Alstate Maintenance, LLC *and* Trevor Greenidge.
Case 29–CA–117101

January 11, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

Employee Trevor Greenidge, a skycap at Kennedy International Airport, was discharged for griping about not being tipped. The Region issued a complaint alleging that Greenidge had been discharged for engaging in protected concerted activity in violation of Section 8(a)(1) of the Act. The judge dismissed the complaint. The General Counsel excepts, contending, among other things, that because Greenidge spoke in the presence of other skycaps and a supervisor and included the word "we" in his statement, a finding that the statement qualifies as concerted activity is compelled by the Board's decisions in *Whittaker Corp.*, 289 NLRB 933 (1988); *Caval Tool Division, Chromalloy Gas Turbine Corp.*, 331 NLRB 858 (2000), enfd. 262 F.3d 184 (2d Cir. 2001); and *WorldMark by Wyndham*, 356 NLRB 765 (2011).

The right to engage in protected concerted activity is one of the most fundamental rights guaranteed by Section 7 of the NLRA. The importance of this right requires us to ensure that the standard for determining whether a particular action qualifies as "concerted" enables the Board to preserve the distinction between group and individual complaints. The applicable standard should not sanction an all-but-meaningless inquiry in which concertedness hinges on whether a speaker uses the first-person plural pronoun in the presence of fellow employees and a supervisor. In addition, the protection afforded by the Act to engage in protected concerted activity requires a clear standard that can be relied upon by employees who seek to engage in such activity and by employers who must determine whether particular employee conduct is within or outside the protection of the Act.

The Board articulated such a standard more than three decades ago in the *Meyers Industries* cases.[1] But even though the *Meyers* decisions have never been overruled, subsequent decisions—including, as relevant here, *WorldMark by Wyndham*—have deviated from *Meyers* and blurred the distinction between protected group action and unprotected individual action. Our decision today begins the process of restoring the *Meyers* standard by overruling conflicting precedent that erroneously shields individual action and thereby undermines congressional intent to limit the protection afforded under the Act to *concerted* activity for the purpose of mutual aid or protection.[2]

As explained below, we find the cases relied upon by the General Counsel are starkly inapposite and do not support the finding he advocates. Additionally, although we believe *WorldMark by Wyndham* is distinguishable, we conclude that *WorldMark* cannot be reconciled with *Meyers Industries* and must be overruled. We also find that even if Greenidge's remark was concerted activity, it was not *protected* concerted activity because it did not have mutual aid or protection as its purpose. Accordingly, we adopt the judge's recommended Order and dismiss the complaint.[3]

Facts

The Respondent provides ground services at JFK International Airport's terminal one under a contract with Terminal One Management, Inc. (Terminal One). Lufthansa Airlines operates out of JFK terminal one. Greenidge was employed by the Respondent as a skycap; his job was to assist arriving airline passengers with their luggage outside the entrance to the terminal. The bulk of skycaps' compensation comes from passengers' tips.

[1] *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[2] Although we do not reach them here, other cases that arguably conflict with *Meyers* include those in which the Board has deemed statements about certain subjects "inherently" concerted. See *Trayco of S.C., Inc.*, 297 NLRB 630, 634–635 (1990) (discussions about wages inherently concerted), enf. denied mem. 927 F.2d 597 (4th Cir. 1991); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (discussions about work schedules inherently concerted), enf. denied in relevant part 81 F.3d 209 (D.C. Cir. 1996); *Hoodview Vending Co.*, 362 NLRB 690 (2015), incorporating by reference 359 NLRB 355 (2012) (discussions about job security inherently concerted). We would be interested in reconsidering this line of precedent in a future appropriate case.

[3] On June 24, 2016, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order dismissing the complaint in its entirety.

The General Counsel has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

On July 17, 2013, Greenidge was working with three other skycaps outside the entrance to terminal one. He was approached by his supervisor, Cebon Crawford, who informed Greenidge that Lufthansa had requested skycaps to assist with a soccer team's equipment. Greenidge remarked, "We did a similar job a year prior and we didn't receive a tip for it." When a van containing the team's equipment arrived, the skycaps were waved over by Isabelle Roeder and Klaudia Fitzgerald, managers from Lufthansa Airlines and Terminal One, respectively. The skycaps walked away. The two managers questioned Crawford, who told them the skycaps did not want to do the job because they were anticipating a small tip. Greenidge testified that he was about 50 feet away and did not hear what Crawford said to the managers. The managers then sought assistance from baggage handlers inside the terminal, who completed a significant share of the work before Greenidge and the other three skycaps helped them finish the job. After the job was completed, the soccer team gave the skycaps an $83 tip.[4]

That evening, Fitzgerald emailed Terminal One managers to alert them that the skycaps had provided subpar service to a group Lufthansa considered a VIP client. Fitzgerald questioned why the skycaps "would refuse to provide skycap services to a partner carrier" and stated that "in [her] entire professional career [she had] never been this embarrassed in front of the customer." After a series of emails, Terminal One Manager Deb Traynor decided that the employment of all four skycaps would be terminated. The skycaps were subsequently discharged; Greenidge's discharge letter stated:

> You were indifferent to the customer and verbally make [sic] comments about the job stating you get no tip or it is very small tip. Trevor, you made this comments [sic] in front of other skycaps, Terminal One Mod [manager on duty] and the Station Manager of Lufthansa.[5]

Discussion

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by discharging Greenidge because Greenidge's complaint about the tipping habits of soccer players was neither concerted activity nor was it undertaken for the purpose of mutual aid or protection. For the following reasons, we agree.

A. Greenidge's Comment Was Not Concerted Activity.

In relevant part, Section 7 of the Act gives employees 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*" (emphasis added). Thus, for employees to enjoy the protection of the Act under the language of Section 7 italicized above, two elements must be satisfied: the activity they engage in must be "concerted," and the concerted activity must be engaged in "for the purpose of . . . mutual aid or protection."

The governing standards for determining whether an activity is concerted are set forth in the Board's decisions in *Meyers Industries*.[6] In *Meyers I*, the Board held that "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[7] Subsequently, in *Meyers II*, the Board responded to several questions posed by the Court of Appeals for the D.C. Circuit regarding whether the *Meyers I* definition of concertedness encompasses individual activity. Two of the court's questions, and the Board's responses to those questions, are relevant here.

[4] The dissent places considerable emphasis on the fact that Crawford communicated Greenidge's complaint to Managers Roeder and Fitzgerald. To the extent she means to suggest that Greenidge and the other three skycaps ended their "walk away" protest *because* Crawford did so, the facts would belie such an inference. First, Greenidge testified that he was standing about 50 feet away from Crawford when Crawford was speaking with Roeder and Fitzgerald, and he did not hear what Crawford said to them. Second, as the dissent acknowledges, inside baggage handlers were brought outside to do the job the skycaps were refusing to do. The dissent does not acknowledge, however, that it was only after the baggage handlers had completed a significant share of the work that the skycaps began to help. Thus, it is clear that the skycaps got to work *not* because Crawford relayed Greenidge's complaint to the managers, but because the skycaps saw that someone else was doing the job and decided it was better to join in and *risk* getting no tip than to stay away and be *certain* not to get one.

[5] Our dissenting colleague states that "[e]ven with the skycaps' initial delay, the team's equipment and luggage was moved into the terminal in 12 minutes." "No harm, no foul," she appears to suggest. We could not disagree more. The length of the delay and its ultimate effect are irrelevant; what matters here was that Greenidge was "indifferent to the customer," as his discharge letter states. Failure to respond to a customer's request can mean loss of business, and of jobs. Greenidge's selfish stunt caused the customer to complain, and failure to remedy the source of that complaint could have resulted in the Respondent losing its contract with Terminal One Management, jeopardizing all the skycaps' jobs. We recognize, of course, that under the Act, employees have a protected right to strike, and the fact that a strike could also result in a loss of contract and jobs does not deprive strikers of the Act's protection. But what happened here was mere insubordination, not a protected strike. Indeed, a case could be made that the skycaps' act of walking away was an unprotected partial strike. See infra fn. 16.

[6] See fn. 1, supra.

[7] *Meyers I*, 268 NLRB at 497.

First, the court asked whether *Meyers I* is consistent with cases in which "concerted activity was found where an individual, not a designated spokesman, brought a group complaint to the attention of management."[8] The Board answered in the affirmative, stating:

> *Meyers I* recognizes that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. When the record evidence demonstrates group activities, whether "specifically authorized" in a formal agency sense, or otherwise, we shall find the conduct to be concerted.[9]

The Board reiterated this point in a later passage in *Meyers II*, stating that the *Meyers I* definition of concertedness "encompasses those circumstances where individual employees . . . bring[] truly group complaints to the attention of management."[10] Thus, under *Meyers II*, an individual employee who raises a workplace concern with a supervisor or manager is engaged in concerted activity if there is evidence of "group activities"—e.g., prior or contemporaneous discussion of the concern between or among members of the workforce—warranting a finding that the employee was indeed bringing to management's attention a "truly group complaint," as opposed to a purely personal grievance. Absent such evidence, there is no basis to find that an individual employee who complains to management about a term or condition of employment is acting other than solely by and on behalf of him- or herself.

Second, the court asked whether the *Meyers I* standard "would protect an individual's efforts to induce group action."[11] The Board in *Meyers II* answered this question in the affirmative as well, explaining that a single employee's efforts to "induce group action" would be deemed concerted based on "the view of concertedness exemplified by the *Mushroom Transportation* line of cases," which the Board in *Meyers II* "fully embraced."[12] In *Mushroom Transportation Company, Inc. v. NLRB*,[13] the Court of Appeals for the Third Circuit held that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees."[14] The court added that "[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'"[15]

Applying the *Meyers II* standard here, we find that Greenidge did not engage in concerted activity.

Preliminarily, it is important to clarify what is not at issue here: the skycaps' act of walking away from the arriving van. In his decision, Judge Green states that "[t]he entire theory of the General Counsel's case is that on July 17, 2013, Greenidge engaged in concerted activity when, while waiting for the arrival of the van carrying a French soccer team, he said . . . : 'We did a similar job a year prior and we didn't receive a tip for it.'" The judge is correct that the General Counsel's theory of the case was strictly limited to the allegation that Greenidge's *statement* constituted protected concerted activity. In paragraph 5(a) of the complaint, the General Counsel alleged that "the Charging Party engaged in concerted activities with other employees for the purpose of mutual aid and protection by complaining that the amount of tips received for performing services to a certain customer may be unsatisfactory." At the beginning of the hearing, Judge Green asked counsel for the General Counsel: "So why do you think that he was—what was his—what are you claiming his Protected Concerted Activity was?" Counsel replied: "He was engaged in conversations with his Co-Workers about tips" (Tr. 6). Consistent with the complaint and counsel's statement at the hearing, the General Counsel's posthearing brief to the judge identified the issue in the case as "whether Respondent's skycap Greenidge was discharged because he engaged in protected concerted activity when he raised concerns to his direct supervisor in front of his coworkers about the possibility that he and his coworkers would not receive tips for a job assignment" (GC's posthearing brief at 1). Indeed, the fact section of the General Counsel's posthearing brief does not even mention that the skycaps walked away from the van.[16]

Turning to the remark itself—"[w]e did a similar job a year prior and we didn't receive a tip for it"—and view-

[8] *Meyers II*, 281 NLRB at 886.
[9] Id.
[10] Id. at 887.
[11] *Prill v. NLRB*, 755 F.2d 941, 955 (D.C. Cir. 1985).
[12] *Meyers II*, 281 NLRB at 887.
[13] 330 F.2d 683 (3d Cir. 1964).
[14] Id. at 685.
[15] Id.; see also *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986).
[16] We understand why the General Counsel might wish to avoid any suggestion that the skycaps' refusal to perform an assigned task constituted part of Greenidge's alleged protected concerted activity. Employees who "refuse to work on certain assigned tasks while accepting pay or while remaining on the employer's premises" are engaged in an unprotected partial strike. *Audobon Health Care Center*, 268 NLRB 135, 136 (1983). Since the Respondent discharged Greenidge for what he said, not for what he did, we need not decide whether the skycaps engaged in an unprotected partial strike when they responded to Crawford's instruction to assist with the luggage in the arriving van by walking away.

ing the remark in light of the standards established in *Meyers II*, we easily find that Greenidge did not engage in concerted activity. First, the General Counsel does not contend that Greenidge was bringing a truly group complaint to the attention of management, and the record is devoid of evidence of "group activities" upon which to base a finding that Greenidge was doing so.[17] There is no evidence that the tipping habits of soccer players (or anyone else) had been a topic of conversation among the skycaps prior to Greenidge's statement. Neither does Greenidge's use of the word "we" supply the missing "group activities" evidence: it shows only that the skycaps had worked as a group and been "stiffed" as a group, not that they had discussed the incident among themselves. Second, the statement in and of itself does not demonstrate that Greenidge was seeking to initiate or induce group action, and the record contains direct evidence to the contrary. At the hearing, Greenidge testified that his remark was "just a comment" and was not aimed at changing the Respondent's policies or practices (Tr. 75), and the judge credited Greenidge's testimony in this regard, finding that the remark "was simply an offhand gripe about [Greenidge's] belief that French soccer players were poor tippers."[18] Where a statement looks forward to no action at all, it is more than likely mere griping,[19] and we find as much here. Accordingly, *Meyers II* compels affirmance of the judge's finding that Greenidge did not engage in concerted activity.

Nonetheless, counsel for the General Counsel excepts to the judge's finding, contending that Greenidge's comment qualifies as concerted activity because Greenidge made it "in a group setting . . . in the presence of his coworkers and Crawford" and used the first-person plural pronoun "we." Counsel cites, as applicable precedent, *Whittaker Corp.*, supra; *Chromalloy Gas Turbine Corp.*, supra; and *WorldMark by Wyndham*, supra. As explained below, *Whittaker Corp.* and *Chromalloy Gas Turbine* do not remotely resemble the instant case, and *WorldMark by Wyndham* is also distinguishable.

In *Whittaker*, the respondent's president, Miller, convened a series of employee meetings to announce that there would be no annual wage increase that year, contrary to the respondent's usual practice. At one such meeting, Miller invited questions, and employee Johnston stated: "Well, I don't remember us being called together when there's been a good year and saying here's something extra. But now that there's a little downturn, I feel we're being asked to bear the brunt of it by not having an increase."[20] The Board stated that "in a group-meeting context, a concerted objective *may* be inferred from the circumstances"[21] (emphasis added), and the Board relied on several circumstances in finding Johnston's statement concerted: (i) Johnston protested the denial of a wage increase; (ii) Johnston spoke up at an employee meeting convened specifically to announce the denial of the increase; (iii) the denial of the increase affected all the employees; (iv) the meeting was the first opportunity employees had to comment on or protest the denial of the increase, and Johnston had not had a chance to meet with other employees beforehand.[22] "In light of all the circumstances," the Board concluded, an objective to initiate or induce group action should be "inferred."[23]

Similarly, in *Chromalloy Gas Turbine*, the respondent's president, Paul Pace, held a series of meetings to announce a predictably unpopular change. Previously, employees were given a 15-minute morning break, but they were also free to leave their work area whenever

[17] *Meyers II*, 281 NLRB at 886, 887.

[18] The dissent claims that our reliance on Greenidge's credited testimony that his remark was "just a comment" to find that Greenidge did not seek to initiate or induce group action is "misplaced" because the applicable standard is objective, citing *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014), and *Citizens Investment Services Corp.*, 342 NLRB 316 (2004) (*CIS*), enfd. 430 F.3d 1195 (D.C. Cir. 2005). These cases do not contradict our finding. In *Fresh & Easy*, the Board stated: "'Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one.'" 361 NLRB at 153 (quoting *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993)). In other words, the *reason why* an employee seeks to initiate, induce, or prepare for group action—whether altruistic or selfish—is irrelevant, and in that sense, the standard is objective. But it is *not* irrelevant whether the employee does in fact seek to initiate, induce, or prepare for group action. Indeed, that is the standard announced in *Meyers II* itself. In *CIS*, abundant evidence established that employee Hayward made multiple statements, on multiple occasions, that brought truly group complaints to the attention of management. The judge relied on this evidence, and he also relied on Hayward's belief that he was acting on behalf of the group. The *CIS* majority disavowed the latter reliance. 342 NLRB at 316 fn. 2. In doing so, the majority correctly recognized that the issue was not what Hayward *believed* he was doing, but what, in fact, he *was* doing. So also here: what, in fact, was Greenidge doing when he made the statement at issue? Unlike in *CIS*, it was not at all apparent from his statement—a terse, truculent complaint about stingy soccer players—that he had a concerted objective, and the record contains direct evidence that he did not. In this context, we appropriately rely on this direct evidence confirming that Greenidge was not seeking to initiate group action.

Seeking to discredit our analysis, the dissent constructs a hypothetical, but her imagined scenario is inapposite. Our colleague posits a scene in which an employer announces a pay cut at a mandatory staff meeting, and an employee says, "We should do something about this!" and then later testifies that he did not intend the ensuing strike. In that scenario, however, the statement itself clearly evidences a concerted objective under *Meyers Industries*. As explained above, Greenidge's statement did not.

[19] *Mushroom Transportation*, 330 F.2d at 685.

[20] 289 NLRB at 933.

[21] Id. at 934.

[22] Id.

[23] Id.

they wanted throughout the day to get coffee from a vending machine. At the meetings, Pace announced that the single 15-minute break would be replaced by two 10-minute breaks—but employees were no longer free to visit the coffee machine outside of breaktime. The meeting attended by employee Diane Baldessari, a programmer, played out as follows. When Pace announced the change, Baldessari asked if employees would be written up if they were caught going for coffee at other times. Pace replied that they would be. Baldessari asked if the new policy would apply to the office employees. Pace asked if she would like it to, and Baldessari responded affirmatively, stating that it would be nice if things were fair for a change. Baldessari then asked Pace whether the new break policy was a way of punishing workers for their scrap rate[24] and downtime. Pace asked what Baldessari meant. She responded that Pace was taking things away from workers who have no control over the work and when it is given to them. She added that the managers schedule the work, and if they don't schedule it properly, it is not the workers' fault if they don't have work to do.[25] In finding Baldessari's statements to Pace to be concerted activity, the Board observed that Baldessari, a programmer, did not raise "purely personal concerns" but rather "espoused the cause of the hourly shop employees" and sought to have the new break policy applied "fair[ly] to all employees."[26] The Board also relied on the group-meeting setting—repeating language from *Whittaker* that in such as setting, "'a concerted objective may be inferred from the circumstances'"[27]—and the fact that, as in *Whittaker*, the meeting was called to announce a change in employment terms and conditions and provided the "first opportunity to protest the employer's proposed changes."[28] Accordingly, in *Chromalloy Gas Turbine* as in *Whittaker*, the Board inferred from all the circumstances an objective to initiate or induce group action.

Contrast the instant case. Here, there was no meeting, no announcement by management regarding wages, hours, or other terms and conditions of employment, and absent such an announcement, no protest that, under the totality of the circumstances, would support an inference that an individual employee was seeking to initiate or induce group action. Instead, there was a brief encounter between a supervisor and his supervisees, the giving by that supervisor of a work assignment, and a gripe about the assignment by an employee who subsequently disclaimed any object of initiating or inducing group action by testifying that his remark was "just a comment." Such is not concerted activity under *Meyers Industries*, *Whittaker*, or *Chromalloy Gas Turbine*.

In *WorldMark by Wyndham*, which the General Counsel also cites, a Board majority, relying on *Whittaker* and *Chromalloy Gas Turbine*, found that salesman Gerald Foley engaged in concerted activity when Vice President of In-House Sales Rodney Hill approached Foley in the sales room and mentioned to him a recently implemented change in the dress code that required employees to tuck in their shirts,[29] and Foley responded by asking Hill a few questions about the change (but did not challenge or protest it) while several employees gathered around.[30] Although the impromptu gathering and exchange in *WorldMark* bear only the faintest resemblance to the formally convened meetings and protests in *Whittaker* and *Chromalloy Gas Turbine*, one may at least trace in the encounter between Foley and Hill the outline of *something* like a meeting and possibly a *prelude* to a protest over an unwanted dress code change (which did happen soon thereafter, although it was not a group protest). Here, by contrast, a supervisor made a work assignment, Greenidge grumbled about it, and that is all. Thus, *WorldMark by Wyndham* is also distinguishable.[31]

[24] The respondent in *Chromalloy Gas Turbine* manufactured aircraft parts.

[25] 331 NLRB at 859.

[26] Id. at 863.

[27] Id. (quoting *Whittaker*, 289 NLRB at 934).

[28] Id.

[29] Many of the salesmen in *WorldMark* wore "Tommy Bahama" shirts, which are designed to be worn untucked. Foley was wearing a Tommy Bahama shirt, untucked.

[30] Foley had just returned from a brief vacation, during which he had heard a rumor about the dress-code change. *WorldMark by Wyndham*, 356 NLRB at 773 & fn. 14. When Hill noticed that Foley's shirt was untucked, he said, "We have a new rule, shirt tails have to be tucked in." Id. at 774. Foley asked if this was true, and Hill said it was. Foley asked whether this was a company-wide policy or "is it just us?" and, if it was company-wide, why it had not been posted. Hill asked Foley why he wanted everything to be in writing, and Foley responded that in companies such as Wyndham, "any time they have changes, we always see a memo." Id. at 765, 779. At that point, a second employee interrupted, stating, "I might not want to tuck in my shirt," "I didn't sign up for this crap," and "I don't need the money." Id. at 765.

[31] The dissent stretches to characterize the fleeting encounter between Greenidge and Crawford as an "impromptu gathering." She does so to align this case with *WorldMark by Wyndham*, where the Board similarly stretched to align the impromptu gathering of employees around Foley and Hill with the formally convened employee meetings in *Whittaker* and *Chromalloy Gas Turbine*—cases that, properly understood, are at the line separating concerted from individual activity. Our colleague implies a design on our part to cut Sec. 7 protections down to nothing. The accusation is false, but ironically, the converse appears to be true of her: in cases such as this, she would seemingly reduce to nothing the distinction between Sec. 7–protected group action and purely individual work-related complaints, deeming the latter concerted activity whenever made in the presence of other employees. (She acknowledges that the category "concerted activity" has boundaries, but it is noteworthy that neither of the cases she cites as outside that category involved the fact pattern at issue here: a complaint made to

But even assuming the facts of this case bring it within the scope of *WorldMark*'s holding, we conclude that *WorldMark by Wyndham* cannot be reconciled with *Meyers Industries* and must be overruled.[32]

Again, the governing standard for determining whether an individual employee has engaged in concerted activity is that set forth in *Meyers II*. In *Meyers II*, the Board held that the definition of concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action" or where individual employees bring "truly group complaints to the attention of management."[33] As to the latter, the *Meyers II* Board required "record evidence [that] demonstrates group activities"[34] in order to find that an individually urged complaint is a truly group complaint. And the Board in *Meyers II* also held that "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence."[35]

Whittaker Corp. tested the limits of the *Meyers II* standard, but the Board's decision in *Whittaker* remained within those limits. In *Whittaker*, the Board stated that "in a group-meeting context, a concerted objective *may* be inferred from the circumstances,"[36] and it carefully evaluated the circumstances surrounding employee Johnston's statement before determining, "[i]n light of all the circumstances," that the statement was "the initiation of group action as contemplated by the *Mushroom Transportation* line of cases which was specifically endorsed by *Meyers II*."[37] In other words, the Board in *Whittaker* treated the question of whether an individual employee had engaged in concerted activity as "a factual one based on the totality of the record evidence," as *Meyers II* dictates.[38]

So also, in *Chromalloy Gas Turbine*, the Board repeated that "'in a group meeting context, a concerted objective *may* be inferred from the circumstances,'"[39] and the Board drew such an inference based on several circumstances, including that (i) employee Baldessari did not raise "purely personal concerns" but rather "espoused the cause of the hourly shop employees"; (ii) Baldessari sought to have the new break policy applied "fair[ly] to all employees"; (iii) Baldessari made her statements in a group-meeting setting, the meeting was called to announce a predictably unpopular change in terms and conditions of employment, and the meeting was the "first opportunity to protest the employer's proposed changes."[40] Thus, in *Chromalloy Gas Turbine* as in *Whittaker*, the Board treated the question of whether an individual employee had engaged in concerted activity as "a factual one based on the totality of the record evidence," in accordance with *Meyers II*.[41]

In *WorldMark by Wyndham*, however, the Board broke from *Whittaker* and *Chromalloy Gas Turbine* and unmoored itself from *Meyers Industries*, in two respects. First, whereas in *Meyers II* the Board treated the question of whether an individual employee has engaged in concerted activity as "a factual one based on the totality of the record evidence," in *WorldMark* the majority announced, as a rule of law, that "an employee who protests publicly in a group meeting *is* engaged in initiating group action."[42] *WorldMark*'s second deviation from

management by a single employee in the presence of coworkers. See *Lutheran Social Service of Minnesota, Inc.*, 250 NLRB 35, 41 (1980); *Yuker Const. Co.*, 335 NLRB 1072, 1080 (2001)).

[32] Repeating a now-familiar refrain, the dissent charges us with "procedural overreach" in overruling *WorldMark by Wyndham*. We reject the charge. Counsel for the General Counsel relies on that decision in her exceptions brief, and assessment of her argument may properly include determining whether the precedent the argument relies on is sound. To the extent our colleague suggests that precedent cannot be overruled unless a party asks us to do so, we disagree. See *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991) (stating that "the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law").

[33] 281 NLRB at 887.

[34] Id. at 886.

[35] Id.

[36] 289 NLRB at 934 (emphasis added).

[37] Id. The Board wrote:

> Here, the Respondent's president called together the employees to announce that their anticipated wage increases would not be forthcoming. As these meetings provided the employees with their first knowledge of the Respondent's decision to suspend the wage increases, they were also the employees' first opportunity to comment on or protest that action. Johnston, not having had a chance to meet with any employee beforehand, made his statements as a spontaneous reaction to the Respondent's announcement. He phrased his remarks not as a personal complaint, but in terms of "us" and "we." Obviously, they were addressed to everyone assembled to discuss the topic of the proposed wage increase suspension, including his fellow employees. His statements implicitly elicited support from his fellow employees against the announced change. [¶] We find that, in the presence of other employees, Johnston protested, at the earliest opportunity, a change in an employment term affecting all employees just announced by the Respondent at that meeting. This is clearly the initiation of group action as contemplated by the *Mushroom Transportation* line of cases which was specifically endorsed by *Meyers II*.

Id.

[38] 281 NLRB at 886.

[39] *Chromalloy Gas Turbine*, 331 NLRB at 863 (quoting *Whittaker Corp.*, 289 NLRB at 934) (emphasis added).

[40] Id.

[41] 281 NLRB at 886.

[42] *WorldMark by Wyndham*, 356 NLRB at 766 (emphasis added). As authority for this proposition, the *WorldMark* majority cited *Cibao Meat Products*, 338 NLRB 934 (2003), enfd. mem. 84 Fed. Appx. 155 (2d Cir. 2004), cert. denied 543 U.S. 986 (2004). In *Cibao Meat Products*, the employer convened an employee meeting for the purpose of announcing a new requirement that employees help open the plant gate

Meyers flows from the first. By holding that any employee who complains in a group setting is engaged in concerted activity per se, the Board in *WorldMark* broke with the *Meyers I* definition of concerted activity—specifically, that to be concerted, activity must "be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[43] Some complaints—*many* complaints—voiced by individual employees in a group setting are spoken "by and on behalf of the employee himself [or herself]." If every complaint voiced by an individual employee in a group setting is concerted activity per se, as *WorldMark* holds, then some complaints—*many* complaints—voiced in a group setting will be deemed concerted activity even though they are spoken by and on behalf of the employee him- or herself, contrary to the central holding of *Meyers I*. Thus, we agree with the criticisms leveled against *WorldMark* by former Member Hayes in his dissenting opinion: the majority's decision in *WorldMark* "impermissibly conflat[ed] the concepts of group setting and group complaints" and "reduce[d] to meaninglessness the *Meyers* distinction between unprotected individual activity and protected concerted activity."[44]

Accordingly, *WorldMark by Wyndham* must be, and is, overruled. In doing so, we reaffirm the standards articulated in *Meyers I* and *II*, under which individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun. The fact that a statement is made at a meeting, in a group setting or with other employees present will not automatically make the statement concerted activity. Rather, to be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action. Consistent with *Whittaker* and *Chromalloy Gas Turbine*, relevant factors that would tend to support drawing such an inference include that (1) the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment; (2) the decision affects multiple employees attending the meeting; (3) the employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely (as in *WorldMark*) to ask questions about how the decision has been or will be implemented; (4) the speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him- or herself; and (5) the meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand.[45]

in the morning before they start work. In response, employee Mendez stated "that it was not his job to open the gate, it was security's job," and that "we are the workers, the employees, after you open the factory." In determining whether this statement was concerted activity, the Board stated: "[A]n employee . . . who protests, in the presence of other employees, a change in an employment term affecting all employees just announced by the employer at an employee meeting, is engaged in the 'initiation of group action as contemplated by the *Mushroom Transportation* line of cases . . . .'" Id. at 934 (quoting *Whittaker Corp.*, 289 NLRB at 934). In *WorldMark*, this appropriately nuanced statement was telescoped into a rule that "an employee who protests publicly in a group meeting is engaged in initiating group action" per se. 356 NLRB at 766. Moreover, in *Cibao Meat Products*, the Board repeated—and italicized for emphasis—the statement from *Whittaker* that "'*in a group-meeting context, a concerted objective may be inferred from the circumstances*,'" 338 NLRB at 934 (quoting *Whittaker*, 289 NLRB at 934) (emphasis in *Cibao Meat Products*)—a statement the *WorldMark* majority omitted from its decision, which effectively replaced "may be inferred" with "must be inferred." Accordingly, *Cibao Meat Products* is consistent with *Whittaker* and *Chromalloy Gas Turbine* (and *Meyers*), the *WorldMark* majority's distorted and distorting reliance on that case for its erroneous per se rule notwithstanding.

[43] *Meyers I*, 268 NLRB at 497.

[44] *WorldMark by Wyndham*, 356 NLRB at 768 (Member Hayes, dissenting). The dissent points out that the *WorldMark* Board discussed the circumstances surrounding employee Foley's comments, and she says we have taken certain language in *WorldMark* out of context. But the fact remains that this language—the categorical declaration that "an employee who protests publicly in a group meeting is engaged in initiating group action"—opened the door for the Board to ignore the totality of the circumstances in future cases, contrary to *Meyers*. We close that door today.

[45] We do not hold that all these factors *must* be present to support a reasonable inference that an employee is seeking to initiate or induce group action. In keeping with *Meyers II*, the determination of whether an individual employee has engaged in concerted activity remains a factual one based on the totality of the record evidence.

The dissent's alarmist response to the factors set forth above, and her claim that they reflect an "unduly cramped" view of concerted activity, warrants stepping back a moment and taking a more comprehensive view of the context within which this case fits. We are not addressing here the heartland of concerted activity—instances where an employee acts *with* other employees or on their behalf as their authorized representative. We are also not presented here with a situation in which an employee, although not expressly authorized to do so, brings a truly group complaint to the attention of management. And we are not concerned here with an employee who addresses one or more coworkers with the object of initiating, inducing, or preparing for group action. Rather, we are dealing with a situation in which an individual employee speaks to management, not to bring a group complaint to management's attention, but the encounter takes place in the presence of other employees. This is a borderline scenario. In such a scenario (although not on the record here), the evidence *may* warrant drawing an inference of a concerted objective, but there is also a substantial risk (in former Member Hayes' apt phrasing) of "impermissibly conflat[ing] the concepts of group setting and group complaints" and "reduc[ing] to meaninglessness the *Meyers* distinction between unprotected individual

Of course, other evidence that a statement made in the presence of coworkers was made to initiate, induce or prepare for group action—such as an express call for employees to act collectively—would also support a finding of concertedness under *Meyers II*.

B. Greenidge's Comment Was Not for the Purpose of Mutual Aid or Protection.

To warrant protection under Section 7, activity must be both concerted *and* undertaken for the purpose of mutual aid or protection. Having found that Greenidge did not engage in concerted activity, our analysis may stop here.[46] But even if Greenidge's remark about soccer players' tipping habits qualifies as concerted activity, we find that Greenidge did not make it for the purpose of mutual aid or protection, and therefore the remark still would have been unprotected.

The judge found that Greenidge's statement concerning customers' tipping habits "did not relate to the skycap's wages, hours, or other terms and conditions of employment." Taking the judge's finding as he intended it—i.e., that tips given to the skycaps by airline passengers are not wages received from, and controlled by, the Respondent—we agree.[47] The amount of a tip given by an airline passenger to the skycap handling his or her luggage at curbside is a matter between the passenger and the skycap, from which the skycap's employer is essentially detached, see *Universal Syndications, Inc.*, 347 NLRB 624, 630–631 (2006), and the dissent cites no case in which the Board has ever held that a statement about a tip within a client's, patron's, or customer's sole discretion comes within the scope of the "mutual aid or protection" clause.[48] Neither was Greenidge's statement aimed at improving the skycaps' lot as employees through channels outside the immediate employee-employer relationship, i.e., through recourse to an administrative, legislative, or judicial forum. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978). Thus, the statement did not have mutual aid or protection as its purpose.

Moreover, despite Greenidge's understandable resentment at having received no tip for a time-consuming job the previous year, there is no evidence that he was dissat-

activity and protected concerted activity." *WorldMark*, 356 NLRB at 768 (Member Hayes, dissenting). Thus, to mitigate that risk, make analysis of these borderline cases more predictable, and furnish guidance to the regulated community, we have drawn certain factors from settled precedent we reaffirm today, *Whittaker Corp.* and *Chromalloy Gas Turbine*, while also making clear that they are *factors*, not necessary elements, and that the concertedness determination remains a factual one based on the totality of the evidence. In short, our colleague's alarmist rhetoric may be colorful, but it is unfounded.

We have rejected our colleague's false suggestion that we would interpret Sec. 7 "down to nothing." See fn. 31, supra. To the contrary, we could not agree more with her declaration that "Sec. 7 rights are the core of the Act." Those rights should be protected to the full extent Congress intended. Precisely for this reason, the term "concerted activity" should mean something. Consistent with the Act and *Meyers Industries*, our decision today returns Board precedent to a meaningful standard for determining whether an employee who addresses management about a workplace matter in the presence of other employees is engaged in protected concerted activity, or individual activity outside the scope of Sec. 7 protection.

[46] See *Meyers I*, 268 NLRB at 494 ("[T]he statute requires that the activities in question be 'concerted' before they can be 'protected.'").

[47] *The Capital Times Company*, 223 NLRB 651 (1976), cited by the dissent, is not to the contrary. There, the Board stated that for purposes of determining the scope of the duty to bargain under Sec. 8(d), the statutory term "wages" includes tips. Id. at 652. Thus, if tipped employees are represented by a union, their employer must bargain on request over matters related to tips, such as tip-pooling and tip-sharing. See fn. 49, infra. But *Capital Times* does not change the fact that customers furnish tips, not employers, or that arriving airline passengers, and they alone, decide whether to tip the skycap and, if so, how much, as Greenidge testified. See, e.g., Tr. 50 ("[S]ome people give you $5, some give you 20. It depends. . . . We take whatever we get, sir."); Tr. 59 ("[E]ach individual gets their own tips from each customer that it helps."); Tr. 74 ("Many times we didn't get a tip . . . .").

The dissent also cites *Nellis Cab Co.*, 362 NLRB 1587 (2015), but our colleague's own discussion of that case shows that it is distinguishable from this one. In *Nellis Cab*, Las Vegas taxicab drivers staged an extended break to protest the potential issuance of additional taxicab medallions by the Las Vegas Taxicab Authority—a move that would have put more taxicabs on the street, which would have meant less income for individual drivers. The Board found the extended break to be protected concerted activity, even though the Taxicab Authority controlled the decision whether or not to issue more medallions, because the employer played a role in that decision. The Board stated that "the taxicab companies obviously could be expected and did seek to influence Taxicab Authority's decision (for example, at [a] . . . meeting of the Taxicab Authority, where representatives of taxicab companies spoke in favor of issuing more medallions)." Id., slip op. at 2. Here, in contrast, the Respondent had no mechanism for, or history of, exerting pressure on airline passengers to provide skycaps more generous tips—or, indeed, any tips at all.

The dissent claims that the Respondent did have some control over tips, citing as evidence that "the skycaps' protest prompted their supervisor to relay their concerns to managers of the airline terminal." Here our colleague either distorts the record or strays from the General Counsel's theory of the case. Greenidge's remark did not prompt Crawford to mention the tip issue to the terminal manager. Crawford mentioned the issue after the terminal manager questioned him, and the terminal manager questioned Crawford when she saw the skycaps walk away. But perhaps by "the skycaps' protest," the dissent *means* their act of walking away. In that case, she abandons the General Counsel's theory of the case, which is that Greenidge's remark alone constitutes the allegedly protected concerted activity at issue here. The dissent says that we miss her point, which is that "an employer has the means to address employee concerns over poor tips." In certain settings, that may be true. For example, a restaurant can slap a mandatory tip surcharge on every bill, and some do. But that is a very different setting than the one we are dealing with here.

[48] Thus, the situation here is unlike that in cases where the employer did exert some control over tip-related matters through tip-pooling or tip-sharing arrangements. See, e.g., *Thalassa Restaurant*, 356 NLRB 1000, 1016 (2011); *Edward's Restaurant*, 305 NLRB 1097, 1098 (1992), enfd. 983 F.2d 1068 (6th Cir. 1992); *Fairmont Hotel Co.*, 230 NLRB 874, 878 (1977); *Top of Waikiki, Inc.*, 176 NLRB 76, 79 (1969), 429 F.2d 419 (9th Cir. 1970).

isfied with the existing tipping arrangements or wanted them to be modified. Indeed, the evidence is to the contrary. Greenidge testified that the tips he receives "help[] to make a good bit of change," as much as $150 a day (Tr. 31). And, as stated previously, Greenidge testified that the remark at issue here was "just a comment" and was not aimed at changing the Respondent's policies or practices. Thus, the evidence does not support a finding that Greenidge was seeking "to improve terms and conditions of employment." *Eastex*, supra at 565.[49]

We correct the judge's decision in one respect, however. The judge found that the fact that Greenidge could not have reasonably expected his gripe might affect the terms or conditions of his employment, supported his finding that Greenidge did not engage in concerted activity. That is incorrect. Rather, this fact supports finding that Greenidge's gripe about the tipping habits of soccer players—even assuming it constituted concerted activity—was not for the purpose of mutual aid or protection. See *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 818 (5th Cir. 1981) (per curiam).

Accordingly, because the conduct for which Greenidge was discharged was not protected concerted activity, the Respondent did not violate Section 8(a)(1) of the Act by discharging him.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. January 11, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Under well-established principles set forth in Section 7 of the National Labor Relations Act, which grants employees the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection,"[1] the Board should have no difficulty finding that the Respondent unlawfully discharged one of its skycaps, Trevor Greenidge, for complaining about the lack of tips.

When the Respondent called upon Greenidge and his fellow skycaps to transport an arriving soccer team's equipment, Greenidge objected to his supervisor that the skycaps had not been tipped for a similar job the previous year. Greenidge lodged this protest in front of his fellow skycaps, who naturally had a mutual interest in his concern because they would be sharing the tip, if any, given by the team. Greenidge's complaint prompted the supervisor to assure the skycaps that he could and would raise the tipping concern with the airline and terminal managers. Following this complaint, the skycaps initially refused to attend to the team, but, a short time later, after baggage handlers were brought in to help with the team's bags, the skycaps did assist the team as requested. The Respondent nevertheless discharged Greenidge, noting expressly that he had raised the tipping concern "in front of the other skycaps."

In those circumstances, longstanding Board and court precedent compels a finding that Greenidge's complaint constituted an attempt to initiate a group objection over tips, and that he was thus engaged in concerted activity for the mutual aid and protection of his fellow skycaps—conduct for which he could not lawfully be fired. Instead, the majority upholds Greenidge's discharge, misreading and overruling (without being asked) a recent Board decision and imposing sharp new restrictions (unsupported by precedent) on what counts as "concerted" and "mutual aid or protection" for purposes of Section 7.

I.

The Respondent is a contractor that provides ground services at JFK International Airport. The Respondent directly paid its skycaps between $3.90 and $4.15 an hour. Most of the skycaps' compensation derived from customer tips, which varied in amount but sometimes totaled up to $150 per day.

[49] Our dissenting colleague's attempt to turn this case into a referendum on the protection of tipped employees is unfortunate. Nothing in our holding should be read as reducing the Act's protection for employees whose pay is in part comprised of tips. To the contrary, our decision today recognizes the importance of these workers in our economy and attempts to provide clearer guidance for them. Indeed, while the dissent's ever-expanding interpretation of what constitutes concerted activity would offer tipped employees a hollow victory by protecting individual griping about matters over which their employer has no control, our restoration of the *Meyers* standard makes clear that employees like Greenidge place themselves outside the Act's protection when they jeopardize customer relationships and attendant jobs through purely individual complaints.

[1] 29 U.S.C. §157.

On the evening of July 17, 2013, Trevor Greenidge, a skycap, was working with three other skycaps, Allan Wills, Terrence Boodram, and Basil Rodney. Cebon Crawford, one of the Respondent's supervisors, notified Greenidge and his coworkers that Lufthansa Airlines had requested four skycaps to transport sporting equipment and about 50 to 70 bags on behalf of a soccer team that would be arriving soon. After receiving this news, Greenidge said to Supervisor Crawford—and in front of the other skycaps who had been asked to help—"We did a similar job a year prior and we didn't receive a tip for it." Greenidge's implication was plain: the work being requested of the skycaps, who worked primarily for tips, might not be worth performing. Supervisor Crawford responded—with Greenidge's coworkers still present—that he would bring this concern to the airlines and terminal managers. Crawford thus understood the clear implication of Greenidge's statement (that a tip was expected, if the work were to be done) and promised to intercede.

Shortly thereafter, the soccer team's van arrived. Rather than immediately assist the team, the skycaps at first walked away—obviously because of the concern raised by Greenidge. While this was happening, Lufthansa's manager, Isabelle Roeder, asked why no one appeared willing to move the team's equipment and baggage. As he had said he would, Crawford then communicated the skycaps' demonstrated concerns, telling Roeder and Klaudia Fitzgerald, one of the terminal's managers,[2] that the skycaps did not want to move the equipment and bags because they did not think they would get an adequate tip. Crawford then requested that several baggage handlers attend to the team. Thereafter the skycaps returned and began assisting the team. Even with the skycaps' initial delay, the team's equipment and luggage was moved into the terminal in 12 minutes, and Lufthansa gave the skycaps an $83 group tip. Later that evening, and continuing the following morning, Fitzgerald and Ed Paquette, the terminal's managers, exchanged a series of emails about the incident with the Respondent's managers and Chief Operating Officer. One of the Respondent's managers, Deborah Traynor, reviewed video footage of the incident and opined in an email that "it was not the service provided but the lack of professionalism on [the skycaps'] part" that was at issue. Based on her investigation, Traynor advised terminal manager Paquette that the four skycaps would be removed from service, and accordingly Paquette requested their names in order ensure their removal from the terminal.

On July 19, Traynor provided letters to the four skycaps informing them that they were discharged.[3] In relevant part, Greenidge's discharge letter stated: "You were indifferent to the customer and verbally make [sic] comments about the job stating you get no tip or it is very small tip. Trevor, you made this comments [sic] in front of other skycaps, Terminal One Mod and the Station Manager of Lufthansa."[4]

In sum, then, when the Respondent called upon Greenidge and his coworkers to transport the soccer team's equipment and bags, Greenidge objected to Supervisor Crawford that the team had not tipped the skycaps the previous year. Greenidge raised this concern in front of his fellow skycaps, who naturally had an interest in the matter because they would be sharing the tip, if any, given by the team. In response, Crawford assured Greenidge—still in front of the other skycaps—that he, Crawford, could and would raise this concern with the airline and terminal managers. Not satisfied with this response, Greenidge and his coworkers, together, initially refused to attend to the team. But after baggage handlers were called in to assist with the team's bags, the skycaps, again together, also proceeded to assist the team with its equipment and bags. The Respondent nevertheless discharged Greenidge, noting expressly in the discharge letter that Greenidge had raised the tipping concern "in front of the other skycaps."[5] As I will explain, on these facts and under well-established law, the majority's conclusion that Greenidge was not engaged in concerted activity for the mutual aid and protection of the skycaps is plainly wrong.

[2] As a manager of the terminal, Fitzgerald was not employed by the Respondent.

[3] All four skycaps filed grievances over their discharges with Local 660, United Workers of America, which was their collective-bargaining representative at that time. The other skycaps were offered positions with one of the Respondent's affiliate companies, but Greenidge was not.

[4] This was not entirely factually correct. As the majority's factual recitation lays out, Greenridge's remark was made in front of Crawford (his supervisor) and his fellow employees, but representatives from Lufthansa and Terminal One were not yet present.

[5] As noted above, the letter also mentioned that the comment was made in front of a terminal manager and the manager from Lufthansa, but that was not correct. While the majority places great emphasis on the importance of the Respondent's ability to preserve its customer relations, it is plain on these facts that Greenridge's *comment*—which was not made in front of customers—was key to his discharge, as was the fact that the comment was made in front of *coworkers* and that the Respondent clearly perceived it as instigating them to act in response. Indeed, the centrality of Greenridge's comment to his ultimate termination is further suggested by the fact that the three other skycaps who refused to serve the customer were all subsequently offered positions with one of the Respondent's other affiliated companies, while Greenridge was not.

II.

Section 7 of the Act establishes the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection," and Section 8(a)(1), in turn, makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[6] "To be protected under Section 7 of the Act, employee conduct must be both 'concerted' and engaged in for the purpose of 'mutual aid or protection.'" *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 152 (2014). In assessing these elements, the Board applies an objective standard, putting aside an employee's subjective intentions.[7] In this case, Greenidge's statement to Crawford satisfied both the objective "concerted" and "mutual aid or protection" requirements under established Board precedent.

A.

Greenidge's remark falls easily into the category of concerted activity for two independent reasons. First, the surrounding circumstances make clear that, to any reasonable observer, Greenidge's remark would have appeared as intended to initiate a group objection by the skycaps regarding their tips. Second, the Respondent here regarded Greenidge's comment, for which it discharged him, as concerted—as intended to induce group action.

1.

In *Meyers Industries*, the Board elaborated the elements of concerted activity. It held that an employee's activity is concerted when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[8] Subsequently the Board clarified its *Meyers I* decision to definitively hold that concerted activity under Section 7 "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action."[9] Notably, the "object of inducing group action need not be express," and an employee's statement may, in certain contexts, "implicitly elicit[] support from his fellow employees."[10]

Here, the evidence, taken as a whole, establishes that Greenidge's statement was objectively intended to induce group action. Greenidge's comment that "[w]e did a similar job a year prior and we didn't receive a tip for it," expressed a concern about the tipping practices of the soccer team that was a matter of natural and immediate interest not just to Greenidge, but also to his coworkers. All of them were about to be asked to handle the team's many bags, and all of them worked primarily for tips—in this particular instance a "group" tip to be shared among themselves. Thus, there clearly was the potential for common cause among a "speaker" employee (Greenidge) and "listener" employees (the other skycaps), which the Board has held supports an inference of concerted intent.[11] Further, although not necessary to drawing an inference of an intent to induce group action, such an inference is further strengthened by the fact that Greenidge clearly was referring to more than an individual interest, as demonstrated by both his statement that *"we* didn't receive a tip," referring to the skycaps involved in the prior incident, and his voicing of this concern in front of the skycaps who were being asked to help—and who also faced the prospect of not being tipped for a larger than usual assignment. Under Board and judicial precedent, these facts strongly support a finding that Greenidge sought to initiate or induce group action.[12]

The events immediately following Greenidge's statement confirm that his statement objectively sought to induce or initiate group action: right after his comment, the skycaps initially refrained from assisting the soccer team with their equipment. It is unclear how else his coworkers got the message to walk away from the soccer team's equipment *other than by understanding Greenidge's comment as urging them to do so.* Objectively, then, Greenidge's comment was aimed at inducing a

[6] 29 U.S.C. §§ 157, 158(a)(1),

[7] See id., 361 NLRB at 153 (holding that "both the concertedness element and the 'mutual aid or protection' element are analyzed under an objective standard," and "[a]n employee's subjective motive for taking action is not relevant to whether that action was concerted"). See *Citizens Investment Services Corp.*, 342 NLRB 316, 316 fn. 2 (2004) (rejecting reliance on employee's subjective belief that he was acting on behalf of others and observing that "only the *objective* evidence in the record establishing that [the employee's] actions constituted concerted activity . . . may be considered"), 430 F.3d 1195 (D.C. Cir. 2005).

[8] 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985).

[9] *Meyers Industries*, 281 NLRB 882, 887 (1986) *(Meyers II)*, enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). See also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) ("[I]nasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition.").

[10] *Whittaker Corp.*, 289 NLRB 933, 933–934 (1988).

[11] See *Fresh & Easy*, supra, 361 NLRB at 154 fn. 10.

[12] See *NLRB v. Henry Colder Co.*, 907 F.2d 765, 768 (7th Cir. 1990) (use of pronoun "we" supports inference that employee "directed his complaints primarily on behalf of the sales force"); *Chromalloy Gas Turbine Group*, 331 NLRB 858, 863 (2000) ("the objective of initiating . . . or . . . inducing group action . . .' may be inferred from the context of the group meeting where the comments are made").

group objection to poor tips.[13] Although the issue of whether the skycaps' delay in moving the team's equipment was not separately alleged by the General Counsel to be concerted activity (because Greenidge's comment substantially motivated his discharge), the delay, like all other contextual evidence, certainly sheds light on how an objective observer would have interpreted the purpose of Greenidge's comment.

Further, the Respondent itself—in contrast to the majority—recognized and regarded Greenidge's comment as seeking to induce group action. The Respondent's perception that the comment was concerted activity is both further evidence that a reasonable objective observer would perceive it to be so, and—as the General Counsel alleged—an independent basis for finding Greenidge's discharge unlawful.[14] The Respondent's termination letter to Greenidge stated, "You were indifferent to the customer and verbally make [sic] comments about the job stating you get no tip or it is very small tip. Trevor, you made this comments [sic] in front of other skycaps, Terminal One Mod and the Station Manager of Lufthansa." This letter made special note of the fact that Greenidge made his comments about tips "in front of other skycaps"—coworkers who might be expected to follow Greenidge's lead, as they indeed did. Significantly, the Respondent's substantially identical discharge letters to two of those skycaps (Terrence Boodram and Allan Wills) likewise relied on the fact that the employees spoke out or acted "in front of other skycaps." Further, the Respondent's discharge letter to Boodram expressly referenced the report about "some conversion [sic] about no tip or small tip for the job," thereby directly linking Boodram's actions to Greenidge's protest to Supervisor Crawford.[15] The Respondent thus clearly did not view Greenidge's comment as a mere personal gripe, but rather recognized it as a statement inviting other skycaps to protest as well. Last, the record establishes that the Respondent actually treated the skycaps as a group in discharging them all; Traynor, following her investigation, notified Paquette in a single email that all of the involved skycaps would be removed. The Respondent's obvious belief that Greenidge's protest had led to concerted activity is yet another, independent basis for finding his discharge unlawful.[16]

2.

In those circumstances, the majority's contrary view—that Greenidge's statement amounted to no more than an unprotected personal gripe—is wholly unpersuasive. As demonstrated, that view is belied by the facts. The majority's reliance on Greenidge's testimony that his statement to Crawford was "just a comment" is misplaced, because the testimony at most reflects a post hoc, subjective belief.[17]

In order *not* to find concerted activity here, the majority chooses, without any request by a party or invitation for briefing,[18] to unnecessarily overrule a recent Board

[13] Cf. *MCPc, Inc. v. NLRB*, 813 F.3d 475, 485 (3d Cir. 2016) (concluding that any doubt whether employee's statements qualified as concerted activity was dispelled by the fact that two other employees expressed their agreement when employee urged the employer to hire more engineers); *Henry Colder Co.*, supra, 907 F.2d at 767–768 (employee who spontaneously assumed leading role in protesting earlier starting time, prompting others to voice their objections, was engaged in concerted activity).

[14] The Board has held that discharges that are motivated by perceived concerted activity are unlawful on that basis alone, even when the employees have not, in fact, engaged in concerted activity. See, e.g., *Metropolitan Orthopedic Assn.*, 237 NLRB 427, 427 fn. 3 (1978) (employer unlawfully punished employee based on its belief that he engaged in protected concerted activity).

[15] The record apparently does not contain a discharge letter for the fourth skycap, Allan Wills.

[16] See *Metropolitan Orthopedic Assn.*, supra, 237 NLRB at 427 fn. 3; *Parexel International*, 356 NLRB 516, 519 (2011) (even if employee had not yet engaged in concerted activity, employer's discharge of that employee in order to preempt future concerted activity—"to 'nip it in the bud'"—was unlawful without more.").

[17] As explained, under Board law, the question is whether an employee's statement or actions would objectively tend to induce group action. See *Fresh & Easy Neighborhood Market*, supra, 361 NLRB at 153; *Citizen's Investment*, supra, 342 NLRB at 316 fn. 2. Contrary to the majority's suggestion, it is not merely the employee's subjective feelings at the time (altruistic, selfish, or somewhere in between) that are irrelevant to the inquiry—it is also irrelevant whether the employee subjectively intended, in his own mind, to induce group action—what matters is if an objective observer would have perceived that intent.

A hypothetical case that turns on the issue of the employee's subjective belief illustrates where the majority's analysis errs. Imagine an employee who, at a mandatory staff meeting called by the employer to announce a pay cut, promptly says, "We should do something about this!" His coworkers react by announcing that they are going out on strike to protest the pay cut—and they do so lawfully. The employer fires only the employee who spoke out first, for inciting the strike. At his unemployment-compensation hearing, the employee testifies that he did not intend for his coworkers to walk out, that he had no idea what they could or should do to protest the pay cut, and that he spoke out impulsively. Consistent with Sec. 7 of the Act, could the Board possibly find (as the majority's holding here suggests) that the discharge of the employee was lawful because he had not subjectively intended to initiate or induce group action, regardless of how the employer and his coworkers all understood his statement? Just as the Act must protect employees whose efforts to initiate or induce group action *fail*, see *Mushroom Transportation*, supra, 330 F.2d at 685, so it must protect employees whose statements reasonably tend to result in group action, even if they did not subjectively intend it. Failing to protect employees in such circumstances obviously would chill the exercise of Sec. 7 rights, if not by the fired employee, then by his coworkers.

[18] This appears to be another example of procedural overreach by the majority. Yet again, the majority disregards adjudicative norms in order to make new law without giving the parties or the public any notice or opportunity to weigh in. See, e.g., *UPMC*, 365 NLRB No. 153, slip op. at 17 (2017) (Member McFerran, dissenting). Although my colleagues dismiss my "familiar refrain," I remain convinced that

decision, *WorldMark by Wyndham*,[19] and to improperly recast settled Board precedent. The majority purports to accept and apply the *Meyers I* and *II* lines of cases and their definition of concerted activity—which includes individual conduct intended to induce or initiate group action—but either casts aside or reinterprets those precedents. In their place, the majority adopts a checklist of factors that imposes significant, and unwarranted, restrictions on what counts as concerted activity.

The majority's decision to overrule *WorldMark*, which supports finding a violation here (but is hardly essential), is based on a fundamental misreading of its significance. In *WorldMark*, an employee spontaneously complained to a supervisor in front of other employees, one of whom then joined in the protest, about a change in his employer's dress code imposing a new requirement that employees tuck in their "Tommy Bahama" shirts, which traditionally were worn untucked. The Board found that the employee's protest was concerted, observing generally that the Board had consistently found activity concerted when, in front of their coworkers, single employees protest terms and conditions of employment common to all employees. Id. at 766. More specifically, looking at all of the attendant circumstances, the Board relied on the following facts: (1) the employee took the first opportunity to question the newly announced dress code change; (2) the dress code affected him and his coworkers as a group; (3) the employee presented his objection in group terms, using "we," not "I"; (4) the employee knew from past experience his coworkers preferred to wear their "Tommy Bahama" shirts untucked, and thus the employee would reasonably expect this issue to be a matter of concern to his coworkers; and (5) in fact, a coworker did join his protest. Id. The Board thus found concerted activity based on a thorough review of all the relevant facts and circumstances.

Nevertheless, the majority insists that *WorldMark* must be overruled because, the majority says, the *WorldMark* Board wrongly announced a per se rule that an employee's protest made in any group context is always a concerted inducement to group action. In particular, the majority finds it problematic that the employee in that case raised his objection in an impromptu gathering of employees, rather than in a formal employer-employee meeting, which the majority says is inconsistent with prior cases.[20] But there is no substance to either of these asserted concerns.

Contrary to the majority, the *WorldMark* Board manifestly did not establish a per se rule that concert is established where an employee's protest occurs in any group context. As described above, the Board plainly considered all the surrounding circumstances in finding that the employee's protest was an inducement to group action. Only by reading language out of context could *WorldMark* suggest a per se rule. But the decision as a whole clearly does not adopt or apply any such a rule.

Further, although *WorldMark* may not be factually identical to the precedents it cites, it is not inconsistent with them (as the majority suggests). Broadly speaking, *WorldMark* simply reflects the unremarkable truism that different cases almost invariably present different facts, and that a full analysis of the particular facts of each case may or may not lead to a finding of concerted activity. In that vein, drawing on earlier cases, the *WorldMark* Board merely reflected the Board's longstanding recognition that a complaint made in front of an audience of coworkers naturally is a relevant consideration that, in combination with other relevant facts, could lead to an inference of concerted activity.

Both *WorldMark* and the present case are fully consistent with these prior cases, as both involve a straightforward application of this longstanding consideration: a complaint made in front of a group, in combination with other circumstances, may support an inference of an inducement of group action, notwithstanding that the employee in *WorldMark,* and Greenidge in this case, made his protest during an impromptu gathering (rather than a formal meeting). In *Chromalloy Gas Turbine Group*, 331 NLRB 858 (2000), for example, the Board found that an individual employee's protest of a new break policy during an employer-initiated meeting to discuss the policy was concerted under all the circumstances, including that the change affected many employees and naturally would be of concern to them. To be sure, the Board also relied on the fact that the employee lodged her protest during a formal meeting about the policy, which often suggests intent to induce group action. But the Board clearly did not hold that concert may be found *only* in such meetings. Similarly, in *Whittaker Corp.*, 289 NLRB 933 (1988), the Board found that a lone employee engaged in concerted activity when he objected, in a formal employer-employee meeting, to the employer's announcement that employees would not be receiving their regular annual wage increase. As in *Chromalloy*,

the Board, the Act, and reasoned decision-making are all better served if we invite public participation in deciding important labor-law questions—as the Board used to do.

[19] 356 NLRB 765 (2011)

[20] See *Whittaker Corp.*, supra; *Chromalloy Gas Turbine Group*, supra; *Cibao Meat Products*, 338 NLRB 934 (2003), enfd. mem. 84 Fed. Appx. 155 (2d Cir. 2004).

the Board noted that, "[p]articularly in a group-meeting context, a concerted objective may be inferred from the circumstances." Id. at 934. But, again, the Board, quoting *Meyers* itself, was careful to emphasize that "'the question of whether an employee engaged in concerted activity is, at its heart, a factual one." Finally, in *Cibao Meat Products*, 338 NLRB 934 (2003), enfd. mem. 84 Fed. Appx. 155 (2d Cir. 2004), the Board again found concerted activity where an employee voiced his protest during an employer-called meeting, but once again the Board did not hold that the setting was determinative.

In sum, although in each of those cases the Board found that, "particularly in a group meeting," one might reasonably infer that a protest was intended to induce group action, the Board never held that asserting an objection during a formal meeting was either necessary or sufficient. Rather, in each case the Board conducted a thorough review of all the facts in finding concerted activity. That is precisely what the Board did in *WorldMark*, undermining the majority's asserted rationale today for overruling it. Notably, in a subsequent case, the U.S. Court of Appeals for the Third Circuit saw no need to interpret *WorldMark* as establishing a per se rule, instead observing in *MCPc, Inc.,* supra, 813 F.3d at 485, that the decision stands for the limited proposition that the mere fact a statement is made spontaneously in an informal setting does not foreclose a finding of concerted activity. This understanding of *WorldMark* is fully consistent with the *Meyers* decisions, where the Board emphasized that the definition of "concerted" given in those cases was "by no means exhaustive and that a myriad of factual situations would arise calling for careful scrutiny of record evidence on a case-by-case basis." *Meyers II*, supra, 281 NLRB at 887 (citing *Meyers I*, supra,). As a result, there is no basis for the majority's conclusion that *WorldMark* must be overruled.

Worse yet, from its unwarranted reversal of *WorldMark*'s nonexistent per se rule, the majority pivots to announcing a new set of factors that threaten to substantially narrow the situations in which statements made by individual employees in front of their coworkers will be found concerted. Consistent with *Meyers*, the Board has always rejected the imposition of strict criteria that, while perhaps capturing some examples of concerted activity, nonetheless prove far too restrictive to properly delineate the boundaries of concerted conduct.[21] The sound policy reasons underlying that approach are clear. As the Board explained in *Meyers II*, one of the fundamental purposes of Congress's decision to protect "concerted" activities by employees was to "reduce the industrial unrest produced by the lack of appropriate channels for the collective efforts of employees to improve working conditions." 281 NLRB at 883. In order to fully realize that statutory goal, it is necessary to interpret "concerted" broadly; otherwise, the Act simply cannot do what Congress intended.[22]

The majority risks frustrating the full realization of that statutory objective by subordinating the fact-sensitive approach at the heart of a *Meyers* analysis to criteria that effectively establish a minimum threshold for finding that an employee's activity is concerted.[23] As the Third Circuit put it, in rejecting an employer's attempt to pick apart an employee's protest based on assertedly missing elements, the majority's factors "espouse an unduly cramped interpretation of concerted activity under [Section] 7—one that assesses concerted activity in terms of isolated points of conduct rather than the totality of the circumstances." *MCPc*, supra, 813 F.3d at 486.

It is not difficult to see, moreover, how the majority's "unduly cramped" factors are likely to exclude from protection what is concerted activity by any reasonable

[21] See, e.g., *Whittaker Corp.*, supra, 289 NLRB at 933–934 (rejecting requirement that the "object of inducing group action [be] express" and finding concerted an employee's "statement at the meeting implicitly elicited support from his fellow employees against the announced change"); *Fresh & Easy*, supra, 361 NLRB at 154 (no requirement that solicited coworkers actually join the protest in order to prove an intent to induce group action).

[22] I do not suggest, of course, that the concept of "concerted" activity has no boundaries. And, in fact, the Board has found in certain circumstances that an individual employee's conduct actually was "mere griping" or purely personal. See *Lutheran Social Service of Minnesota, Inc.*, 250 NLRB 35, 41 (1980) ("more than 3 months of behind-the-scenes dissatisfaction without any indication of an intention to cultivate it into some more confrontational form of expression," made clear that the conduct lacked any realistic aim at a group protest); *Yuker Construction Co.*, 335 NLRB 1072, 1080 (2001) (complaints exchanged between two employees which were not directed at management, and which implied no further protest nor concerted action to be taken, found not concerted).

[23] The majority states that the factors are not exhaustive. Yet, somewhat contradictorily, my colleagues expressly provide that not *all* of these factors must be present to find an inducement to group action—thus implying that *at least one factor must be present* and that situations not encompassed by these factors will not support an inference of concerted action. Further, my colleagues' application of these factors in the present case makes clear that the absence of any one of these factors will weigh against an inference of concerted intent. For example, my colleagues find that, with respect to Greenidge's comment, there "was no meeting, no announcement by management regarding wages, hours, or other terms and conditions of employment, and absent such an announcement, no protest that, under the totality of the circumstances, would support an inference that an individual was seeking to initiate or induce group action." In other words, the absence of these new criteria is dispositive, despite other circumstances supporting an inference of concert.

measure.[24] Take the majority's first factor: whether the statement occurred at a meeting called by the employer at which the policy being protested was newly announced. To be sure, that an employee has raised a matter at an official meeting might well *strengthen* an inference of the intent to induce group action. But, as Board and judicial decisions illustrate, employees also initiate protest through spontaneous, informal means that also deserve Section 7 protection.[25] Factor 3—which suggests that employee questions, as opposed to declarative protests, are less likely to be inducements of group action—suffers from the same obvious defect. Asking questions is frequently an indirect way of criticizing and drawing others to oppose a new policy.[26] Likewise, the majority's factor 5—which suggests that an intent to induce group action is absent if the employee previously had an opportunity to, but did not, discuss a matter with his coworkers—unnecessarily excludes the possibility that an employee might not jump at the first opportunity to protest, but instead might take or need time to work up the resolve to confront his employer about a matter of obvious mutual employee concern.

Applying the majority's factor-based test to Greenidge's case puts its severe limitations in stark relief. The majority ignores the overall picture that the facts in this case depict: spontaneous or not, Greenidge's statement indicated an objective intent to induce group action. As described, prompted by Greenidge's complaint to Supervisor Crawford about the soccer team's previous failure to tip the skycaps—a matter of mutual concern among them—the skycaps initially refused to attend to the team. All of the skycaps acted together, and they were subsequently disciplined as a group for their response to Greenidge's statement. Thus, at each step of the way, the evidence shows that Greenidge's objection cannot reasonably be dismissed as a purely personal concern, as the majority does.[27] Rather, the Board should find that it qualified as "concerted" activity under well-settled Board and court precedent.

B.

Just as it errs with respect to whether Greenidge's protest was concerted, the majority erroneously concludes that the protest was not for "mutual aid or protection." "The concept of 'mutual aid or protection' focuses on the *goal* of concerted activity;" here, Greenidge's obvious concern that the skycaps be compensated fairly for work performed. *Fresh & Easy Neighborhood Market*, supra, 361 NLRB at 153. That the Respondent was not directly responsible for the skycaps' tips does not mean that group action related to tips was not for "mutual aid or protection." In fact, the "mutual aid or protection" element is easily satisfied in this case. By broadly holding that tips are not matters of "mutual aid or protection," my colleagues have unquestionably curtailed the Act's protection for tipped employees who engage in any form of concerted conduct involving this critical aspect of their working conditions.[28]

As the Board observed in *Fresh & Easy Neighborhood Market*, supra, the Supreme Court has endorsed the view that "Congress designed Section 7 'to protect concerted activities for the *somewhat broader* purpose of "mutual

[24] My colleagues deem my criticism of their factor-based approach an "alarmist response," because this case is not within the "heartland" of concerted activity. But Sec. 7 rights are the core of the Act, and they should be protected to the full extent Congress intended, not cut back for the sake of predictability (the majority's stated aim). If Sec. 7 were interpreted down to nothing, of course, predictability would be achieved, but at the expense of the purpose of the statute. The majority is similarly incorrect not to recognize that what begins on the "borderline" may well lead to the "heartland." As the Board has observed, "almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals. . . ." *Fresh & Easy Neighborhood Market*, supra, at 153 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

[25] See *MCPc,* supra, 813 F.3d at 484 (endorsement of Board's concerted activity finding in cases of "lone employee who complains to management in a less organized group context and who, in so doing, successfully attracts the impromptu support of at least one fellow employee"); *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 24–26 (D.C. Cir. 2011) (finding protected concerted activity where employees objected to a new break policy in front of other employees while on the job); *Colders Furniture*, 292 NLRB 941 (1989), enfd. sub nom *NLRB v. Henry Colder Co.*, 907 F.2d 765 (7th Cir. 1990) (spontaneous lunchroom discussion among employees led to employee's impromptu visit to manager's office to make concerted complaint); *Salisbury Hotel*, 283 NLRB 685, 686, 694 (1987) (complaints exchanged among employees themselves were concerted where they led to group protest to management).

[26] See *NLRB v. Talsol Group*, 155 F.3d 785, 791, 797 (6th Cir. 1998) (employee's questions of management concerning details of safety policy found to be concerted inducement of group action).

[27] As noted, the majority mistakenly relies on Greenidge's testimony that his remark was "just a comment," as "[a]n employee's subjective motive for taking action is not relevant to whether that action was concerted." *Fresh & Easy Neighborhood Market*, supra, 361 NLRB at 153 (internal citations omitted). Further, whatever Greenidge's subjective intent, his coworkers plainly did not understand it as a purely personal concern to him. Why else did they follow his lead? Query, moreover, whether the majority would find the converse to be true: if an employee is credited as subjectively intending to induce group action, but there is no objective evidence supporting that aim, is the conduct concerted? Compare *Citizens Investment*, supra 342 NLRB at 316 fn. 2 (disavowing any reliance on employee's subjective statement that he intended to engage in concerted activity).

[28] The majority accuses me of inappropriately turning this case into a "referendum" on the Act's protections for tipped employees, because "[n]othing in [the] holding should be read as reducing the Act's protection for employees whose pay is in part comprised of tips." Except, that is exactly what my colleagues are doing—expressly finding that Greenidge's remark was not for mutual aid or protection because he was a worker whose compensation involved tips and his comment was directed toward this aspect of his compensation.

aid or protection" as well as for the narrower purposes of "self-organization and collective bargaining."" 361 NLRB at 154 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)). Thus, the "mutual aid or protection" clause encompasses a wide swath of employee activity that has the potential to "improve their lot as employees." Id. This necessarily includes employees' shared "interests as employees," even if they do not "relate to a specific dispute between employees and their own employer over an issue which the employer has the right or power to affect." *Eastex, Inc. v. NLRB*, supra, 437 U.S. at 563, 566–567. As with "concerted" activity, the concept of "mutual aid or protection" has its limits, but those limits are reached only when there is a highly "attenuated" connection to workplace interests. Id. at 567–568. The present case falls well within that limit.

Greenidge's comment raised an issue of shared interest among all skycaps and other employees: how much they were paid. Tips constituted the lion's share of the skycaps' earnings, a common reality faced by many service workers. Indeed, for many if not most tipped employees, few subjects impinge more dramatically on working conditions than the amount of their tips. The federal minimum wage for tipped workers is $2.13[29] and tips generally make up the remainder of their hourly earnings. For restaurant workers, who make up the largest portion of the tipped work force, tips can make up over half their income (leaving some below the poverty level *even after* accounting for tips).[30] Consequently, for most employees, and certainly for the skycaps in this case, discussions about the amount of tips directly concern their compensation, are integral to their "interests as employees," and are thus for "mutual aid or protection." *Eastex*, supra, at 567. Thus, Greenidge's comment directly implicated the skycaps' interests as employees and fell comfortably within the scope of Section 7's "mutual aid or protection" clause.

The majority's contrary view misunderstands both the broad language of Section 7 and the workplace reality for tipped workers by inexplicably holding that Greenidge's comment was unrelated to terms and conditions of employment, despite overwhelming evidence to the contrary.[31] In particular, there is no merit at all to the majority's argument that the skycaps' tips were solely a matter between them and airline passengers. As discussed, there can be no denying that tips fall within the broad ambit of matters within the shared interests of employees, regardless of whether the tips were within the Respondent's control or even a term or condition of employment. Moreover, tips are clearly an implicit part of skycaps' terms and conditions of employment, as both employers and employees in tip-reliant industries expect and depend upon the fact that tips will supplement direct wages and thus provide for adequate overall compensation. Indeed, the Respondent was legally permitted to pay the skycaps less than the state and federal minimum wage precisely because the skycaps were expected to work for and receive tips. Not surprisingly, the Board has recognized that tips, particularly in customer-service-oriented industries, are properly regarded as a component of wages, and thus are a term and condition of employment, *even when the employer is not the source of those tips*. See generally *The Capitol Times Co.*, 223 NLRB 651–652 (1976), overruled on other grounds by *Peerless Publications*, 283 NLRB 334 (1987).[32] That recognition is grounded in the common sense understanding that the payment of customer tips to an employee actually bears on the employer-employee relationship, not least of all because the employer benefits when employees are rewarded and encouraged to provide good services on the employer's behalf. Id. For this reason, the majority's insistence that the Respondent was "essentially detached" from the skycaps' concern over their tips is baseless.[33]

[29] This is the amount the employer must directly pay tipped employees. The difference between the $2.13 minimum wage and the standard $7.25 minimum wage must be made up for in tips, or else the employer will have to make up the difference in order to be in compliance with the federal minimum wage. States often establish their own minimum and tipped-employee minimum wages.

[30] See Irene Tung, National Employment Law Project, *Wait Staff and Bartenders Depend on Tips for More Than Half of Their Earnings*, available at *https://www.nelp.org/ publication/wait-staff-and-bartenders-depend-on-tips-for-more-than-half-of-their-earnings/*.

[31] It perhaps suggests an excess of zeal to roll back existing precedent that my colleagues see fit to find no violation here based on the fact that Greenidge's conduct was *neither* concerted *nor* for mutual aid or protection, when either holding would have sufficed to resolve the case on their terms.

[32] Contrary to my colleagues' view, *Capitol Times* does not suggest that tips are matters of concern for employees only insofar as they are distributed through some sort of tip-sharing arrangement. Naturally, any matter that is a term of employment *akin to wages*—as *Capitol Times* held tips to be—is at the core of tipped workers' "interests as employees." Further, *Capitol Times*, by citing waiters' tips as a mandatory subject of bargaining—and given that waiters typically earn their tips directly from customers—suggests that the bargaining obligation regarding tips encompasses mechanisms affecting direct customer tips. Although employers cannot bargain over the amount a customer gives, obviously they can bargain over mechanisms to encourage customer tipping or means to supplement employees' direct pay when tips are inadequate.

[33] The Supreme Court's decision in *Eastex* also undercuts the majority's position that Greenidge's comment concerned a matter solely between the skycaps and the passengers. *Eastex* itself involved protests concerning federal and state law—matters further afield than customer tips from the employer-employee relationship. The *Eastex* Court nevertheless found that a wide range of factors—including matters not

Moreover, the Respondent actually possessed some ability to resolve the skycaps' concern over poor tipping in general, and the possibility of the soccer team's poor tipping in this particular case. In fact, the Respondent had a number of potential mechanisms by which to do so. The Respondent could have responded to the employees' concerns by raising their base compensation to offset inadequate tips, whether on an ongoing or ad hoc basis. It could have taken steps to encourage voluntary customer tipping. And here, of course, the skycaps' protest prompted their supervisor to relay their concerns to managers of the airline terminal[34]—which was the Respondent's direct client—thus demonstrating that the Respondent was far from helpless in seeking some recourse for its employees' concerns.[35]

The majority insists that absent "evidence that [Greenidge] was dissatisfied with the existing tipping arrangements or wanted them to be modified," his complaint cannot be regarded as "seeking 'to improve terms and conditions of employment.'" But pay for work is obviously a term and condition of employment, whether it involves an annual salary, an hourly wage, or a one-time tip. Greenidge plainly spoke up because he feared the skycaps would be paid too little—as the result of a poor tip—for a difficult task. Nothing in Section 7 of the Act suggests that in order for his complaint to be for the "mutual aid or protection" of employees, it had to include a reference to tipping arrangements generally or a proposal for modifying them—any more than the employees in the Supreme Court's famous *Washington Aluminum* case were required to make a specific demand on their employer to fix the furnace before walking out of the plant on a bitterly cold winter day.[36]

The majority points to one case, *Universal Syndications*, 347 NLRB 624 (2006), to support its view that the Respondent had no interest in the tips its skycaps received from passengers. But that case is plainly distinguishable. In *Universal Syndications*, the Board found that the employer was "essentially detached" from a dispute among employees that arose from a private arrangement among them regarding tip money for a pizza delivery driver. By contrast, the Respondent had a far more direct and immediate interest in the tips the skycaps received for providing services on its behalf, as confirmed by Supervisor Crawford's agreement to bring the skycaps' concern to the terminal managers' attention.

For all of those reasons, Greenidge's objection to handling the soccer team's equipment plainly was for the "mutual aid or protection" of the skycaps as a group.

III.

Against the weight of precedent, common sense, and even a basic sensitivity to workplace realities, the majority concludes that workers generally do not seek to induce group action, and thereby exercise their right to engage in concerted activity under Section 7 of the Act, when they spontaneously protest their working conditions. Ironically, the majority decision purports to adhere to established precedent, which calls for examining the full context of an employee's conduct to determine whether it was intended to induce group action. Yet my colleagues themselves impose arbitrary restrictions on what constitutes concerted activity, ignoring workplace realities and the wide range of means by which employees might protest unfair conditions.

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even "relate[d] to a specific dispute between employees and their own employer," id. at 563, 567—are matters of mutual aid or protection. Although Greenidge, unlike the employees in *Eastex*, did not appeal to legislative, judicial, or administrative forums, the Court made clear that the scope of the clause was far broader, including "*much legitimate activity* that could improve their lot as employees." Id. at 566 (emphasis added). Certainly, a verbal protest, directed not at a third-party government entity but at one's own employer, regarding a central workplace concern, is well within the bounds of mutual aid or protection.

[34] The majority claims that I distort the record here because Crawford raised the tipping concern with managers from the Respondent's clients in response to the skycaps' walking away from the soccer team––which was not alleged to be concerted activity that caused the discharge—and not by Greenidge's remark, on which the General Counsel's theory of the case rests. My colleagues misunderstand the point. The broad issue here is whether an employer such as the Respondent possesses the ability to take steps to try to address an employee's tipping complaint. Thus, the fact that the Respondent *did* take steps here, regardless of whether it was in response to Greenidge's statement or to the skycaps' walking away, supports the general principle that an employer has the means to address employee concerns over poor tips.

[35] See, e.g., *Nellis Cab Co.*, 362 NLRB 1587 (2015), in which the Board held that taxicab drivers' brief work stoppage to protest a city proposal to issue additional taxi medallions was for "mutual aid or protection" because increased availability of medallions threatened to reduce the drivers' pay. Recognizing that the employer could not directly control the city's decision, the Board nevertheless reasoned that the employer could reasonably be expected to influence such a decision, and indeed attempted to do so. Id., slip op. at 2. Cf. *Mojave Electrical Cooperative, Inc.*, 327 NLRB 13 (1998), enfd. 206 F.3d 1183 (D.C. Cir. 2000) (employees' petition for injunctive relief against harassment by two officials employed by a subcontractor with whom their employer did business was for the purpose of mutual aid or protection). My colleagues suggest that *Nellis* is distinguishable because there was evidence the employer there could influence the cab medallion decision. But, as explained, the Supreme Court's decision in *Eastex* does not require that an employer have control over a matter for it be a subject of mutual aid and protection. Further, as I have discussed, an employer like the Respondent that relies on tips to provide a substantial portion of its compensation package self-evidently has means to address employee concerns over tips.

[36] *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) ("We cannot agree that employees necessarily lose their right to engage in concerted activities . . . merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable.").

My colleagues compound their error by incorrectly holding that an employee's protest of low customer tips is not a matter of mutual aid or protection, and thus that concerted protests involving tips are not statutorily protected. In so holding, the majority ignores the breadth with which the Supreme Court has interpreted Section 7's "mutual aid or protection" clause and turns a blind eye to the reality faced by many service workers that tips are a vital component of their total compensation. Indeed, it will come as a great surprise to the millions of tipped workers who depend on tips for most of their pay that the Board has today declared that tips are not a term and condition of their employment. Because I cannot join a decision so at odds with precedent and the goals of the National Labor Relations Act, I dissent.

Dated, Washington, D.C. January 11, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

Colleen Breslin Esq., for the General Counsel.
Ian B. Bogaty Esq. and *Kathryn J. Barry Esq.,* for the Respondent.
Brent Garren Esq., for Local 32B/J SEIU.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on various dates in Brooklyn, New York. The charge in this proceeding was filed on November 13, 2013, and the complaint was issued on November 21, 2014. In substance, the complaint alleged that on or about July 19, 2013, the Respondent discharged Trevor Greenidge because of his concerted activity of complaining about the amount of tips received.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The parties stipulated that Alstate Maintenance, LLC, located in Rockville Centre, New York, is engaged in providing ground services at JFK Airport. They also stipulated that during the past calendar year, it purchased and received at its Rockville Center facility goods and supplies valued in excess of $50,000 directly from points outside the State of New York and performed services valued in excess of $50,000 for Lufthansa Airlines, Air France and Aero Mexico, which are themselves directly engaged in interstate commerce.

The question here is whether Alstate as a contractor performing services for airlines, is exempt from the NLRA's jurisdiction and should be covered by the Railway Labor Act. Section 2(2) of the National Labor Relations Act excludes any person subject to the RLA.

This case is related to Case 29–CB–103994. That case, although involving a different set of transactions, involved the same employer. And for the same reasons set forth in that case, JD(NY)–12–16, I find that Alstate is not covered by the National Mediation Board, but is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

Alstate has a contract to perform services for an airline consortium at terminal 1 located at JFK airport. Among the airlines using this terminal is Lufthansa. Alstate's employees are classified as skycaps, wheelchair agents, baggage handlers, passenger service agents, boarding gate agents, and CTX baggage handlers.

Trevor Greenidge, at the time of his discharge, was employed as a skycap. In this job, he earned the minimum wage for tipped employees and the remainder of his income consisted of passenger gratuities. And although the minimum wage for skycaps is lower than for others, it appears that this is a desired job because tips more than compensate for the lower wage rate.[1]

During the evening of July 17, 2013, Greenidge was working at terminal 1 with a group of other skycaps whose names were Allan Wills, Terrence Boodram, and Basil Rodney. From the account of the witnesses, this was a slow time.

At some point during the early evening, the skycaps were notified by Respondent's supervisor, Crawford, that Lufthansa Airlines had requested Alstate to provide four skycaps to meet and assist a van that was soon to arrive with a soccer team and their equipment. Upon receiving this notification Greenidge commented to the other skycaps that: "We did a similar job a year prior and we didn't receive a tip for it."

The credible evidence shows that when the van arrived, the four skycaps did not go to the van to offer assistance in unpacking the luggage. Instead, despite being waved over, they walked away. At this point, Lufthansa's manager, Isabelle Roeder, told the terminal one Manager, Klaudia Fitzgerald, that there was no one willing to assist with the baggage. Shortly thereafter, while Roeder was standing outside with the van, Alstate's supervisor, Crawford, told her that the skycaps did not want to take the equipment because they did not think that they would get a big enough tip. In my opinion, the skycaps simply refused to assist the soccer team with their equipment and luggage and thereby

[1] The General Counsel claims that the minimum wage paid to skycaps and skycap captains was lower than what was permitted under the relevant wage-and-hour laws. She cites to the fact that several months ***after*** Greenidge was discharged, the New York Attorney General's Office began an investigation regarding their pay rates. I do not know whether the skycaps were paid in accordance with either Federal or State law and it is not within my jurisdiction to make such a determination. More importantly, for purposes of this case, there is no evidence that Greenidge initiated or was involved in that investigation or that the Respondent was motivated by that investigation in its decision to discharge him.

refused to do their jobs. It is also clear that their refusal was based on the belief that the soccer team would not be generous in their tips. The result was that Alstate brought in a group of baggage handlers to do the work and only after the baggage handlers started bringing in the luggage, did the skycaps begin to assist the customer. Notwithstanding the initial refusal of the skycaps to assist, Lufthansa gave them an $83-tip.

With respect to the above, it should be noted that although tips comprise a substantial part of a skycap's income, it cannot be construed as a wage that is paid by their employer. For better or worse, the custom of tipping in the United States, puts the onus on the customer and not the employee's employer. If a customer refuses to tip (or gives an inadequate tip), this is not a matter that is addressable between the employee and his or her employer. In this case, the reason for the refusal to perform work was the perceived dissatisfaction with the customer and not with Alstate. Perhaps it would have been a different matter, if Greenidge and the other skycaps had concertedly complained to Alstate and engaged in a work stoppage in order to compel the Respondent to raise their wages or in some other fashion compensate them in lieu of tips.[2] But that is not what happened here. This particular dispute was between the skycaps and the soccer team. It was not between the skycaps and the Respondent.

That night, Fitzgerald sent an email to Alstate's managers, Deb Traynor and Vince Orodisio and to Ed Paquette, the manager of terminal one. This stated:

> As you may be aware, a French soccer team is travelling on LH405 tonight and on behalf of Lufthansa, we had requested skycap services. There were no issues with the soccer team players regular baggage as they dropped them off directly at the pit, however, the equipment was a totally different story. At approximately 1900 hrs, we were advised by LH that the truck with the equipment was stuck in traffic and wasn't going to arrive for at least another hour, but at 1920 LH ASM Isabelle informed that the equipment should be arriving in the next five minutes. I requested assistance from Crawford via radio to mobilize all the sky caps so that they are standing by. I observed only one skycap standing outside, but not assisting the soccer team and LH ASM Isabelle. I proceeded outside and at this point Crawford was explaining to Isabelle that the skycaps don't want to handle it because of the large quantity of bags and a small tip. I interjected and instructed Crawford to get all the skycaps on departures by revolver #2 to handle these bags immediately. As per Crawford and LH Isabelle, Wills was one of the skycaps who refused to assist and eventually showed up after being called on the radio for the third time. I believe Crawford will fill you in with the additional details as to who were the other employees and supervisors being uncooperative. In attempt to compensate for the mishandling, I asked Crawford to send over few [sic] baggage handlers to assist and Crawford went above and beyond to do so. One of the soccer coaches said to LH ASM that they might as well handle these bags themselves. Even after providing this substandard service, the skycap captain received a tip from LH Isabelle. I'm wordless; how service provider [sic] employees don't comprehend their job descriptions, why they have jobs and would refuse to provide skycap services to a partner carrier or any customer for that matter. I must say that in my entire professional career I have never been this embarrassed in front of the customer and I expect that you thoroughly investigate and take appropriate action immediately. I had personally apologized to LH ASM Isabelle on behalf of Terminal One and Alstate, but would highly suggest that you do the same.

On the following morning there was a series of emails between Paquette and Alfred DePhillips. The first of which was sent at 5:28 a.m.

> This is totally unacceptable and embarrassing to say the least. I expect a full report on my desk before lunchtime.
> I want each of the SKYCAPs involved removed from the Terminal One project immediately, the supervisors as well. I do not need supervisors on duty who cannot control their people.
> Figure out how you are going to cover the vacancies as I also expect uninterrupted service.

At 12:25 p.m., Paquette sent a second email that stated:

> It's now 12:30 and I have yet to hear from anyone regarding this incident or the one Neil sent to you regarding wheelchairs.
> If I do not hear from someone shortly I will pull everyone I think was Involved from the swipe system.[3]

At 12:37 p.m. DePhillips replied:

> We have not ignored the issue at hand. We are currently finishing our investigation. Our report will be to you shortly.

At 1:07 p.m. Deborah Traynor responded to Paquette's email. This read:

> Based on my investigation this morning all 4 skycaps will be removed from service, it is unacceptable to Alstate as well to speak or behavior [sic] unprofessional [sic] at any time while doing your Job. Based on the video footage I watched, the equipment was taken from the truck into the terminal in 12 minutes. I do understand that it was not the service provided but the lack of professionalism on Alstate employee's part. I assure you that the removal of this employees will not impact Terminal Ones operation

At 2:35 p.m. Paquette replied to Traynor's email and stated:

> Can I please have the names of the four individuals so that I can have Gary remove them from the Terminal One system.

Subsequent to this exchange of emails, the respondent, by

[2] For example, in many European countries, restaurants add a service charge to a customer's bill and customers are not expected to tip the restaurant's staff.

[3] The swipe system refers to the use of a card that allows a person entry to certain nonpublic parts of the terminal.

Traynor, informed each of the four skycaps that they were discharged for the circumstances surrounding the Lufthansa incident. The discharge letter to Greenidge states:

> You were indifferent to the customer and verbally make comments about the job stating you get no tip or it is very small tip. Trevor, you made this comments in front of other skycaps, Terminal One Mod and the Station Manager of Lufthansa.

The letters given to the other skycaps also indicate that the reason for the discharges was because of their refusals to perform their duties and the comments made about tipping.

After the four skycaps were discharged, they filed grievances with Local 660, United Workers of America which at that time had a contract with the Respondent. It appears that after a period of time, the other three skycaps were offered jobs at the Respondent's sister company, Airway Cleaners. Goodridge was not offered employment.

Analysis

In pertinent part, Section 7 of the Act states:

> 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 such activities…

The provisions relating to "other concerted activity" for the purpose of "other mutual aid or protection," are interpreted broadly and encompass activity that need not be related to union activity. *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, (5th Cir. 1981) (refusal to work in the face of dangerous working conditions); *Walls Mfg. Co. v. NLRB*, 321 F.2d 753 (D.C. Cir. 1963) (writing a letter about sanitary conditions on behalf of fellow employees).

In order to be covered by Section 7, the activity must be concerted in the sense that it is ordinarily engaged in by two or more employees. However, the Board has found that actions by an individual employee may be construed as concerted in a variety of circumstances. For example, if an individual seeks to enforce a collective-bargaining agreement by, for example filing a grievance involving only himself, this will be construed as concerted because it is in furtherance of enforcing a collectively bargained contract. *NLRB v. City Disposal System*, 465 U.S. 822 (1984). Also, activity by a single person may be construed as concerted if it is done in an effort to gain the support of other employees for some type of action, or if it is done on behalf of or in support of the interests of other employees. *Beyoglu*, 362 NLRB 1238 (2016) (lawsuit filed by an individual as a class action for overtime wages construed as concerted activity).

On the other hand, activity by a single individual for that person's own personal benefit is not construed as concerted activity. *NLRB v. Adams Delivery Services*, 623 F.2d 96 (9th Cir. 1980) (individual griping about his overtime pay was not concerted activity); *Pelton Casteel Inc., v. NLRB*, 627 F.2d 23 (7th Cir. 1980) (venting of personal grievance not concerted activity).

In order to fall within the protection of Section 7, the activity has to have some relationship to the wages, hours, or other terms and conditions of employment of employees and not to matters that are personal or unrelated to those subjects. *MCPc, Inc*., 360 NLRB 216 (2014); *Plumbers Local 412*, 328 NLRB 1079(1999). For example, in *Waters Orchard Park*, 341 NLRB 642 (2004), a Board majority concluded that two employees who called a New York State hotline to report that patients were experiencing excessive heat were not engaged in protected activity. Two of the Board members stated that the employees' calls to the hotline did not involve a term or condition of their employment and were not otherwise an effort to "improve their lot as employees." They concluded that this only involved a concern for the quality of care of patients, and therefore did not involve the interests "encompassed by the mutual aid or protection clause." In a concurring opinion, member Meisburg stated that "the statutory language is not infinitely malleable. It was not intended to protect every kind of concerted activity, no matter how salutary." He went on to state; "Absent an intent to improve wages, hours or working conditions, concerted action of the type in this case cannot be deemed" "mutual aid or protection" because the employees testified that their sole motive was to act in the interests of their patients.

In *Metro Transport LLC d/b/a Metropolitan Transportation Services*; 351 NLRB 657, 661–662, (2007) the claim was that a group of mechanics were unlawfully suspended because they protested the discharge of a supervisor. In concluding that this was not concerted activity for mutual aid and protection, the Board, with Member Liebman dissenting, applied a three part test: (1) whether the protest originated with the employees rather than other supervisors; (2) whether the supervisor at issue dealt directly with the employees; and (3) whether the identity of the supervisor was directly related to the employees' terms and conditions of employment. The Board majority noted that even assuming that the first two parts of the test were met, the suspension allegation had to be dismissed because there was no relationship between the supervisor and the mechanics' terms and conditions of employment. The Board noted that the record showed that the mechanics were only concerned with the supervisor's employment situation and made no mention of their own interests.

In my opinion, Section 7 affords employees protection for engaging in concerted activity for their mutual aid and protection but this encompasses matters relating to their own or to other workers' wages, hours and/or other terms and conditions of employment. In *MCPc, Inc*., supra, the Board stated:

> In agreement with the judge, we find that Galanter engaged in concerted activity when discussing with other employees their terms and conditions of employment—staffing shortages resulting in heavy workloads—which constituted protected concerted activity under *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). See *Worldmark by Wyndham*, 356 NLRB No. 104 [765], slip op. at 2 [766] (2011) ("[T]he Board has consistently found activity concerted when, in front of their coworkers, single employees protest changes to employment terms common to all employees.").

It is a violation of Section 8(a)(1) for an employer to discharge or discipline an employee or employees who engage in protected concerted activity. In order to establish a primae facie case the General Counsel is required to show that the employee(s) engaged in protected activity and that the activity was a motivating reason for the employer's action. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 399 (1983) (approving *Wright Line* analysis). Assuming that the General Counsel meets that burden, then the Respondent can defend its action by establishing that it would have taken the same action notwithstanding the employee's concerted activity.

The entire theory of the General Counsel's case is that on July 17, 2013, Greenidge engaged in concerted activity when, while waiting for the arrival of the van carrying a French soccer team, he said to the other skycaps; "We did a similar job a year prior and we didn't receive a tip for it." This single statement by Greenidge did not call for or request the other skycaps to engage in any type of concerted action or to otherwise make any kind of concerted complaint to their employer about their wages. In my opinion, this was simply an offhand gripe about his belief that French soccer players were poor tippers.

I also do not think that Greenidge's comment can be construed as concerted activity because it did not relate to the skycap's wages, hours, or other terms and conditions of employment.

It is of course true that for income tax purposes, tips are considered to be part of an employee's wages by the IRS. But they are not considered to be a deductible expense for the employer as they are not construed as wages paid by the employer. Although constituting a large portion of a skycap's income, tips are not moneys received from their own employer. Instead, they are received as gratuities from customers. Indeed, in this case, the tips received by skycaps are twice removed from the Respondent as they are received from Alstate's customer's customers. The fact is that if there was any dispute in this case, it was not between the employees and the Respondent. As noted above, a comment about the poor tipping habits of French soccer players was not and could not be addressed by the skycap's employer as this was not within Alstate's control.

Accordingly, I hereby recommend that the complaint be dismissed.

Dated, Washington, D.C. June 24, 2016