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RIGHTS OF MINE ACCESS FOR MINERS’ REPRESENTATIVES: HAS A WALK AROUND THE MINE BECOME A RUN AROUND THE LAW?

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I. INTRODUCTION

With the passage of the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), federal law added a new dimension to labor relations at mining operations. Section 103(h) of the Coal Act provided that “the authorized representative of the miners at the mine” shall be given an opportunity to accompany a federal inspector on any inspection of the mine. Eight years later, in section 103(f) of the Federal Mine Safety and Health Act of 1977 (Mine Act), Congress enlarged the role of this “walkaround” representative, giving him the right “to participate in pre- and post-inspection conferences held at the mine,” and guaranteeing him compensation for “lost work time during the inspection.” The Mine Act also authorized the use of multiple company and miner representatives if the inspector determined that “more

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than one representative from each party would further aid the inspection."^4

The policies underlying these provisions are clear enough. Congress hoped to encourage greater participation by miners in health and safety matters and, thus, to increase their understanding of the requirements of the law and their awareness of conditions and problems in the mine.^5 In Congress' view, including a representative of miners in the inspection party would enhance the overall safe operation of the mine because "if the worker is along, he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough."^6

Who can be a "representative of miners," and how is he to be chosen? Despite the importance that Congress attached to the position, neither statute defined the term nor established procedures for selection, but left those details to the administrative agencies—under the Mine Act, the Mine Safety and Health Administration (MSHA) of the United States Department of Labor, and, formerly, under the Coal Act, the Bureau of Mines and the Mining Enforcement and Safety Administration of the United States Department of the Interior. MSHA, like the Interior Department before it, interprets the term broadly, defining "representative of miners" as "[a]ny person or organization which represents two or more miners."^8 Similarly, MSHA's procedures for designating a representative impose few restrictions, requiring only that the designee provide MSHA and the operator with certain information concerning the nature and scope of his authority.^9

If Congress had legislated on a blank slate when it created these entitlements, the open approach of the regulations may not have become problematic. However, as Congress recognized during debate on the Coal Act, mining was traditionally a unionized industry.^10 Under

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4. Id.
10. 115 CONG. REC. 27,288 (Sept. 26, 1969) (statement of Sen. Metcalf) (*Most of
the National Labor Relations Act (Labor Act or NLRA), miners at many operations had already selected a union, usually the United Mine Workers of America (UMWA) in the coal fields, as their exclusive representative for dealing with the operator over “terms and conditions of employment,” which by law included workplace safety and health. Without accommodation between the two laws, MSHA’s regulatory scheme of multiple, minority-based representation and compelled admission to mine property inevitably has created a fundamental conflict with the NLRA’s principle of exclusive representation through majority vote of the employees, the attendant rights that flow to employers and employees under that Act, and, in particular, federal labor law’s longstanding recognition and preservation of the employer’s private property rights.

MSHA has made no such accommodations. During rulemaking in 1978, it brushed aside, as premature or unfounded, comments noting the significance of the term “representative” under federal labor law and seeking a more precise administrative definition of the Mine Act’s terminology. “[P]roblems are not anticipated with this broad interpretation of the term representative of miners,” the agency assured the public; “[i]f problems do arise MSHA will propose appropriate revisions.”

Problems now have arisen, yet MSHA’s regulations and policies remain unchanged. The problems are epitomized in Kerr-McGee Coal Corp., which was recently decided by the Federal Mine Safety and

these mines are under the jurisdiction of the United Mine Workers”).

11. 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988)) (also known as the Wagner Act) was amended by the Labor-Management Relations Act, 61 Stat. 136 (1947) (also known as Taft-Hartley), by the Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959) (also known as the Landrum-Griffin), and by other minor enactments. References in this article are to the statutory sections of the NLRA, as amended.


Health Review Commission (Commission). In Kerr-McGee, the Commission affirmed the holding of an administrative law judge (ALJ) that the operator of a nonunion mine which the UMWA was attempting to organize violated section 40.4 of MSHA’s regulations by refusing to post the name of a nonemployee union organizer as a representative of miners at the mine. The operator argued, inter alia, that the compelled posting of the information and admittance of the organizer to mine property created an unnecessary and impermissible conflict between MSHA’s regulations and the NLRA’s scheme of employer and employee rights. The judge disagreed, and the Commission affirmed. The judge noted that the Mine Act and its regulations place no limits on who may be chosen as the miners’ walkaround representative and found no evidence that the union had abused the walkaround privilege. Further, he found no basis to conclude that the designation of a union organizer as a representative of miners was a per se abuse of the Mine Act, irrespective of what the NLRA might require.

This Article examines the interplay of the NLRA and the Mine Act, with particular focus on problems that arise when miners designate, and the operator is required to recognize and to admit onto mine property, a nonemployee union representative as a representative of miners under the Mine Act. We first review the principles of majority rule and exclusive representation which underlie the NLRA and explain how those principles, which are designed to protect the employees’ free choice in matters of collective bargaining, are carefully balanced with other rights which the NLRA confers or preserves, such as the private property rights of employers.

We then analyze the language and legislative and administrative histories of the statutory provisions and implementing regulations con-

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18. Section 40.4 provides:
   A copy of the information provided the operator (concerning the identity and scope of authority of the designated representative of miners) shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.
20. Id. at 1904-05.
cerning representatives of miners under the Coal Act and Mine Act. We demonstrate that in both statutes, Congress consciously legislated against the backdrop of a predominantly unionized industry. In so doing, Congress pursued the dual objectives of providing representation for miners at all mines, whether unionized or not, and enhancing federal mine inspections by including on the inspection team an individual with an employee’s perspective and knowledge of day-to-day conditions in the mine. We also demonstrate that in implementing the statutory provisions through regulations, the agencies—particularly MSHA—have strayed from Congress’ intent by adopting an excessively open policy for designating and recognizing miners’ representatives, at the expense of employers’ and miners’ rights under the NLRA, and at the further expense of the benefits that Congress intended to flow from employee participation in federal safety and health inspections of their workplace. We conclude that the purposes of the NLRA and the Mine Act can best be achieved, and the conduct of the parties most appropriately affected, by harmonizing the two statutes rather than interpreting the Mine Act in isolation.

II. EMPLOYEES’ AND EMPLOYERS’ RIGHTS UNDER THE NLRA

A. Employees’ Right to Majority-Based Representation

The overall goal of the NLRA is to eliminate impediments to the free flow of commerce by “encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”21 Significantly, Congress chose only to encourage collective bargaining, not to require it, for to do otherwise would be to deprive employees of the very right to self-determination and workplace democracy that Congress sought to protect. Thus, the basic right protected by the NLRA is the right to choose, not merely between one or

another collective bargaining representative, but whether to be represented at all. As section 7 of the NLRA provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

While Congress sought to safeguard the right to join together for "mutual aid or protection," it placed an even greater premium on ensuring the employee's right to choose whether to exercise those rights.

With particular reference to section 7, the Supreme Court recently noted that "the NLRA confers rights only on employees, not on unions or their nonemployee organizers." Those rights are safeguarded during the selection of a collective bargaining representative by section 9 of the NLRA, which creates an elaborate procedural mechanism and requires that a collective bargaining representative be selected by a majority of the employees in an appropriate unit. Once selected by

23. See H.R. REP. No. 245, 80th Cong., 1st Sess. 27 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 318 (1985) (explaining that section 7 was being amended so that the "[National Labor Relations] Board will be prevented from compelling employees to exercise such rights against their will, as it has consistently done in the past"); see also Pattern Makers' League of North America v. NLRB, 473 U.S. 95, 100 (1985) (noting that section 7 of the NLRA "grants employees the right 'refrain from any or all [concerted] . . . activities'").
26. Section 9(a) provides: Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.
such a majority, the representative becomes the sole representative of the employees. An employer violates the rights of its employees who have selected an exclusive collective bargaining representative if it negotiates or "deals with" any other person or entity as a "representative" of the bargaining unit.27

Although an employer can voluntarily recognize an employee representative based on a showing of majority support, the employer has the right to refuse recognition and to require the representative to prove its majority support through a secret-ballot election supervised by the National Labor Relations Board (Board or NLRB).28 The Board strives to ensure "laboratory conditions" for the elections it conducts so that employees are not threatened or induced to vote for or against union representation.29 To this end, the Board has issued detailed procedural regulations to govern the determination of who is eligible to vote and the conduct of the election itself.30 Laboratory conditions are violated if an employer "dominate[s] or interfere[s] with the formation or administration of any labor organization,"31 or prematurely recognizes a minority union, depriving employees of free choice.32 Moreover, a Board-supervised election promotes

27. The concept of "dealing with" is central to the NLRA's definition of "labor organization." See infra notes 70-80 and accompanying text. The refusal to deal exclusively with the properly elected majority representative would violate 29 U.S.C. § 158(a)(5) (1988), which makes it an unfair labor practice for the employer to "refuse to bargain collectively with the representatives of his employees." See Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944) ("[I]t is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions").
labor-management stability because the statute bars another election for twelve months following a valid election.  

B. Exclusivity of Representation Under the NLRA

Once a union or other representative is selected by a majority of the employees, its representation is exclusive. Both union and employer share a common obligation to bargain collectively in good faith over "wages, hours, and other terms and conditions of employment." Workplace safety and health constitute such "other terms and conditions of employment" and must be subjected to good-faith collective bargaining. The justification for according the representative this privileged status is not to promote the well-being of labor organizations, but rather to further the employees' majority decision to deal collectively with the employer. To "secure to all members of the unit the benefits of their collective strength and bargaining power," the NLRA guarantees that majority can impose its chosen representative on the minority through the exclusivity provision of section 9(a) and bargain with the employer to make union membership a condition of employment. In exchange for these privileges, the representative in-

34. Outside the procedural restrictions just discussed, the NLRA places few limitations on who can serve as a "representative." It can be an individual or a labor organization. 29 U.S.C. § 152(4) (1988). If the latter, it need not have any formal structure or affiliation, but can be: [A]ny organization of any kind, or any agency or employee representation commit- tee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. § 152(5) (1988) (emphasis added). The determinative factor is a functional one—that of the representative's purposes be to "deal with" employers concerning working conditions.
39. Id. (discussing NLRA §§ 7 & 8(a)(3), 29 U.S.C. §§ 157 & 158(a)(3)). Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate in hiring or job
curs a "statutory obligation to serve the interests of all members without hostility or discrimination toward any." 40 In this fashion and others, 41 federal labor law "attempt[s] to promote democracy by adjusting conflict between individual employee rights and union collective authority." 42

The consequences that flow from the concept of exclusive, majority-based representation have been consistently upheld as essential to the NLRA's scheme for promoting industrial peace despite their impact on individual freedom of choice. We discuss some of those consequences in the sections that follow.

1. Subordination of Individual Employee Interests to the Collective Interest of the Unit

The interests of individual employees, whatever their significance prior to the selection of a collective bargaining representative, become

tenure on the basis of union membership or affiliation, but states in a proviso that: "[N]othing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . . ." 29 U.S.C. § 158(o)(3) (1988). The "membership" obligation extends to payment of dues to cover collective-bargaining costs of the representation. See Communications Workers of America v. Beck, 487 U.S. 735 (1988).

40. Vaca v. Sipes, 386 U.S. 171, 177 (1967); see also Emporium Capwell, 420 U.S. at 64 ("Congress implicitly imposed upon [the bargaining representative] a duty fairly and in good faith to represent the interests of minorities within the unit").

41. Additional checks on the exclusive representative's authority include limiting the authority to the "unit appropriate for the purposes of collective bargaining," Emporium Capwell, 420 U.S. at 64 (citing Chemical Workers v. Pittsburgh Glass, 404 U.S. 157, 171 (1971)), and giving union members quasi-constitutional rights against their unions, including freedom of speech and assembly and the right to elect union officers by secret ballot at regular intervals. Id. at 64 (discussing Landrum-Griffin Act, Pub. L. 86-257, 73 Stat. 519 (1959)); see supra note 11.

42. Roger C. Hartley, The Framework of Democracy in Union Government, 32 CATH. U. L. REV. 13, 18 (1982). As Hartley points out, one impetus behind adoption of the NLRA was the belief of its sponsor, Senator Wagner, that "Democracy in industry must be based on the same principles as democracy in government. Majority rule, with all its imperfections is the best guarantee of workers' rights, just as it is the surest guarantee of political liberty that mankind has yet discovered." Id. at 43 (quoting 79 CONG. REC. 7571 (1935)).
subordinate to the collective interest of the group once a majority of the employees choose to bargain collectively. This principle has been strongly articulated by the United States Supreme Court ever since its 1944 decision in *J.I. Case Co. v. NLRB.* The litigation concerned the continued validity of individual employment contracts after a majority of employees voted to be represented by a union. The Court sustained the statutory preference for exclusivity of the majority representative and invalidated the prior contracts.

Under *J.I. Case Co.*, individual arrangements between employers and employees cannot withstand the selection of a majority-based representative or be used to delay or defeat the procedures prescribed by the NLRA. Otherwise, "the Act would be reduced to a futility." The Court explained that the very purpose of collective bargaining is to supplant the terms individual employees might prefer with "terms which reflect the strength and bargaining power and serve the welfare of the group." Even if separate contracts confer advantages on individual employees, the Act's collective bargaining scheme views them "with suspicion" because:

They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down of some other standard thought to be for the welfare of the group, and always creates a suspicion of being paid at the long-range expense of the group as a whole . . . . The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result.

The Court did not invalidate individual employment contracts altogether in the collective setting. It did, however, underscore the primacy

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43. 321 U.S. 332 (1944).
44. See id. at 333-34.
45. Id. at 332-39.
46. Id. at 337.
47. Id. at 338-39.
48. Id. at 339.
49. Id. ("We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not
of exclusivity by stressing that such contracts were impermissible if they diminished an employer's obligations or increased an employee's obligations under the collective bargaining agreement.\(^5\)

2. Accommodating Other Statutorily Protected Interests
   Within the NLRA’s Framework of Exclusive Collective Representation

Like the terms of individual employment contracts, rights conferred on employees by other statutes must be harmonized with the demands of exclusive majority representation under the NLRA. The Supreme Court’s decision in *Emporium Capwell Co. v. Western Addition Community Organization*\(^51\) illustrates the primacy of exclusive representation and majority rule in the face of potentially conflicting policies that Congress advanced in other statutes. In that case, black employees accused their employer of racial discrimination in violation of the collective bargaining agreement as well as Title VII of the Civil Rights Act of 1964.\(^52\) The union investigated and confirmed the employees’ allegations and notified the company that it would take the grievances to arbitration if necessary. The employees, however, felt that the contractual grievance procedure was inadequate for their allegations of systemic discrimination. They attempted to raise the matter directly with company officials, demanded the right to bargain for improvements, and were eventually discharged for picketing in violation of the contractual no-strike provision. In unfair labor practice proceedings before the Board, they argued that their discharges violated the NLRA because they sought to vindicate racial discrimination and were thus entitled to raise the issue separately with the employer, “free from the constraints of the exclusivity principle of section 9(a).”\(^53\)

\(^50\) Id.
\(^51\) 420 U.S. 50 (1975).
\(^53\) *Emporium Capwell*, 420 U.S. at 65.
The Supreme Court disagreed. In an opinion by Justice Marshall, the Court held that even so important a consideration as the elimination of racial discrimination in employment, as embedded in another federal statute, did not justify the employees' departure from the NLRA's orderly scheme for resolving their dispute with the employer:

[The employees'] argument confuses the employees' substantive right to be free of racial discrimination with the procedures available under the NLRA for securing these rights. Whether they are thought to depend upon Title VII or have an independent source in the NLRA, they cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA. 54

The Court explained that the union, as the collective bargaining representative of all the employees in the unit, has a legitimate interest in presenting a united front on this, as on other issues, and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests. 55

Thus, the principle of exclusive majority representation under section 9 denies any minority group the ability to circumvent the collective bargaining representative and deal directly with the employer, even when the interest they assert is explicitly and undisputedly protected by another federal statute. 56 In such cases, section 9 has a drastic, but altogether intended, effect: it "extinguishes the individual employee's power to order his own relations with his employer" and gives the bargaining representative "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." 57

54. Id. at 69.
55. Id. at 70.
56. Section 9(a) permits individual employees or groups of employees to present grievances to their employer and have their grievances adjusted without the intervention of the bargaining representative, but only if that type of adjustment is not inconsistent with the collective bargaining agreement, and only if the bargaining representative has an opportunity to be present. 29 U.S.C. § 159(a) (1988).
Employer conduct is also restricted under the mandate of exclusivity established by section 9(a). Just as the NLRA precludes employees from circumventing the union, so too it forecloses employers from avoiding the exclusive representative by dealing with some other representative or dealing directly with employees. Because an employer is obligated under sections 8 and 9(a) to bargain exclusively with the union, the NLRA “exacts ‘the negative duty to treat with no other.’” 58 Even if the employees were to consent, an employer cannot, “by its own actions, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will.” 59

A further corollary to the principle of exclusive representation is that the employer cannot, by bypassing the union and dealing directly with the employees, “create the impression that the employer rather than the union is the true protector of the employees’ interests.” 60 Rather, the employer must at least recognize that “the statutory representative is the one with whom it must deal in conducting bargaining negotiations, and that it can no longer bargain directly or indirectly with the employees.” 61

3. Consequences for the Nonorganized Workplace

The NLRA and the cases just discussed demonstrate that the principles of majority rule and exclusive representation permeate labor relations in the organized workplace. These principles also, however, affect employer, union, and employee conduct even if the employees have not (or have not yet) selected a collective bargaining representative. In those circumstances, the principles work by negative implication to bar an employer from treating any representative as the statutory representative of the employees.

58. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-84 (1944) (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44 (1937)).
59. Id. at 687 (quoting NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318, 339 (1940)).
61. Id. at 194.
In the leading case, *Bernhard-Altman Texas Corp.*, the Board concluded that an employer and a union violated sections 8(a)(1) and (2) and 8(b)(1)(A) of the NLRA through the employer's recognition of the union as an exclusive bargaining representative, even though a majority of the employees had not selected the union as a representative as of the date on which the employer extended recognition. Neither the company’s and union’s good faith belief that majority support existed at that time, nor the fact that the union had acquired majority support by the time the parties signed a collective bargaining agreement, was a defense to the charges.

The Supreme Court upheld the Board’s conclusion. The Court explained that whereas the exclusivity provision of section 9(a) “placed a nonconsenting minority under the bargaining responsibility of an agency selected by a majority,” the reverse was the case here: the company “granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority.” The parties’ good faith but mistaken belief that majority support existed at the time of recognition was no defense, because such recognition “would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives.” Moreover, the Court found it inconsequential that the union may have acquired majority support by the time the parties

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63. Sections 8(a)(1) and (2) make it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7” of the Act, and to “dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” 29 U.S.C. § 158(a)(1)-(2) (1988).

64. Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization to “restrain or coerce . . . employees in the exercise of rights guaranteed in section 7” of the Act. 29 U.S.C. § 158(b)(1)(A) (1988).


66. *Id.* at 737 (quoting Brooks v. NLRB, 348 U.S. 96, 103 (1954)).

67. *Id.*

68. *Id.* at 738-39.
executed the collective bargaining agreement, some forty days after the company recognized the union. "Indeed," the Court noted, "such acquisition of majority status itself might indicate that the [earlier] recognition . . . afforded [the union] a deceptive cloak of authority with which to persuasively elicit additional employee support." 69

4. Scope of Affected Employer Conduct: "Dealing with" Employee Representatives

The scope of an employer's interaction with the statutory representative of the employees depends upon the meaning of the term "dealing with." The NLRA defines the term by implication only, using it to describe the core function of a labor organization. Under section 2(5), a "labor organization" is "any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 70

Those seeking a more precise definition must look to the case law, where the Board and the courts, like the statute itself, have eschewed the use of "conventional accoutrements of a labor organization—constitution, bylaws, officers, and the like" 71—for a functional definition. 72 "Dealing with" encompasses much more than merely

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69. Id. at 736. The NLRA permits an employer to bargain with a minority union only in the building and construction industry, under a special exemption in section 8(f), 29 U.S.C. § 158(f) (1988). Without the exemption, this common practice in the construction industry would have been an unfair labor practice, as it was for the company and union in Bernhard-Altman. See NLRB v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 344 (1978) (citing Bernhard-Altman, 366 U.S. at 737).


72. The only formality that the Board insists upon is the representative nature of the labor organization's status. "The essence of a labor organization," the Board has explained, "is a group or person which stands in an agency relationship to a larger body on whose behalf it is called upon to act." General Foods, 231 N.L.R.B. at 1234. In General Foods, the Board upheld an ALJ's conclusion that work teams, when used in lieu of an assembly
“bargaining with,” as the Supreme Court has made clear. In *NLRB v. Cabot Carbon Co.*, the Court held that company-dominated employee committees were “labor organizations” even though they had no membership requirements, collected no dues, and had no funds of their own, and even though they did not engage in traditional bargaining, but only made recommendations which the employer had complete discretion to accept, modify, or reject. The Court reviewed the legislative history of section 2(5), and concluded that Congress, by rejecting the more limited term “bargaining collectively” in favor of the broader term “dealing with,” intended to encompass activities such as making proposals and formulating requests concerning seniority, job classifications, and the improvement of working conditions. The Board has taken *Cabot Cove* even further, holding in *Thompson Ramo Woolridge, Inc.* that an employee committee is a “labor organization” even if it does nothing more than forward employee “views” and individual grievances to the company without any specific recommendations about the action needed to accommodate the views or resolve the grievances. The Board held that the committee’s function as a conduit for grievances alone rendered it a “labor organization,” so that the company violated section 8(a)(2) by making financial contributions to the committee and by dominating and interfering with it through arrangements such as allowing top management representatives to vote in the election of committee board members.

A miners’ representative “deals with” a mine operator on safety and health issues and, by so doing, becomes the functional equivalent of a labor organization. The UMWA describes the duties of the walkaround representative as “assist[ing] MSHA and the miners who have selected him in enforcing the statutory and regulatory safety and health standards”—that is, “safety rules and practices” in the mine line, did not constitute “labor organizations,” because otherwise every bargaining unit, “viewed as a ‘committee of the whole,’” would be accorded *de facto* labor organization status. *Id.*

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74. See *id.* at 210-12.
75. *Id.* at 210-14.
77. *Id.* at 994-95.
78. Secretary of Labor *ex rel.* Barry Mylan v. Benjamin Coal Co., 9 F.M.S.H.R.C. 27,
which are otherwise mandatory subjects of bargaining.79 Throughout an inspection—and all pre- and post-inspection meetings, as well as accident investigations and the like—the operator, the inspector, and the miners’ representative constantly “deal with” each other on “conditions of employment”80 through discussion, debate, compromise, and correction. Affording an organizer such prominence in the lives of employees who have not selected a representative through majority choice is contrary to the policies of the NLRA.

C. Preservation of the Employer’s Property Rights Under the NLRA

Union organizing campaigns, like the designation of a representative of miners to accompany a federal inspector wherever he goes during his inspection, implicate the private property rights of the mine operator.81 A union seeking to organize a work force can gain a considerable advantage if it can enter onto mine property and communicate with the miners there, rather than wait until they leave the mine and disperse at the end of a shift. But section 7 of the NLRA confers its rights on employees, not on unions,82 so the crucial question is whether the employee rights are sufficient to obligate the company to waive its private property rights and admit union organizers onto company property:

46 (ALJ 1987).
79. See supra notes 36-37 and accompanying text.
81. A representative of miners gains far more than physical access to the mine site. He also acquires substantial informational and participational rights. The representative stands in a privileged position to participate as a full-fledged party in all proceedings before the Commission and in petition for modification proceedings. See 30 U.S.C. §§ 811(c), 815(d), 817(e)(1) (1988); 29 C.F.R. § 2700.4(a)-(b) (1991). The representative must also be given access to mine maps and the roof control plan at underground mines and must receive a copy, with opportunity to comment, of the mine’s training plan. 30 C.F.R. §§ 48.3, 48.23, 75.200, 75.1203 (1991). In addition, the representative has the legal authority to initiate formal review proceedings of various types before the Commission and the Secretary. See, e.g., 30 U.S.C. §§ 811(c), 815(d), 817(e)(1) (1988). A union’s access to company information during an organizing drive can be particularly inequitable to the employer because the union might obtain covert discovery if the organizing campaign leads to litigation before the NLRB, an agency that does not provide for discovery.
This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization.\(^{83}\)

The case law concerning union access to company property is extensive\(^{84}\) and varied, not only because of the fact-sensitive nature of the determination,\(^{85}\) but also because the issue can arise in a variety of substantive and procedural contexts\(^{86}\) and become interwoven with considerations of judicial deference to the Board’s interpretation of the statute.\(^{87}\) A common thread running throughout the cases, how-

85. The Board has stated that “as with other legal questions involving multiple factors, the ‘nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.’” Jean Country, 291 N.L.R.B. 11, 14 (1988) (quoting Electrical Workers Local 761 v. NLRB, 366 U.S. 667, 674 (1961)).
86. For example, the union can raise the issue in an unfair labor practice proceeding before the Board by alleging interference with section 7 rights in violation of section 8(a)(1) of the NLRA. See Babcock & Wilcox, 351 U.S. at 112. The employer could sue for injunctive relief in state court for violation of its property rights—a type of action which, when first brought, raised the further question of whether the NLRA preempted state law. See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978) (finding no preemption). The issue has also been decided in the context of First Amendment challenges to an employer’s restriction on the use of its quasi-public property at workplaces such as stores and shopping malls. See Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); Hudgens v. NLRB, 424 U.S. 507 (1976). And, as the pending action before the D.C. Circuit illustrates, the issue can arise in litigation under the Mine Act as an employer’s defense to MSHA citations because of its refusal to recognize a nonemployee as a representative of miners. See Kerr-McGee, 13 F.M.S.H.R.C. 1889 (ALJ 1991), aff’d, 15 F.M.S.H.R.C. 352 (1993), petition for review docketed, No. 93-1250 (D.C. Cir. Apr. 1, 1993); see also Utah Power & Light Co. v. Secretary of Labor, 897 F.2d 447 (10th Cir. 1990); Mid-Continent Resources, Inc., 10 F.M.S.H.R.C. 881, 883 (ALJ 1988), aff’d, 12 F.M.S.H.R.C. 949 (1990); Secretary of Labor ex rel. Barry Mylan v. Benjamin Coal Co., 9 F.M.S.H.R.C. 27, 36-37 (ALJ 1987).
87. The Board’s claim to absolute deference was rejected in Lechmere, where the Supreme Court held that as to nonemployees’ access to company property, the meaning of section 7 was clear, so that (1) courts need not defer to the Board’s interpretation, and (2),
ever, is the distinction between employees and nonemployees, which, as the Supreme Court recently reaffirmed, is a distinction "of substance." The Court explained that in cases involving employee access to company property to engage in organizing activities, the Board can appropriately balance the employee’s interest in receiving information about self-organization on company property from fellow employees against the employer’s right to control the use of his property. But nonemployees receive far less protection from the NLRA: “Section 7 simply does not protect nonemployee union organizers except in the rare case where the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.” The Court held that the exception was narrow, and that the union’s burden of establishing it was “a heavy one”: [The exception] does not apply wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective, but only where the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.

The enormity of this burden gives a union a powerful incentive to gain access to employees and legitimize its presence on company property through means other than the section 7 exception. In the mining industry, one of the union’s chosen vehicles is the miners’ representative provisions of the Mine Act and their implementing regulations, to which we now turn.

to the contrary, the Board must conform to the Supreme Court’s interpretation under the doctrine of stare decisis. Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 847-48 (1992) (citing Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759, 2768 (1990)).

88. Id. at 848 (quoting Babcock & Wilcox, 351 U.S. at 113).
89. Id. at 848.
90. Id. at 848 (quoting Babcock & Wilcox, 351 U.S. at 112) (emphasis in original).
91. Id. at 849 (quoting Babcock & Wilcox, 351 U.S. at 113) (emphasis added by Court). The Court gave three “classic examples” of the exception—logging camps, mining camps, and mountain resort hotels. These examples make clear that both the work site and the living quarters must be beyond the union’s reasonable reach before the employer can be required to admit nonemployees onto company property. The Court further confirmed the conjunctive nature of these factors when it held that because the employees in Lechmere did not reside on the company’s property, they were “presumptively not ‘beyond the reach’ of the union’s message.” Id. at 849 (citation omitted).
III. MINERS' RIGHTS TO WALKAROUND REPRESENTATION


The miners’ entitlement to walkaround representation originated in section 103(h) of the Coal Act, which provided: “At the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.”92 This provision was not part of the legislation as originally introduced in the Senate or reported out of committee, but was added as a floor amendment.93 The Senate debate reveals that the provision was not written on a blank slate, but against the recognized backdrop of a predominantly unionized industry. Senator Metcalf, the amendment’s sponsor, explained:

[T]he whole purpose of the amendment is to provide that when the representative of the Secretary, the mine inspector, goes into the mine and makes an inspection, *some member of the union, or, if there is not a union, some worker* be authorized to accompany the inspector to see what he has inspected and to report back to the miners.94

Senator Williams likewise noted that “[m]ost of these mines [were] under the jurisdiction of the United Mine Workers” and that the amendment would ensure miner representation on inspections of those mines as well as nonunionized operations.95 The language of Senator

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94. 115 CONG. REC. 27,287 (Sept. 26, 1969) (emphasis added).
95. *Id.*
Metcalf's amendment was included in the House bill\textsuperscript{96} and with only slight, unexplained change became section 103(h) of the Coal Act.\textsuperscript{97} The Conference Committee echoed the Senate's concern about nonunionized mines, pointing out that "representative of the miners' includes any individual or organization that represents any group of miners at a given mine and does not require that the representative be a recognized representative under other labor laws."\textsuperscript{98}

Thus, although the Coal Act did not require the representative of miners to be a recognized collective bargaining representative under the NLRA, Congress was cognizant of federal labor law's general applicability to mining operations and of the unionized setting in which the Coal Act would most frequently be applied. Congress also assumed that the miners' representative, while not in every instance identical to the union, would be a person or organization that was familiar with the specific conditions in the mine at the time of the inspection—that is, a miner who worked at the mine. Providing for miner representation was not the end in itself, but a means of assuring a thorough and accurate inspection. Conditions at the mine would be brought to the attention of the inspector through the participation of the persons most familiar with those conditions—the operator of the mine and the miners who worked there:

MR. WILLIAMS of New Jersey: . . . I would suggest that no people know the mine that is under inspection as do the mine owner and the miners themselves. What the amendment would provide would be the opportunity for a representative of the men who work in that mine, to accompany the inspector as he goes through what, for him, could be a new mine or one that he has not seen in 3 or 4 months. The amendment would permit the miners to have a representative to go with that inspector.

MR. METCALF: Mr. President, it might well happen that that miner who has been working in that mine would help the inspector by calling attention to certain safety violations. He is familiar with the operation of

\textsuperscript{96} See H.R. 13950, 91st Cong., 1st Sess. § 103(h) (1969).
\textsuperscript{97} The change consisted of deleting the words "if any" from the phrase "the authorized representative, if any, of the miners." The Conference Report gave no reason for the change. See H.R. CONF. REP. No. 761, 91st Cong., 1st Sess. 67 (1969), reprinted in 1969 Legislative History, supra note 93, at 1445, 1511.
\textsuperscript{98} Id. at 2582.
the mine, and he would be able to represent his fellow union members or his fellow mine workers to reveal safety violations.

MR. WILLIAMS of New Jersey: They would be conditions that existed. Whether they were violations or not would be the inspector’s conclusions. However, conditions as the miners themselves know them to exist from day to day in the mines could be pointed out.99

The Interior Department’s regulations implementing section 103(h) of the Coal Act defined “representative of the miners” broadly as “any person or organization which represents two or more miners at a coal mine for purposes of the Act.”100 The regulations and the rulemaking preambles were silent as to the need for the representative to be an employee of the operator.101 The selection process was left largely undefined, but did permit a collective bargaining representative to establish itself as a Coal Act representative by filing with the agency and the operator a “statement that he is the representative of the miners at the mine for purposes of collective bargaining or that he has written authorization from two or more miners at the mine to represent them under the Act.”102 The agency thus achieved some consonance between the provisions of the Coal Act and the NLRA concerning representatives.

Although the legislative history spoke exclusively in terms of a single representative at a given mine and gave no hint that Congress contemplated the designation of multiple representatives,103 the regulations left unclear whether, at a unionized mine, the union would enjoy exclusive status under the Coal Act. In the preamble to the final

100. 30 C.F.R. § 81.1(b) (1977). The regulations were first issued by the Department’s Bureau of Mines. 36 Fed. Reg. 21,405 (1971). They were subsequently transferred to the Interior Department’s Mining Enforcement and Safety Administration when that agency was created to administer the Coal Act and the Federal Metal and Nonmetallic Mine Safety Act, Pub. L. 89-577, 80 Stat. 772 (1966) (previously codified at 30 U.S.C. §§ 721-740 (1976)). See also 38 Fed. Reg. 18,665, 18,668 (1973).
103. See supra notes 92-98 and accompanying text; see also 115 CONG. REC. 27,288 (statement of Sen. Metcalf) (“There would automatically be a shop steward or some representative of the union present.”).
rule, the agency rejected a comment that since the UMWA was the collective bargaining representative at “most of the coal mines throughout the United States on wages, hours, and other conditions of employment including safety,” it “should be recognized as the representative of miners under the [A]ct.”\(^\text{104}\) It is not clear whether the comment was directed at the exclusivity of the union’s representation (i.e., that NLRA’s principle of exclusivity precluded the designation of some other Coal Act representative besides, or in addition to, the union), or was an attempt to gain entry to nonunionized mines through regulation (i.e., that because the UMWA was the collective bargaining representative at most coal mines for purposes of safety, it should as a matter of law be made the Coal Act representative at all coal mines). The first argument would be a valid application of the NLRA’s principle of exclusivity, whereas the second would conflict with principles of employee choice under both the NLRA and the Coal Act.

B. Federal Mine Safety and Health Act of 1977

Section 103(f) of the Mine Act expanded the rights available to a representative of miners. It provides:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine.\(^\text{105}\)

Section 103(f) further enlarged section 103(h) of the Coal Act by providing that a miners’ representative “who is also an employee of the operator shall suffer no loss of pay” while participating in the inspection, and that more than one representative of miners and the


operator could be used if doing so "would further aid the inspection." 106

The legislative history makes clear that although section 103(f) of the Mine Act contains several new provisions for representatives of miners, the basis and underlying rationale were still those of section 103(h) of the Coal Act. Section 103(f), originally section 104(e) of the Senate bill, 107 expanded the entitlements available under the section 103(h) of the Coal Act but was nonetheless "based on" that earlier provision. 108 The House would have retained section 103(h) of the Coal Act without enlargement. 109 When the Conference Committee ultimately settled on the Senate version, it did so without explaining its choice, but made clear that it, like Congress when it enacted the Coal Act, was still mindful of the predominantly unionized setting to which the provision would apply: The Senate bill required the Secretary to consult with a reasonable number of miners if there was no authorized representative of miners. The House amendment did not contain this provision for unorganized miners. 110

The legislative history of section 103(f) also makes clear that central to Congress' purpose in enhancing the role of the representative of miners in 1977, just as it was when Congress first provided walkaround rights in the Coal Act, was the concept of familiarity with day-to-day conditions in the mine in order to enhance the federal inspection. During debate on an amendment by Senator Helms that would have eliminated the mandatory compensation feature of section 103(f), Senator Javits, the ranking minority member of the Senate Committee on Human Resources and the sponsor of the Senate bill, stressed that the provision was directed at enhancing the role of "miners," by which Congress meant "any individual working in a coal or other mine." 111 He explained that the new provisions would provide for "greater miner participation in health and safety matters," and

106. Id.
110. Id. (emphasis added).
increased "miner awareness of the safety and health problems in the mine." He elaborated:

One of the things we found at the hearings, Mr. President, that all the witnesses agreed to, is that miners' safety consciousness needs to be materially improved. Indeed, one of the matters which was criticized by the Comptroller General, was the matter of training miners in sensitivity to safety and health considerations . . . .

If miners are going to accompany inspectors, they are going to learn a lot about mine safety, and that will be helpful to other employees and to the mine operator.

Senator Javits' choice of language reflected Congress' underlying assumption that the representative of miners would be a miner himself, and would in fact be an employee of the mine who could educate "other employees" about what he had learned from exercising his walkaround rights. As the Senator explained, in words reminiscent of the debate on the Coal Act in 1969:

If the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough . . . .

It seems such a standard business practice that is involved here, and such an element of excellent employee relations, and such an assist [sic] to have a worker who really knows the mine property go around with an inspector in terms of contributing to the health and safety of the operation . . . .

Senator Javits' statements confirmed that familiarity with conditions at the mine was not merely a desirable attribute, but was the essence of the walkaround function.

When the Mine Act took effect on March 9, 1978, MSHA appeared to make the same assumption. The agency stated in an Interpretative Bulletin that "participation in the inspection process by representatives of miners will directly aid the inspection itself by providing

112. 123 CONG. REC. 26,019 (1977) (emphasis added).
113. Id. (emphasis added).
114. See supra notes 92-98 and accompanying text.
115. 123 CONG. REC. 26,019 (1977) (emphasis added).
information through individuals familiar with day-to-day conditions at the mine site.”\footnote{116} No such qualification, however, appeared in MSHA’s regulations, which the agency had proposed before issuing the Interpretative Bulletin but did not issue in final form until afterwards.\footnote{117} Rather, MSHA’s regulations defined “representative of miners” virtually without limitation, as “[a]ny person or organization which represents two or more miners at a coal or other mine for purposes of the [A]ct.”\footnote{118} Moreover, unlike the Interior Department’s regulations, which reflected some accommodation to the NLRA by allowing a Coal Act miners’ representative to prove his status by filing a statement that he was the miners’ collective bargaining representative,\footnote{119} MSHA’s regulations entirely dropped the use of collective bargaining representative status as evidence of a representative’s authority under the Mine Act.\footnote{120}

Commenters on the proposed rule criticized the definition as overly broad and likely to create confusion among miners, and they suggested that the definition of representative under the NLRA be applied, or at least that the Mine Act representative be elected by a majority of the miners and be a miner from the work force.\footnote{121} In its wholesale rejection of these comments, MSHA asserted that a broad definition advanced the legislative goal of having miners “freely participate in health and safety matters” and was justified because of the frequent use of the term “representative” in different contexts throughout the Mine Act.\footnote{122} MSHA also opined that a more restrictive rule “would be intrusive into labor-management relations” and would be difficult to formulate because of variations among mines in terms of size, unionized status, and type of product mined.\footnote{123} It rejected the use of the NLRA definition of “representative,” asserting without elaboration that

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\begin{itemize}
\item \footnote{116}{43 Fed. Reg. 17,546 (1978) (emphasis added).}
\item \footnote{117}{See 43 Fed. Reg. 9108 (1978) (proposed rule); 43 Fed. Reg. 29,508 (1978) (final rule).}
\item \footnote{118}{43 Fed. Reg. 29,509 (1978) (promulgating 30 C.F.R. § 40.1(b)(1)).}
\item \footnote{119}{30 C.F.R. § 81.2(a)(3) (1977).}
\item \footnote{120}{43 Fed. Reg. 29,505 (1978) (promulgating 30 C.F.R. § 40.3(a)(4)).}
\item \footnote{121}{43 Fed. Reg. 29,509 (1978).}
\item \footnote{122}{Id. at 29,508.}
\item \footnote{123}{Id.}
\end{itemize}
"[t]he meaning of the word representative under this act is completely different" and that the rights of nonunion miners would be "severely limited" if such a definition were used.124 MSHA also rejected the use of a majority rule concept because majority rule under the NLRA contemplates only one representative whereas, in MSHA's view, the Mine Act's purposes were better served by allowing the designation of multiple representatives. Lastly, in addressing the comment that the miners' representative should be a qualified miner from the work force, MSHA stated that it anticipated no problems with its broad interpretation because miners could reasonably be expected to "choose representatives with a substantial amount of experience."125

IV. PROBLEMS OF IMPLEMENTATION AND ENFORCEMENT

A. MSHA's Problematic Rationale

Experience at the juncture of the NLRA and the Mine Act has borne out the commenters' fears, not MSHA's rosy vision. In recent years, the UMWA has begun to use the rights granted to the miners' representatives to advance its interests as a collective-bargaining representative without the limitations imposed by the NLRA, the law which governs collective bargaining. The problems are rooted in MSHA's broad-brush rejection of public comments during rulemaking. MSHA seemed on the right track in its Interpretative Bulletin, which ostensibly recognized two factors which would advance Mine Act enforcement without entangling that enforcement with actions which contravene the NLRA: The representative's familiarity with the "day-to-day conditions at the mine site"126 and the need for his physical presence on private mine property during the inspection.127 As a practical mat-

124. Id.
125. Id.
127. The Interpretative Bulletin used the inspector's and representative's physical presence on mine property as the principal touchstone for defining the types of activities which give rise to the representative's participation rights. See 43 Fed. Reg. 17,547 (1978) ("section 103(f) contemplates activities where the inspector is present for purposes of physically observing or monitoring safety and health conditions as part of a direct enforcement activity") (emphasis added).
ter, the first consideration would almost certainly have required that the representative come from the work force at the mine, and the second would have allowed an operator to bar the use of outside strangers, whom the operator could exclude from mine property as trespassers.

Neither of these elements, however, survived the transition from Interpretative Bulletin to final rule, where MSHA eschewed them with generalizations that avoided, rather than addressed, the potential problems posed by its inclusive approach to Mine Act representation. For example, MSHA stated that “representative” under the Mine Act has a “completely different” meaning from the Labor Act definition,128 but never explained why—a significant omission, given that under the NLRA, safety and health issues are not “completely different” from other labor-management issues and by law are the exclusive province of the collective bargaining representative and the employer, who have a mandatory obligation to “deal with” one another about such issues.129 In addition, MSHA asserted that the legislative history of the Mine Act contained “no clear statement” of who is qualified to be a representative,130 but ignored the Conference Committee’s assumption that a majority-based union would fulfill that role in organized mines.131 MSHA also rejected the NLRA’s concept of majority rule because the purposes of the Mine Act “were better served by allowing multiple representatives,”132 but never explained its questionable (and unarticulated) assumption that a majority was less capable than a minority of selecting more than one Mine Act representative.133 And in explaining why the representative need not be an employee of the

129. See supra notes 34-37 and accompanying text.
133. Within the union’s organizational context, for example, the employees could still designate multiple union officials, provided each was identified in the designation forms filed with MSHA and the operator. See Utah Power & Light Co. v. Secretary of Labor, 897 F.2d 447, 455 (10th Cir. 1990). Given the unannounced nature of MSHA inspections, the designation of multiple representatives may be the only practical way for miners at a multi-shift operation to ensure that their representatives would be available whenever an inspector showed up for an inspection.
mine, MSHA completely sidestepped the issue of familiarity with day-to-day conditions in the mine.\textsuperscript{134} It also failed to explain why, under Congress’ virtually identical employee representative authorization in the Occupational Safety and Health Act (OSH Act),\textsuperscript{135} the Secretary of Labor (who administers both the OSH Act and the Mine Act) \textit{required} that absent good cause, the employees’ representative be an employee of the employer being inspected.\textsuperscript{136}

For present purposes, the preamble’s least satisfactory response to public comment about the agency’s overly broad approach to miner representation was its unexplained assertion that “any attempt to limit the manner in which [the Mine Act] representatives are selected would be intrusive into labor-management relations at the mine and not in keeping with the spirit of miner participation.”\textsuperscript{137} In other words, rather than attempt the difficult task of interpreting and applying the Mine Act within the context of existing law which imposed its own obligations,\textsuperscript{138} MSHA chose to adopt an enforcement scheme which pretends that the only relevant consideration is the Mine Act. This blind approach to enforcement was successful only to the point at which unions, particularly the UMWA, began to use section 103(f) and MSHA’s regulations to advance collective bargaining goals. Mine operators now find themselves at the mercy of the conflict between the

\begin{itemize}
  \item \textsuperscript{134} 43 Fed. Reg. 29,508 (1978). MSHA stated only that it was reasonable to expect miners to choose representatives “with a substantial amount of experience.” \textit{Id.} The crucial point was not, however, that the representative be “experienced,” but that he be familiar with day to day conditions in the mine. \textit{See supra} notes 92-98, 110-14, and accompanying text.
  
  \item \textsuperscript{135} Occupational Safety and Health Act, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-78 (1988)) (OSH Act). The OSH Act states: “Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace . . . .” 29 U.S.C. § 657(e) (1988).
  
  \item \textsuperscript{136} 29 C.F.R. § 1903.8(c) (1992).
  
  \item \textsuperscript{137} 43 Fed. Reg. 29,508 (1978).
  
  \item \textsuperscript{138} The NLRA applies to any “industry affecting commerce,” which is defined as “any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.” 29 U.S.C. § 142(1) (1988).
\end{itemize}
two statutes and their policies, with MSHA only too willing to impose a “waiver” of the operator’s NLRA rights.

MSHA’s grant of “representative” status to any person or organization with an authorization from “two or more” miners conflicts with fundamental principles of the NLRA in several ways:

- It can require operators to “deal with” a representative (or more than one) of a minority group of miners despite the presence of an exclusive representative under the NLRA.139
- It can expose operators to potential unfair labor practice charges for “dealing with” a minority union.140
- It can require operators to “deal with” a “labor organization,” as defined by the Labor Act, without any of the protections, rights or obligations established by that law for employees, employers and labor organizations.141
- It can effectively void the results of an election conducted by the NLRB and force a “representative” upon employees even after they have voted to reject that specific representation.142
- It directly and dramatically interferes with an operator’s legal right to refuse entry to company property and access to company records to nonemployees143—even nonemployee union organizers during an organizing campaign.144

In contrast, MSHA’s laissez-faire approach, although easily rationalized at the time of rulemaking, failed to account for the realities of the

139. See supra notes 34-37 and accompanying text.
140. Bernhard-Altman Texas Corp., 122 N.L.R.B. at 1292; see supra notes 61-68 and accompanying text.
141. MSHA’s regulations permit any two miners to designate any representative they choose. In addition, miners can obtain independent “safety” representation in contradiction of NLRA exclusive representation. See 30 C.F.R. § 40.2(b) (1978); 43 Fed. Reg. 29,508 (1978) (discussing MSHA’s preference for “multiple representatives”).
144. See discussion of Kerr-McGee, supra notes 17-20 and accompanying text.
mining workplace and has since created complicated issues for the Commission and the courts.

B. Problems of Enforcement

1. The Operator’s Dilemma

MSHA has not developed a procedure through which an operator can verify an asserted representative’s status or resolve conflicting claims to representation for the same purposes. As a result, such issues typically are not raised until the operator incurs a citation for either failing to post the designation papers, as required by 30 C.F.R. § 40.1, or refusing to admit the purported representative onto mine property to accompany an inspector. An operator could seek injunctive relief directly in district court by raising claims of constitutional violations and statutory conflict, but the courts are divided as to whether a federal district court has jurisdiction to hear such claims. Thus, as the law now stands, an operator’s only certain means of adjudicating a challenge to a purported representative in most jurisdictions is to incur a citation under the Mine Act, contest it in proceedings before the Commission, and raise the representation challenge as a defense.

The absence of any alternative is unsatisfactory for several reasons. First, merely because the operator has a reasonable, good faith

145. Compare Southern Ohio Coal Co. v. Donovan, 774 F.2d 693, 700 (6th Cir. 1985), amended, 781 F.2d 57 (6th Cir. 1986) (district court has jurisdiction over constitutional challenges to Mine Act because (1) Act does not expressly deny jurisdiction, (2) constitutional claims are not within the agency’s expertise, and (3) such claims concern the Act, rather than arise under it) and Zeigler Coal Co. v. Marshall, 502 F. Supp. 1326, 1329-30 (S.D. Ill. 1980) (district court has jurisdiction to hear claim that § 105(c) of Mine Act violates constitutional due process) with Thunder Basin Coal Co. v. Martin, 969 F.2d 970 (10th Cir. 1992) (reversing district court’s assertion of jurisdiction over constitutional challenge to designation of union employees as representatives of miners at nonunion mine; Mine Act does not preclude Commission from considering constitutional claims, and appealability of Commission decision to court of appeals provides assurance of adequate consideration of constitutional challenges and questions of conflicts with other statutes), cert. granted, 113 S. Ct. 1410 (1993).

146. See Thunder Basin, 969 F.2d at 975 (“Operators may not avoid the Mine Act’s administrative review process simply by filing in a district court before actually receiving an anticipated citation, order, or assessment of penalty”).
disagreement with MSHA's interpretation of the statute, he is forced to "violate" the law to vindicate his interpretation. Second, an operator who is cited for such a "violation" must, even before he can litigate his challenge to it, abate the violation, usually within a very short time,\(^{147}\) or face further sanctions in the form of a failure-to-abate order\(^{148}\) and daily civil penalties until abatement occurs.\(^{149}\) Third, if the operator abates the violation while proceeding with the administrative appeal process, as the Tenth Circuit has suggested an operator should do,\(^{150}\) the very harm that the operator sought to avoid—the infringement of the operator's private property rights and the interference with the miners' right to select an exclusive, majority-based bargaining representative—will occur. The union, through the purported miners' representative, gains ready access to the nonunionized mine site with a "deceptive cloak of authority with which to persuasively elicit additional employee support."\(^{151}\) Fourth, instead of obtaining immediate review of the constitutional challenges and questions of statutory conflict by a federal court, which is inherently competent to hear such matters, the operator must take his challenge through two levels of specialized administrative adjudication before an agency which, although sometimes willing to entertain these kinds of is-

\(^{147}\) In Kerr-McGee, for example, the operator was given approximately 15 minutes to post the designation of miners' representative to which it objected. 13 F.M.S.H.R.C. at 1896.


\(^{149}\) The Mine Act provides for the assessment of a civil penalty of "not more than $5,000 for each day during which such failure or violation continues." 30 U.S.C. § 820(b) (1988). In denying an operator the right to seek injunctive relief in district court without waiting to be cited for an alleged violation, the Tenth Circuit conceded that "[t]hreats of such penalties in the face of a bona fide interpretive dispute are indeed troubling," but thought it "questionable that either the Commission or a court of appeals would sustain a significant penalty on appeal." Thunder Basin, 969 F.2d at 976. Nevertheless, operators do face a real threat of daily penalties, which MSHA will use to pressure the operator into abatement. See Kerr-McGee, 13 F.M.S.H.R.C. at 1900 (MSHA district manager advised operator of intent to request imposition of daily penalties if operator did not immediately abate citation by posting contested designation of union organizer as miners' representative at nonunion mine).

\(^{150}\) Thunder Basin, 969 F.2d at 976.

\(^{151}\) Bernhard-Altman, 366 U.S. at 736.
sues,152 has only a limited area of legislatively recognized expertise which does not extend to such issues.153

2. Nonemployee Miners' Representatives

As the law now stands, a representative of miners need not be an employee of the mine being inspected, despite the contrary intimations in the legislative history. The leading case, Utah Power & Light Co. v. Secretary of Labor,154 involved the designation of a UMWA international representative as a representative of miners at a unionized mine. The UMWA was the certified bargaining representative of the miners, but the international representative was not an employee of the operator. The operator argued that nonemployees were ineligible to be miners' representatives under section 103(f) of the Mine Act. MSHA responded that the definition of “representative of miners” in 30 C.F.R. § 40.1 “recognizes that there is no statutory limitation on the miners’ right to choose their representatives.”155 The Commission held that although the Mine Act’s guarantee of miner representation was “not unqualified,” it nonetheless did not authorize the “broad participatory restriction based on employee status” urged by the operator.156 Otherwise, the Commission held, the miners’ right to select representatives of their own choosing under the Mine Act would be impermissibly abridged.157

152. See Thunder Basin, 969 F.2d at 974 (collecting cases). The Commission has not always balked at addressing questions of statutory conflict. See Emery Mining Corp., 10 F.M.S.H.R.C. at 290, but its analysis in Kerr-McGee retreated to the confines of the Mine Act. See Kerr-McGee, 15 F.M.S.H.R.C. at 362 ("nothing in the Mine Act or general principles of administrative law requires that the Secretary or the Commission defer to or incorporate the NLRA").

153. Under the Mine Act, the members of the Commission are to be drawn “from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission.” 30 U.S.C. § 823(a) (1988). The functions are spelled out in terms of cases and matters “under this Act.” 30 U.S.C. § 823(d) (1988).

154. 897 F.2d 447 (10th Cir. 1988), aff’g in part & rev’g in part Emery Mining Corp., 10 F.M.S.H.R.C. 276 (1988).


156. Id. at 284.

157. Id. at 285.
The Commission also agreed with MSHA that the operator’s refusal to admit the asserted representative was not excused by the union’s failure to identify the individual by name in the designation forms filed with MSHA and the operator under 30 C.F.R. §§ 40.2 & 40.3. It found that because the forms designated the UMWA as the representative and because it was undisputed that the individual was a valid international representative of the UMWA, the ALJ had properly concluded that both the union and the individual were miners’ representatives. The Commission cautioned MSHA, however, that the agency had pledged to review its regulations if any problems arose, and suggested that the “interests of the mining community and the cause of cogent enforcement might well be served” by reviewing and clarifying the filing requirements.

The one qualification which the Commission was willing to uphold was the operator’s policy that the asserted representative, like all visitors to company property, execute a waiver of liability as a condition of entry into the mine. The result of this holding, which placed only a minimal additional burden on the individual, is less significant than the Commission’s rationale in reaching it. Based on Supreme Court precedent in cases involving union access to company property under the NLRA, the Commission recognized that “in appropriate circumstances conflicts between statutory rights of employees and private property rights of employers must be resolved by seeking a proper and balanced accommodation between the two.”

In Utah Power & Light, the Tenth Circuit affirmed the Commission’s holding that nonemployees can be miners’ representa-

158. Id. at 287.
159. See supra note 16 and accompanying text.
160. Emery, 10 F.M.S.H.R.C. at 288 (discussing 43 Fed. Reg. 29,508 (1979)).
161. Id. at 288-92.
162. Id. at 290 (citing Detroit Edison Co. v. NLRB, 440 U.S. 301, 318-19 (1979); Hudgens v. NLRB, 424 U.S. 507, 521-22 (1976); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956)). Applying this principle, the Commission found that the operator had a legitimate and substantial interest in obtaining liability waivers, given the prior cancellation of its liability insurance following a mine fire, and that this interest overrode the miners’ interest in having their representative accompany the MSHA inspector without executing the waiver. Id.
tives, but reversed the Commission’s casual approach that had excused the failure to identify the individual representative on the documents filed with MSHA and the operator. The court held that the Mine Act’s guarantee of compensation to a miners’ representative who is an “employee” of the operator “clearly recognized that some miners’ representatives may be employees of the operator and some may not.” The court acknowledged the operator’s concern that walkaround rights might be abused by nonemployee representatives, but ruled that an operator could take action against individual instances of abuse and that “the potential for abuse does not require a construction of the Act that would exclude nonemployee representatives from exercising walkaround rights altogether.” The court agreed, however, with the operator’s contention that the asserted representative must comply with MSHA’s filing requirements before being entitled to admittance onto mine property. The court explained that the operator and the miners must be able to determine “who the miners’ representatives are and the scope of their authority” and to ascertain that the asserted representative is in fact “authorized.” The court also noted that MSHA’s interpretation would put the operator in the “untenable position” of having either to admit a putative “representative” despite uncertainties about the validity of his status or to risk citation, fines, and withdrawal orders for failing to permit a valid representative to accompany an inspector.

The decisions made by the court and the Commission create a tension between the language of section 103(f), which the court found “clearly” permitted the use of nonemployees as miners’ representatives, and the legislative histories of the Mine Act and the Coal Act, in which Congress extolled the benefits of the miners’ representative in terms of his familiarity with day-to-day conditions in the mine.

163. 897 F.2d 447 (10th Cir. 1988). The Commission’s ruling concerning the waiver of liability was not appealed.
164. Id. at 450.
165. Id. at 452.
166. Id. at 455.
167. Id. at 455-56. Ironically, these were the same concerns that the Tenth Circuit would minimize in its decision two years later in Thunder Basin. See supra note 147.
168. See supra notes 92-98, 110-14, and accompanying text.
The court did not elaborate on what might constitute sufficient “abuse” to justify an operator’s refusal to permit a nonemployee representative to accompany an inspector.\(^{169}\) Thus, the decision leaves the operator room to argue, in a given case, that the designation of a particular nonemployee as a miners’ representative would constitute an “abuse” of the Act because the nonemployee, unlike the UMWA international representative in *Utah Power & Light*,\(^{170}\) knew little or nothing about conditions in the mine.

By subjecting *individual* union representatives to the filing requirements, moreover, *Utah Power & Light* addressed one misuse of section 103(f) to advance collective bargaining, not safety, interests. Unions will no longer be able to use the sudden designation of multiple miners’ representatives to exact other concessions from an operator, as the UMWA admittedly did, for example, in *The Naaco Mining Co.*\(^{171}\) Furthermore, if the representatives are not employees of the operator, they must comply with an operator’s nondiscriminatory requirement that outsiders execute a waiver of liability as a condition of entering company property. Presumably, the operator could impose other conditions, as long as they are nondiscriminatory and survive the balancing test that the Commission applied in *Utah Power & Light*.\(^{172}\)

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169. *Utah Power & Light*, 897 F.2d at 452.

170. The representative's duties for the union consisted primarily of investigating mine accidents. He had twice participated in underground investigations at the mine in question, but had not participated in inspections as a walkthrough representative. *See Emery*, 10 F.M.S.H.R.C. at 280 n.5.

171. 6 F.M.S.H.R.C. 2734 (1984). In *Naaco*, the union attempted to put pressure on the operator in support of a grievance by designating all of the mine’s mechanics, and only mechanics, as the miners’ representatives for a shift. The result of the designation, as the union anticipated, was that mining operations became unsafe and the operator had to curtail production during inspections requiring multiple miners’ representatives. When the operator refused to recognize the designation of more than one miners’ representative per shift from a single job classification, it was cited for violating section 103(f). The penalty was upheld despite the union’s admission in a settlement agreement that its designation of only mechanics “was made for purposes unrelated to the Act’s safety objectives and thereby constituted an inappropriate exercise of UMWA’s designation rights under § 103(f).” *Id.* at 2738. The ALJ imposed the penalty on the operator under terms of the settlement agreement although he agreed that the union’s tactic “would have curtailed both production and the ability to operate a safe mine.” *Id.* at 2735.

172. *See supra* note 160 and accompanying text.
Whether the Commission would extend the balancing analysis to the compelled admission of nonemployee union representatives at nonunionized mines remained to be seen. The court and Commission were not called upon to reach the issue in *Utah Power & Light*. A collective bargaining representative was already in place at the mine; and the asserted representative was an official of that union, so no conflict with principles of exclusive representation arose on the facts of *Utah Power & Light*. Those issues have arisen in another case, however, as we explain in the next section.

3. Nonemployee Union Representatives at Nonunionized Mines

The attempted use of nonemployee union representatives at nonunionized mines squarely presents the conflict between the NLRA's principles of employee free choice, exclusive representation, and majority rule, and MSHA's inclusive definition of, and procedures for designating, a representative of miners under the Mine Act. *Kerr-McGee Coal Corp.* sharpens the issues further because it involves MSHA's willingness to enforce walkaround rights under the Mine Act as an aid to a union organizing under the NLRA: the asserted miners' representative was a professional UMWA organizer who had moved to Wyoming for the express purpose of unionizing coal miners in the

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173. In their dissent in *Emery Mining Corp.*, Commissioners Doyle and Nelson agreed that labor-relations law requires a balanced accommodation of the employees' rights under the NLRA and the employer's private property rights. They would have found, however, that the labor-relations cases were not dispositive, because the Mine Act has an "entirely discrete purpose" from the NLRA. 10 F.M.S.H.R.C. at 298 (Doyle & Nelson, Comm'rs, dissenting) (quoting UMWA v. Peabody Coal Co., 7 F.M.S.H.R.C. 1357, 1365 (1985), *aff'd sub nom. Brock v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987)). But the Peabody reasoning is questionable. It suffers from the same flaw as MSHA's assertion that the meaning of "representative" under the Mine Act is "completely different" from its meaning under the NLRA; upon this basis, without rationale or justification, MSHA seeks to avoid the exclusivity of the collective bargaining representative's role in dealing with the operator over all conditions of employment, including job safety and health. See *supra* notes 128-29 and accompanying text. Other federal statutes, such as the Civil Rights Act of 1964, have an "entirely discrete purpose" from the NLRA, yet their purpose must be accommodated within the NLRA's framework of exclusive majority representation. See *supra* notes 50-55 and accompanying text. The dissenting Commissioners gave no reasons for treating the Mine Act any differently.

Powder River Basin, including the miners at Kerr-McGee's Jacobs Ranch Mine.\textsuperscript{175} Seven of those miners designated the organizer as their representative of miners under the Mine Act, but the operator refused to post the designation and received a citation followed by a failure-to-abate order.\textsuperscript{176}

The operator contested the citation and order. The operator argued that the union could not validly "represent" miners under the Mine Act if the union was not their collective bargaining representative under the NLRA, and that Part 40 of MSHA's regulations created an unnecessary and improper conflict between the Mine Act and the NLRA. The operator further argued that, under Utah Power & Light, it was an "abuse" of the Mine Act for the union to use Part 40 to facilitate organizing efforts and for MSHA to enforce Part 40 to require the operator to waive its rights under the NLRA, so that the operator was justified in taking action against the abuse by refusing to post the designation.\textsuperscript{177}

The ALJ upheld the citation and order. He found that the Mine Act and its regulations imposed "no restrictions or qualifications" on persons or organizations in what he termed their "inherent right to serve as representatives of miners."\textsuperscript{178} He agreed with MSHA that the term "representative" has different meanings under the NLRA and the Mine Act, so that the union did not need to satisfy the former to qualify as a representative under the latter. Under the NLRA, he reasoned, representation is "pervasive" and covers "virtually all aspects" of the labor-management relationship, whereas under the Mine Act it serves the more limited purpose of "assisting the mine inspector and accompanying the inspector to point out any problems that miners may have noticed."\textsuperscript{179} The ALJ also found that the operator had not shown any instances of "abuse" as contemplated by Utah Power & Light, and that the operator had failed to show "beyond speculation"

\textsuperscript{175} Kerr-McGee, 13 F.M.S.H.R.C. at 1895, 1897-98.
\textsuperscript{176} Id. at 1896. The order was a "no area affected" order, meaning that it did not close or shut down any equipment or area of the mine. Id. at 1890 n.2.
\textsuperscript{177} See id. at 1891.
\textsuperscript{178} Id. at 1901.
\textsuperscript{179} Id. at 1902 & n.9.
that the union contemplated misuse of the Part 40 rights by engaging in organizing activities during the walkaround.\textsuperscript{180} The Commission affirmed, holding that it is the “conduct” of a miners’ representative during the walkaround, not his “motivation” in becoming the miners’ representative, that determines whether abuse has occurred.\textsuperscript{181}

Like MSHA’s rulemaking analysis,\textsuperscript{182} the ALJ’s and Commission’s attempt to reconcile MSHA’s regulations with the principles underlying the NLRA failed utterly to resolve the conflict between them. The ALJ correctly recognized that the representative’s function under the NLRA is “pervasive,” but failed to explain why, given this pervasiveness in all aspects of the labor-management relationship including job safety, a nonunion operator can be required, allegedly in the name of exercising “important safety rights” granted under another Act of Congress,\textsuperscript{183} to violate the NLRA’s scheme of exclusive majority representation by admitting a nonmajority union organizer onto mine property. This result is contrary to established precedent\textsuperscript{184} and impermissibly confers an aura of legitimacy on the organizer’s privileged admission onto mine property, which miners could mistake for the operator’s or MSHA’s endorsement of the union’s organizing effort.\textsuperscript{185} In such a case, it is settled law that no specific “abuse” need be shown because the NLRA flatly prohibits an employer from conduct that recognizes “an agency selected by a mi-

\textsuperscript{180} Id. at 1905.

\textsuperscript{181} Kerr-McGee, 15 F.M.S.H.R.C. at 361.

\textsuperscript{182} See supra notes 126-34 and accompanying text.

\textsuperscript{183} Kerr-McGee, 13 F.M.S.H.R.C. at 1905.

\textsuperscript{184} See supra notes 43-55 and accompanying text.

\textsuperscript{185} See Bernhard-Altman, 366 U.S. at 736. Forcing a nonunion operator to admit a union organizer also undercuts the enforcement scheme of the NLRA. Sections 8(a)(1) and 8(b)(1)(A) of the NLRA protect employees from restraint or coercion by employers and unions; section 8(a)(2) forbids employer domination or interference with formation of a “labor organization”; section 8(b)(1)(A) also prohibits a union from acting as a party to the employer’s interference with employee rights. 29 U.S.C. § 158(a), (b) (1988). Neither an employer nor a union can engage in conduct that actively benefits a union (or one potential representative over another) to the detriment of employee free choice. See, e.g., Raeco Sewing Indus., Inc., 243 N.L.R.B. 438 (1979) (employer cannot favor preferred union by allowing its organizers onto company property); Ravenswood Elecs. Corp., 232 N.L.R.B. 609 (1977) (same).
minority of its employees, thereby impressing that agent upon the non-consenting majority.”

The Kerr-McGee reasoning is questionable for other reasons as well. First, it miscast the role of the miners’ representative. The ALJ credited the testimony of MSHA’s subdistrict manager that representatives “who would not be familiar with the mine” had been valuable because of their “knowledge of accidents or accident types or assistance in mine rescue or whatever we’re involved in at the time.” The ALJ then uncritically applied this testimony to legitimize the use of the union organizer as a miners’ representative. However, the legislative history makes it clear that the purpose of the miners’ representative is not to act as a general expert on mine safety and health (which is MSHA’s role, not the representative’s), but to ensure that the inspector would be accompanied by someone who was familiar with current conditions in the mine. If, as the Utah Power & Light court suggested, an “abuse” of the Mine Act occurs if the representative does not fulfill the purposes of section 103(f), then the use of a representative who, as in Kerr-McGee, was unfamiliar with day-to-day conditions in the mine would for that reason alone be an impermissible “abuse.” Indeed, the use of such a person instead of an individual who was familiar with the mine would compromise, not advance, the cause of mine safety, because it would deprive the inspector of a legislatively mandated supplemental source of information about the mine.

Second, Kerr-McGee jettisoned the employer’s property rights that are clearly preserved under the NLRA. Under the rubric of administrative deference, the decision failed to look beyond MSHA’s bald assertion “that any person qualified to be on a minesite may act as a miner’s representative” and failed to probe MSHA’s question-begging assumption that the union organizer was indeed “qualified to be on [the] minesite.” In fact, the organizer was not so qualified because

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186. Bernhard-Altman, 366 U.S. at 737; see supra notes 65-68 and accompanying text.
188. See supra notes 92-98, 110-14, and accompanying text.
189. Utah Power & Light, 897 F.2d at 452.
federal labor law draws a distinction “of substance” between employees’ and nonemployees’ access to company premises and preserves the employer’s right to exclude nonemployee union organizers from company property. Thus, the operator had a legitimate basis under the NLRA to exclude the organizer along with anyone else who lacked a right of entry.

Third, the ALJ’s use of the doctrine of administrative deference failed to recognize the inherent limitations on the extent of deference to which an agency is entitled. The ALJ correctly noted that deference can be accorded to reasonable interpretations of the statute by an agency charged with enforcement. However, he only cited the legislative history’s general statement that MSHA’s interpretations of the Mine Act “shall be given weight by both the Commission and the courts.” He did not consider whether MSHA’s interpretations were “reasonable” in view of Congress’ interest in ensuring the representative’s familiarity with current conditions in the mine or in view of the primacy of exclusive majority representation. Similarly, he did not consider whether the usual deference to the agency should be diminished in this instance because the Secretary’s interpretation could compromise miner safety by permitting an inspector to use a miners’ representative who was unfamiliar with the conditions in the mine. Moreover, the ALJ invoked traditional deference even though MSHA’s interpretation implicated principles developed and rights preserved under a statute that was beyond MSHA’s administrative expertise, the NLRA. He also failed to consider and apply Supreme Court law recognizing the importance of balancing employee statutory rights and em-

191. Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 848 (1992); see supra notes 87-90 and accompanying text. Such exclusion is the rule except in rare cases. Id. In Kerr-McGee, the miners were clearly accessible without forced trespass: the UMWA had held meetings with them, conducted several days of safety training for them, and had obtained seven of their signatures on miners’ representative designation forms. Kerr-McGee, 13 F.M.S.H.R.C. at 1897-98.


193. Id. (quoting S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977)).

ployer private property rights, even though the Commission itself had applied the rationale.195

Besides these analytical flaws, Kerr-McGee constitutes bad policy because it compounds the operator’s dilemma. It forces an operator not only to “violate” the Mine Act and incur a citation if he wants to adjudicate his challenge to a representative,196 but also to meet a heavy burden of proving abuse by showing nothing less than “misuse of Part 40 rights by either ‘outside’ or fifth-column type infiltration of working areas to enlist members, distribute literature, purloin confidential [operator] records, etc., under the facade of the Mine Act walk-around participation.”197 The more subtle (but no less effective) abuse, carried out by a nonemployee organizer who inherently influences the collective bargaining choices of nonunion miners because of his privileged presence on mine property under government coercion, completely eluded the ALJ.

V. ACCOMMODATION OF MINE ACT AND NLRA RIGHTS AND OBLIGATIONS

The conundrum forced on the mining industry by MSHA’s enforcement of section 103(f) is not necessary and is counterproductive to miner safety. No one disputes that the miners’ representative plays an important role in the scheme of the Mine Act, and only MSHA disputes the importance of other statutory rights and obligations under the NLRA. The goals of both statutes could be harmonized with careful attention to the purposes of each.

The function of the walkaround representative is to inform the inspector of conditions in the mine and to educate the miners through

195. See Emery, 10 F.M.S.H.R.C. at 290.
196. See supra notes 143-51 and accompanying text.
197. Kerr-McGee, 13 F.M.S.H.R.C. at 1905. One assumes that the union itself would bristle at this burden if a representative from a non-UMWA union attempted to exercise section 103(f) rights on behalf of a rump group of employees at a UMWA-represented mine. Any NLRA exclusive representative could complain to the NLRB if an employer “dealt with” a minority representative on walkaround matters. The tactic would clearly advance a union “raid” to steal the members of an existing collective bargaining representative.
reports to them on inspection activities.\textsuperscript{198} The Commission should clarify this function and should also adopt the express Congressional preference that the section 103(f) representative be an employee of the mine or at least someone familiar with its day-to-day operation. An exclusive NLRA representative can properly fulfill this role: the union representative may himself be an employee and at a minimum would be someone with the obligation to ensure familiarity with the bargaining unit and its terms and conditions of employment.

Unlike MSHA, the Commission should not ignore or denigrate the rights and obligations imposed by the NLRA. The fallacy behind MSHA's current position is best demonstrated by examining its operation at a unionized, rather than a nonunion mine site: The Secretary's argument would have the effect of authorizing (indeed, requiring) a mine operator to deal with a stranger as representative of his miners even if the employees are otherwise represented by a union. Under MSHA's rationale, the exclusivity guaranteed to a majority-based representative under the NLRA is for naught on life-and-death safety issues if any two miners desire to insert their own outside representative. \textit{Emporium Capwell} teaches that other federal employment statutes cannot and do not displace the primacy of the exclusive representative under the NLRA.\textsuperscript{199}

Obviously, miners can designate one or more employees as their representatives. Also, a mine operator can voluntarily admit any stranger to its private property. But the operator should not be forced—by a government agency that found it too "difficult" to analyze the issues—to forgo private property rights vis-a-vis a nongovernment agent. The Commission (or the courts) should interpret the Mine Act in a way that complements the statutory objectives of the NLRA and requires the admittance of nonemployee representatives only when those representatives have obtained that status properly. Mine safety would not suffer, since Congress has directed the inspectorate to talk to the miners themselves in the absence of a properly authorized represen-

\textsuperscript{198} See supra notes 92-114 and accompanying text.
\textsuperscript{199} See supra notes 50-55 and accompanying text.
tative. Indeed, mine safety would be enhanced by ensuring that representatives are familiar with mine conditions.

VI. CONCLUSION

The walkaround conundrum is both easy and necessary to resolve. It is easy to resolve because the NLRA affirmatively privileges the operator’s right to refuse admittance to a union organizer and Part 40 of MSHA’s regulations does not protect such abuse of walkaround rights to further non-Mine Act goals. Notwithstanding MSHA’s regulatory “gloss” to section 103(f) of the Mine Act, an operator has a right under the NLRA to refuse to recognize or deal with a minority “representative” and to deny his alleged “right” to accompany an MSHA inspector on a physical inspection of the mine. A nonemployee organizer’s access to company property has been squarely addressed and resolved under the NLRA. An operator’s private property rights may be lessened in an organizing campaign only if the miners are inaccessible to an outside union’s reasonable attempts to communicate with them. No regulatory interpretation from MSHA can turn that narrow exception into a general rule.

These issues are also necessary to resolve. At present, the industry finds itself in the untenable position of having to comply with one statute at the peril of violating another. The cases also implicate the broader issue of whether an administrative agency, in the guise of furthering safety and health, can ignore the applicability of NLRA policies on union organizing and employee representation. This issue too has been squarely addressed and resolved by the Supreme Court of the United States. Federal policies cannot be implemented in a manner that destroys the NLRA’s framework of exclusive representation and majority rule, or conflicts with each employee’s right to engage in concerted activities or to refrain from them. In the wake of Kerr-McGee, it is now up to the courts to harmonize the interpretation of the Mine Act with NLRA principles and to curb MSHA’s blind enforcement policy.