.[231] Thus, the "under the circumstances" approach strikes the appropriate balance between the rights of employees and the interests of employers and labor organizations.

225. *See Randell Warehouse of Ariz., Inc.*, 1999 WL 554239, at *18–*24 (Brame, M., concurring in the result).
226. *See id.*
227. *See supra* Part III.A.
228. *See supra* Part III.B.1.
229. *See supra* Part III.B.2.
230. *See supra* Part IV.
231. *See supra* Part IV.