

Washington Law Review

Volume 70 | Number 1

1-1-1995

***Bravo v. Dolsen Cos.:* Shoring Up Employer Bargaining Power by Sandbagging Nonunion Workers**

Peter B. Gonick

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Peter B. Gonick, Notes and Comments, *Bravo v. Dolsen Cos.: Shoring Up Employer Bargaining Power by Sandbagging Nonunion Workers*, 70 Wash. L. Rev. 203 (1995).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol70/iss1/6>

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

BRAVO v. DOLSEN COS.: SHORING UP EMPLOYER BARGAINING POWER BY SANDBAGGING NONUNION WORKERS

Peter B. Gonick

Abstract: In *Bravo v. Dolsen Cos.*, the Washington Court of Appeals held that the public policy provision of Washington's little Norris-LaGuardia Act applied only in cases involving union activity, thus depriving nonunion workers of protection from discharge for engaging in concerted activities. This Note argues that the court misconstrued both the public policy provision and Washington case law to reach a result contrary to sound labor policy and federal interpretations of a similar act. It suggests an alternative interpretation of the public policy provision that provides adequate protection for workers to engage in concerted activities.

Jose Israel Bravo worked in a dairy.¹ During the summer of 1990, he and other milkers became dissatisfied with the conditions under which they worked. The milkers met and chose a representative to speak to their employer about wages, medical coverage, the denial of lunch and rest breaks, and better treatment from the dairy managers. When the dairy management refused to discuss these issues with the representative, the milkers decided to go on strike.

Unfortunately for Bravo and his fellow milkers, management at the dairy declared that anyone who did not show up for work was immediately fired. Despite Bravo working his shift later that day, the dairy discharged him along with the other striking milkers. Dairy managers did not give the striking workers an opportunity to discuss their demands, stating that plenty of replacement workers were available. The dairy refused to reinstate the striking workers, even when vacancies occurred after the strike. The dairy management based its refusal to rehire the workers on their participation in the strike and an employer's ability, under the employment-at-will doctrine, to discharge employees for any reason.

According to the court of appeals in *Bravo v. Dolsen Cos.*,² the dairy managers had done nothing illegal in firing the workers and refusing to reinstate them.³ Although the public policy provision of Washington's

1. The facts for this scenario are taken from *Bravo v. Dolsen Cos.*, 71 Wash. App. 769, 771, 862 P.2d 623, 625 (1993), *review granted*, 124 Wash. 2d 1001 (1994).

2. *Id.*

3. *Id.* at 778, 862 P.2d at 629.

little Norris-LaGuardia Act protects the concerted activities of workers,⁴ the court of appeals held that the law applied only to discharges of employees based on union activities.⁵ The *Bravo* court distinguished *Bravo's* situation because case law declaring discharges illegal had always addressed situations involving union activity.⁶

Part I of this Note examines Washington state labor law, including statutory authority and case law. Additionally, Part I examines federal authority, insofar as it affects Washington's interpretations of its own state law and summarizes the issues and holding in *Bravo*. Part II criticizes *Bravo* as contrary to Washington statutes and case law, as well as inconsistent with federal authority and sound labor policy. Finally, Part III suggests an appropriate interpretation of the public policy provision of Washington's little Norris-LaGuardia Act.

I. WASHINGTON LABOR LAW

Washington state labor law is governed by common law and statutory labor regulations. Although state law does not specifically protect concerted activities of workers, such as going on strike, Washington's little Norris-LaGuardia Act⁷ contains a public policy provision which recognizes the necessity of concerted action in order for workers to achieve more equal bargaining positions with employers.⁸ Early Washington cases have interpreted this provision to grant substantive rights to employees to be free from employer interference in choosing and joining unions.⁹ Additionally, interpretations of the National Labor

4. Wash. Rev. Code § 49.32.020 (1994). The Act is so named because it is based on the federal Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1988).

5. *Bravo*, 71 Wash. App. at 777, 862 P.2d at 629.

6. *Id.* at 775-76, 862 P.2d at 628.

7. Wash. Rev. Code § 49.32 (1994). The little Norris-LaGuardia Act is an anti-injunction statute, which prohibits the courts of the state from enjoining the labor organizations and concerted activities of workers, such as strikes. *Id.* Before the enactment of the statute, employers had often enlisted the aid of the courts to prevent strikes and picketing. See *City of Yakima v. Gorham*, 200 Wash. 564, 94 P.2d 180 (1939) (recognizing line of cases holding peaceful picketing to be unlawful to have no authority after enactment of little Norris-LaGuardia Act); Robert F. Koretz, *Statutory History of the United States: Labor Organization* 162 (1970).

8. Wash. Rev. Code § 49.32.020 (1994).

9. E.g., *Krystad v. Lau*, 65 Wash. 2d 827, 400 P.2d 72 (1965); *International Union of Operating Eng'rs Local No. 286 v. Sand Point Country Club*, 83 Wash. 2d 498, 519 P.2d 985 (1974).

Concerted Activities of Nonunion Workers

Relations Act (“NLRA”),¹⁰ a federal statute granting similar rights, do not deny nonunion workers this protection.¹¹

A. *Washington Statutory Authority*

Washington State labor law is governed by common law doctrine and the Revised Code of Washington (“RCW”) Labor Regulations Title.¹² The title covers areas such as industrial health and safety,¹³ minimum wages,¹⁴ and discrimination.¹⁵ These laws apply only to labor regulations not preempted by the NLRA.¹⁶ Because the NLRA is much more comprehensive than state law, in most labor disputes employees in the state look to the NLRA to protect their rights.¹⁷ More particularly, while the NLRA contains various provisions regarding the protection of concerted activities of workers,¹⁸ Washington law does not specifically protect the concerted activities of many workers. However, the NLRA specifically exempts some workers, including agricultural workers, from its scope.¹⁹ Therefore, agricultural workers and other workers not covered by the NLRA²⁰ must rely solely on state law for protection when engaging in concerted activities.

10. 29 U.S.C. §§ 141–187 (1988).

11. *E.g.*, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

12. Wash. Rev. Code. § 49 (1994).

13. *Id.* § 49.17.

14. *Id.* § 49.46.

15. *Id.* § 49.60.

16. *See, e.g.*, *Shane v. Greyhound Lines*, 868 F.2d 1057 (9th Cir. 1989) (holding that state cause of action was entirely displaced by § 301 of Labor Management Relations Act); *Krystad v. Lau*, 65 Wash. 2d 827, 400 P.2d 72 (1965) (applying state law only because NLRA did not apply). The NLRA was amended in 1947 and reenacted as the Labor Management Relations Act (“LMRA”). 29 U.S.C. §§ 141(a), 142 (1988). For the sake of clarity, however, this Note will hereafter use “NLRA” when referring to this statute.

17. *See, e.g.*, *Beaman v. Yakima Valley Disposal, Inc.*, 116 Wash. 2d 697, 705, 712, 807 P.2d 849, 853, 857 (1991) (holding that wrongful discharge claim preempted by NLRA because dispute arguably subject to § 7 or § 8 of the NLRA); *Hotel Employees & Restaurant Employees, Local 8 v. Jensen*, 51 Wash. App. 676, 679, 754 P.2d 1277, 1280 (1988) (holding state law claim preempted because “arguably protected or prohibited by the NLRA”) (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242–245 (1959)).

18. *See* 29 U.S.C. § 157 (1988) (protecting rights of employees as to organization, collective bargaining, etc.); § 158 (describing unfair labor practices); § 163 (preserving right to strike).

19. 29 U.S.C. § 152(3) (1988) (excluding agricultural laborers from definition of employee for the purposes of the provisions of the Act); *DiGiorgio Fruit Corp. v. NLRB*, 191 F.2d 642 (D.C. Cir. 1951) (finding agricultural workers not covered by the NLRA), *cert. denied*, 342 U.S. 869 (1951).

20. For example, workers in the domestic service, independent contractors, and supervisors are all explicitly excluded from the NLRA. 29 U.S.C. § 152(3) (1988).

Although Washington law does not specifically protect a worker's right to engage in concerted activities, the public policy of the state evinces a concern for safeguarding the bargaining position of the worker.²¹ The public policy provision, enacted as part of Washington's little Norris-LaGuardia Act,²² specifically recognizes that the unorganized worker lacks an effective bargaining position and declares that workers should be free to associate or to decline to associate with fellow workers in organizing themselves and in designating representatives.²³ The provision further prohibits employers from interfering with workers' organizing, designating representatives, or engaging in other concerted activities.²⁴

B. Washington Case Law Interpreting Statute

The Washington Supreme Court, in a landmark decision, interpreted Washington's little Norris-LaGuardia Act's public policy provision to grant substantive rights to workers to engage in concerted activities without fear of reprisal, despite the statute's lack of a specific grant of such rights.²⁵ This decision has been reaffirmed by courts that have found that the public policy provision prohibits employers from interfering with their employees' designation of representatives and

21. Wash. Rev. Code § 49.32.020 (1994).

22. Wash. Rev. Code § 49.32 (1994).

23. *Id.* § 49.32.020.

24. *Id.* The provision in its entirety reads:

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the state of Washington as such jurisdiction and authority are herein defined and limited, the public policy of the state of Washington is hereby declared as follows:

Whereas, Under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the state of Washington are hereby enacted.

Id.

25. *Krystad v. Lau*, 65 Wash. 2d 827, 400 P.2d 72 (1965).

Concerted Activities of Nonunion Workers

organization into unions.²⁶ These courts, however, have limited the scope of the public policy provision to protect only the right of employees to gain more effective bargaining positions, declining to require employers to engage in good faith negotiations.²⁷

1. *The Krystad Decision*

The first case in Washington to rule on whether the public policy provision granted substantive rights to workers was *Krystad v. Lau*.²⁸ In *Krystad*, the Washington Supreme Court held that the public policy provision of the little Norris-LaGuardia Act granted substantive rights to employees. Thus, employers could not interfere with their workers' efforts to organize themselves for bargaining purposes.²⁹ The *Krystad* court specifically held illegal the discharge of four employees of a professional laundry for joining a union, stating that Washington's little Norris-LaGuardia Act conferred actionable rights on employees, including the rights to be free from interference in organizing a union and in designating that union as their bargaining agent.³⁰ The *Krystad* employees, not covered by the NLRA,³¹ had resorted to state law for their claim of interference with joining a union.³²

In reaching its conclusion that state law protected the laundry workers, the court stated that it was merely effectuating the legislative intent expressed in the plain language of the statute.³³ The court also found

26. See, e.g., *Culinary Workers & Bartenders Union, Local No. 596 v. Gateway Cafe, Inc.*, 91 Wash. 2d 353, 588 P.2d 1334 (1979); *International Union of Operating Eng'rs Local No. 286 v. Sand Point Country Club*, 83 Wash. 2d 498, 519 P.2d 985 (1974).

27. *Sand Point*, 83 Wash. 2d at 502, 519 P.2d at 988.

28. 65 Wash. 2d 827, 400 P.2d 72 (1965).

29. *Id.* at 846, 400 P.2d at 83.

30. *Id.* The employer in *Krystad*, who had a personal animosity towards unions due to their discriminatory actions toward him when he was younger, had clearly stated that his reason for discharging the employees was that they had joined a union. *Id.* at 828, 400 P.2d at 73.

31. The employees were not covered by the NLRA because the National Labor Relations Board ("NLRB") had determined that enterprises such as the one at issue in *Krystad*, with sales under \$500,000, were excluded from the Act. *Id.* at 831, 400 P.2d at 75. The NLRB is a body created by the NLRA to hear and decide labor disputes. 29 U.S.C. § 153 (1988). The decisions of the NLRB are appealable to federal circuit courts. 29 U.S.C. § 160(f) (1988). The NLRB initially decides whether it has jurisdiction in a particular case, and it has the power to decline jurisdiction for enterprises not within the scope of the NLRA. These include enterprises which the NLRB believes do not affect interstate commerce sufficiently to justify federal power over the States. 29 U.S.C. § 164(c) (1988).

32. *Krystad*, 65 Wash. 2d at 830-31, 400 P.2d at 74-75.

33. *Id.* at 844, 400 P.2d at 82. The court did not address the question of legislative history to the statute, perhaps because the legislative history to Washington's little Norris-LaGuardia Act gives no

support for its position in a Wisconsin state court decision. While acknowledging the scant authority directly addressing interpretations of the public policy provision of the Norris-LaGuardia Act,³⁴ the court found persuasive the reasoning in *Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Manufacturing Co.*³⁵ In that case, the Wisconsin Supreme Court held that the public policy section of its little Norris-LaGuardia Act, which was nearly identical to Washington's provision,³⁶ conferred substantive rights on employees.³⁷ The *Simplex Shoe* court held that the employer had acted contrary to Wisconsin's public policy section in threatening to close its factory if the employers joined a union.³⁸ The Wisconsin Supreme Court later reaffirmed its interpretation when it declared that the public policy section was inconsistent with allowing closed-shop agreements.³⁹ The *Krystad* court noted that there were no further Wisconsin decisions construing the public policy provision, attributing this absence to the enactment of a comprehensive labor relations statute in that state.⁴⁰

substantive indications of the policy behind its enactment. See Washington House Journal, Extraordinary Session, 23rd Legislature (1933); Senate House Journal, Extraordinary Session, 23rd Legislature (1933). The federal Act upon which it was based, however, was primarily motivated by a desire to overturn U.S. Supreme Court decisions such as *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921). See Koretz, *supra* note 7, at 162. Many organizers and supporters of the Norris-LaGuardia Act felt that the *Duplex Printing* decision's limitation of the Clayton Act's anti-injunction provision to disputes between employers and employees eviscerated the Clayton Act, contrary to the intent of Congress. The Norris-LaGuardia Act was then passed to support labor organizations, to encourage collective bargaining, and to declare specifically that labor disputes were to be defined broadly. The Act was cast in terms of an anti-injunction statute in order to take power away from the courts who had earlier defeated the purpose of the Clayton Act. Koretz, *supra* note 7, at 162-63. See also Senate, 73rd Cong., 2d Sess. (1935) (statement of Sen. Robert Wagner), reprinted in Koretz, *supra* note 7, at 314-16 (outlining judicial hostility to labor organizations and courts' limitations of congressional statutes designed to aid labor).

34. *Krystad*, 65 Wash. 2d at 837, 400 P.2d at 78.

35. 256 N.W. 56 (Wis. 1934).

36. Wisconsin's public policy provision is essentially the same as Washington's, although Wisconsin's statute contains additional language that "[n]egotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control." Wis. Stat. Ann. § 103.51 (West 1988).

37. *Simplex Shoe*, 256 N.W. at 60-61.

38. *Id.*

39. *American Furniture Co. v. Chauffeurs, Teamsters & Helpers General Local No. 200*, 268 N.W. 250 (Wis. 1936). A closed-shop agreement is one in which employees must join a particular union in order to work at a particular business. Patrick Hardin, *The Developing Labor Law* 1492 (3d ed. 1992).

40. *Krystad v. Lau*, 65 Wash. 2d 827, 839, 400 P.2d 72, 79-80 (1965) (citing Wis. Stat. § 13.111.03 (1939) (repealed 1969)). Although the section cited by the court has been repealed, the remainder of the statute is still in force, setting forth regulations similar in scope to the NLRA. See

Concerted Activities of Nonunion Workers

Finally, the *Krystad* court relied on Washington and federal law in finding a substantive right where none had been explicitly granted. The court stated that earlier Washington cases had established that public policy provisions were more than simply aids to statutory construction.⁴¹ To refute the proposition that the legislature did not intend to grant rights under the statute because it had not established a remedy, the court relied on a U.S. Supreme Court case that found substantive rights in federal legislation despite the absence of penalties in the statute for violating such rights.⁴² Consequently, the court held that the public policy provision granted substantive rights, in spite of its placement in the preamble to the statute, where such rights were not typically granted.⁴³ However, the *Krystad* decision was controversial, and was criticized at the time as the product of judicial activism.⁴⁴

Although not addressed by the court, an important outcome of *Krystad* is that it provides protection to agricultural workers. Washington's little Norris-LaGuardia Act does not distinguish between different types of workers.⁴⁵ Consequently, the statute applies equally well to both agricultural workers and laundry workers; whereas the NLRA specifically excludes such workers.⁴⁶ Washington thus became one of the first states to protect the right of agricultural workers to engage in concerted activity.⁴⁷

Wis. Stat. Ann. § 111.04 (West 1988) (defining rights of employees); § 111.06 (defining unfair labor practices); § 111.07 (providing remedies for unfair labor practices).

41. *Krystad*, 65 Wash. 2d at 839–40, 400 P.2d at 80–81 (citing, e.g., *Audubon Homes, Inc. v. Spokane Bldg. & Constr. Trades Council*, 49 Wash. 2d 145, 298 P.2d 1112 (1956), *cert. denied*, 354 U.S. 942 (1957); *City of Yakima v. Gorham*, 200 Wash. 564, 94 P.2d 180 (1939)).

42. *Id.* at 840–41, 400 P.2d at 80–81 (citing *Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930) (finding employer's practice of establishing company union and disbanding employees' union illegal and actionable under the Railway Labor Act, 63 Stat. 107 (1949), 45 U.S.C. § 151 (1988))).

43. *Id.* at 846, 400 P.2d at 83.

44. See Cornelius J. Peck, *Judicial Creativity and State Labor Law*, 40 Wash. L. Rev. 743, 754 (1965). The opinion was particularly striking as it was a break from earlier decisions limiting the reach of other provisions of the statute as an unconstitutional infringement on the power of the courts. See *Adams v. Building Serv. Employees Int'l Union, Local No. 6*, 197 Wash. 242, 247, 84 P.2d 1021, 1023 (1938) (holding that legislature may not divest courts of jurisdiction to issue restraining order); *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 412, 63 P.2d 397, 404 (1936) (holding provision of little Norris-LaGuardia Act that prohibits courts from granting injunctions to be contrary to the state constitution).

45. Wash. Rev. Code § 49.32 (1994).

46. 29 U.S.C. § 152(3) (1988) (excluding agricultural laborers from definition of employee for the purposes of the provisions of the Act).

47. As evidence of the controversial nature of inclusion of agricultural workers in a labor statute, a legal consultant for the employer in *Krystad* suggested using the fact that the decision to protect

2. *Krystad and the Public Policy Provision Reaffirmed*

The *Krystad* holding remains an important protection for workers in Washington State not covered by the NLRA. While Wisconsin and the federal government have enacted comprehensive labor schemes to obviate the recognition of substantive rights from public policy provisions,⁴⁸ Washington workers remain dependent on the rights enunciated by the *Krystad* court. Consequently, opinions since *Krystad* have reaffirmed its holding but have declined to extend its reach.⁴⁹

In 1974, the Washington Supreme Court held in *International Union of Operating Engineers Local No. 286 v. Sand Point Country Club* that while the public policy provision of the little Norris-LaGuardia Act prevented interference with an employee's designation of representatives, the provision did not mandate that the employer bargain with the representatives.⁵⁰ The court declined to require employers to bargain with the union because there was no specific language in the public policy section to support such a requirement.⁵¹ The court distinguished *Krystad* by stating that in that case, the court was providing a remedy for a right recognized in the statute.⁵²

The *Sand Point* court recognized the balancing that the legislature had performed in providing organized labor a manner in which they could effectively bargain with an employer, while otherwise leaving the complex field of labor relations to the bargaining parties.⁵³ The court

the workers would apply to agricultural workers as an argument against the court's eventual interpretation. Telephone Interview with Cornelius J. Peck, Professor Emeritus, University of Washington School of Law (July 5, 1994). Since the *Krystad* decision, several states have enacted statutes specifically protecting the rights of agricultural workers. See, e.g., Cal. Lab. Code § 1140 (West 1989) (adopting Agricultural Labor Relations Act); Haw. Rev. Stat. § 21.377-1(3) (1985) (adopting act similar to NLRA but failing to exclude agricultural workers from definition of employee). Washington, however, has not enacted any statute expressly protecting the rights of agricultural workers to organize.

48. Wis. Stat. Ann. § 111 (West 1988); 29 U.S.C. §§ 151-168 (1988).

49. These cases may alleviate concerns that the logical extension of *Krystad* would allow courts to read into the public policy section other protections offered by the NLRA, such as creating an affirmative duty on employers to bargain in good faith. For a presentation of these concerns see Peck, *supra* note 44, at 764-65.

50. 83 Wash. 2d 498, 519 P.2d 985 (1974). The employees in *Sand Point* were golf course maintenance workers, and the parties agreed that the NLRB had declined jurisdiction over such enterprises. *Id.* at 498-99, 519 P.2d at 986.

51. *Id.* at 500, 519 P.2d at 987.

52. *Id.* at 501, 519 P.2d at 987. A more recent decision has also cited *Krystad* for the proposition that even where not indicated in the statute, the court must construct a remedy for violation of rights within a statute. *Bennett v. Hardy*, 113 Wash. 2d 912, 920, 784 P.2d 1258, 1261 (1990).

53. *Sand Point*, 83 Wash. 2d at 502-03, 519 P.2d at 988.

echoed the *Krystad* court's concern that the individual worker be provided with some means of organizing, thereby securing a more equitable bargaining position with his employer. Because the employer in *Sand Point* had not threatened or interfered in any way with its employees' designation of representatives for bargaining, the court affirmed a summary judgment for the defendant.⁵⁴ The *Sand Point* court also reasoned that the *Krystad* opinion did not rely solely on the public policy provision in finding substantive rights for workers, but also looked to the statute as a whole. Therefore, according to the *Sand Point* court, the *Krystad* court had not held that the public policy provision was a source of substantive law. Rather, the court concluded that *Krystad* had held that the public policy provision made it clear that the legislature had intended the statute as a whole to prohibit interference in joining labor organizations.⁵⁵

Despite the *Sand Point* court's apparent limitation of *Krystad*, subsequent case law has specifically indicated that *Sand Point* in no way undermined the holding of *Krystad* or the import of the public policy provision. For example, in *Culinary Workers & Bartenders Union, Local No. 596 v. Gateway Cafe, Inc.*,⁵⁶ the Washington Supreme Court reaffirmed *Krystad*'s essential holding that an employer cannot interfere with an employee's choice of representation.⁵⁷ The court in *Culinary Workers* prohibited an employer from designating who would represent employees in bargaining for wages, benefits, and work conditions.⁵⁸ The court held that the employer had violated the public policy provision by unilaterally agreeing to recognize one union and to discharge those employees who failed to join it.⁵⁹ However, as pointed out by the *Bravo* court, the *Culinary Workers* case and other Washington cases

54. *Id.* at 502, 506–07, 519 P.2d at 988, 990.

55. *Id.* at 506, 519 P.2d at 990. Conversely, Chief Justice Hale would have required employers to bargain in good faith because he felt that doing so would merely be giving effect to the statutory provision—i.e., that giving employees the right to bargain without requiring the employer to at least meet with them was a meaningless right. *Id.* at 510–11, 519 P.2d at 992 (Hale, C.J., dissenting).

56. 91 Wash. 2d 353, 588 P.2d 1334 (1979).

57. *Id.* at 370, 588 P.2d at 1345.

58. *Id.* at 370–71, 588 P.2d at 1345. The court considered various provisions of a settlement agreement entered into by an employer and employees setting up a pension trust fund, designating a union as bargaining agent, and providing for benefits. The court generally upheld the agreement, but invalidated the particular clause designating a union to represent the employees and promising to discharge those employees who did not join. *Id.* at 357, 371, 588 P.2d at 1338, 1345.

59. *Id.* at 370, 588 P.2d at 1345. The court noted that while employees may designate one union as their bargaining agent, thereby binding future employees, an employer may not unilaterally agree to recognize only one particular union. *Id.*

interpreting the public policy provision involved union activity.⁶⁰ Nevertheless, an analysis of federal authority shows that the *Krystad* rationale is equally applicable to nonunion members.

C. Federal Case Law

Because no Washington case other than *Bravo* addresses the issue of whether nonunion members are entitled to the protection of the public policy provision, analogous federal legislation and case law provide helpful analysis in this area. While interpretations of federal statutes by federal courts are not binding on state courts, Washington courts have generally looked to the jurisdictions from which legislation is borrowed as an aid to statutory construction.⁶¹ Since Washington's labor law is based in part on federal legislation, a discussion of federal law is warranted.⁶² Additionally, legislative history reveals that the agricultural worker exclusion in the NLRA was most likely a matter of expediency.⁶³ Therefore, looking to federal law for guidance in applying Washington's little Norris-LaGuardia Act to farm workers is not only helpful, but warranted. Federal case law suggests not only that the NLRA grants protection to nonunion members, but that in some cases courts afford more latitude to actions of nonunion workers than union workers, specifically because they are unorganized.

60. *Bravo v. Dolsen Cos.*, 71 Wash. App. 769, 776, 862 P.2d 623, 628 (1993) (citing *Krystad v. Lau*, 65 Wash. 2d 827, 400 P.2d 72 (1965)); *Culinary Workers & Bartenders Union, Local 596 v. Gateway Cafe, Inc.*, 91 Wash. 2d 353, 583 P.2d 1334 (1979); *International Union of Operating Eng'rs Local 286 v. Sand Point Country Club*, 83 Wash. 2d 498, 519 P.2d 985 (1974)), *review granted*, 124 Wash. 2d 1001 (1994).

61. *See, e.g.*, *Fahn v. Cowlitz County*, 93 Wash. 2d 368, 610 P.2d 857 (1980) (adopting federal doctrine of disparate treatment and disparate impact in interpreting Washington discrimination law), *modified*, 621 P.2d 1293 (Wash. 1981); *Juanita Bay Valley Community Ass'n v. Kirkland*, 9 Wash. App. 59, 68-69, 510 P.2d 1140, 1146-47 (1973) (looking to federal law in interpreting State Environmental Protection Act patterned after the National Environmental Protection Act); *State v. Carroll*, 81 Wash. 2d 95, 109, 500 P.2d 115, 123 (1972) (adopting federal interpretation of conspiracy statute borrowed from federal law). *See also* *Krystad v. Lau*, 65 Wash. 2d 827, 839-40, 400 P.2d 72, 80 (looking to federal interpretation of analogous legislation due to lack of controlling authority).

62. *See* *State v. Board of Trustees*, 93 Wash. 2d 60, 605 P.2d 1252 (1980) (looking to NLRA for appropriate remedies under Washington's Public Employees Collective Bargaining Act, which court found similar to NLRA).

63. *See infra* part I.C.1.

Concerted Activities of Nonunion Workers

I. *Legislative History of the NLRA and Agricultural Workers*

While the NLRA expressly exempts agricultural workers from its provisions,⁶⁴ the legislative history suggests that these workers were excluded only for reasons involving political expedience.⁶⁵ The Senate hearings on the bill contain no explanation of why agricultural workers were excluded.⁶⁶ The only mention of a policy supporting the exclusion of farm workers in the Senate debate tellingly comes from a brief filed by the Washington representative of the National Grange.⁶⁷ The majority report of the House of Representatives likewise made no reference to the policy behind the agricultural exclusion,⁶⁸ nor did any subsequent reports discussing and passing the bill give a reason for the exclusion.⁶⁹ However, debates on the bill suggest that even those wishing to exclude agricultural workers from the bill nevertheless felt that such workers merited protection to engage in labor activities.⁷⁰ Thus, the legislative history of the NLRA gives no indication that the exclusion of agricultural

64. 29 U.S.C. § 152(3) (1988).

65. Cong. Research Serv., *Legislative History of the Exclusion of Agricultural Employees from the National Labor Relations Act, 1935 and the Fair Labor Standards Act of 1938* at LRS 1-2.

66. *Id.*

67. *Id.* at LRS 3. The brief suggested that it would be unfair to force farmers, who were often poor themselves, to be burdened by the labor requirements of the NLRA. *Id.* The National Grange is an American farmers' organization formed in 1867 to preserve the rights of farmers. The Grange has been instrumental in passing legislation protecting the rights of farmers. Thomas A. Woods, *Knights of the Plow: Oliver H. Kelley and the Origins of the Grange in Republican Ideology* at xv, xxi (1991).

68. *Recommendation of the House Committee on Labor*, June 10, 1935, reprinted in Koretz, *supra* note 7, at 301. The minority report, on the other hand, contained strenuous objections to the exclusion of agricultural workers, stating "[i]t is a matter of plain fact that the worst conditions in the United States are the conditions among the agricultural workers I, therefore, respectfully submit that there is not a single solitary reason why agricultural workers should not be included under the provisions of this bill." *Id.* at 301-06.

69. Cong. Research Serv., *supra* note 65, at LRS 6.

70. For example, the Chairman of the House Committee on Labor stated:

We hope that the agricultural workers eventually will be taken care of. . . . [C]ertainly I am in favor of giving the agricultural workers every protection, but just now I believe in biting off one mouthful at a time. If we can get this bill through and get it working properly, there will be opportunity later, and I hope soon, to take care of the agricultural workers.

. . . .

. . . [I]f the gentleman asks me personally how I feel about the organization of agricultural workers, I certainly hope they will organize just the same as industrial workers.

79 Cong. Rec. 9721 (1935) (statement of Rep. Connery), reprinted in Cong. Research Serv., *supra* note 65, at LRS 7.

workers was one of principle or policy.⁷¹ Accordingly, federal interpretations of the NLRA provide a useful tool for an analysis of Washington's analogous state legislation, even in cases such as the present one, which involve agricultural workers.

2. *Federal Courts Interpreting the NLRA*

Federal courts interpreting the NLRA⁷² have not required that workers be members of a union before gaining the protection of the statute.⁷³ In fact, the U.S. Supreme Court has granted more latitude to the actions of nonunion workers in determining whether they have complied with the requirements of the NLRA.⁷⁴ In following this decision, federal circuit courts have reinforced that the NLRA guarantees rights to union and nonunion members alike.⁷⁵

The NLRA, a successor statute to the Norris-LaGuardia Act, contains language related to concerted activities of employees nearly identical to the public policy provision of Washington's little Norris-LaGuardia Act.⁷⁶ In section 7, the NLRA grants employees the right to self-organize, to form labor organizations, and to engage in concerted activities.⁷⁷ Section 8 forbids employers from interfering with these

71. See Cong. Research Serv., *supra* note 65, at LRS 16-17.

72. While Washington's public policy provision is borrowed from the federal Norris-LaGuardia Act, federal interpretations of that statute have focused on its effect on the court's power to grant injunctions. See, e.g., *Brotherhood of Locomotive Firemen & Enginemen v. Florida E. Coast Ry.*, 346 F.2d 673 (5th Cir. 1965) (holding that policy of Norris-LaGuardia Act was to prevent injunctive interference in labor disputes, thereby allowing labor controversies to be settled through negotiation and the free play of economic forces). However, federal courts have not considered the issue of whether the Norris-LaGuardia Act grants substantive rights because just two years after enactment of the Norris-LaGuardia Act, Congress passed the NLRA, which provided for more specific remedies for employees engaging in concerted activities. National Labor Relations Act, ch. 372, 49 Stat. 452 (1935) (current version as amended at 29 U.S.C. § 141 (1988)). Accordingly, federal law interpreting the NLRA will be addressed here as it is more relevant to this analysis than that interpreting the Norris-LaGuardia Act.

73. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

74. See *id.*

75. See, e.g., *Halstead Metal Prods. v. NLRB*, 940 F.2d 66 (4th Cir. 1991).

76. Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. Pa. L. Rev. 1673, 1681-82 (1989). See *infra* notes 134-38 and accompanying text for a discussion of the differences in the two statutes.

77. The provision in whole reads:

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

rights and outlines other prohibited practices.⁷⁸ Both section 7 of the NLRA and the public policy provision of the little Norris-LaGuardia Act concern the protection of the unorganized worker.⁷⁹

Federal courts have not required that an employee be a member of a union before obtaining the protections of section 7 of the NLRA. In *NLRB v. Washington Aluminum Co.*,⁸⁰ the U.S. Supreme Court unanimously held that several workers had engaged in concerted activity when they refused to work in a plant with inadequate heating on a particularly cold day.⁸¹ The workers were not members of a union and did not designate a representative. They merely joined together and decided that they could not work under the conditions in the plant.⁸² When the foreman discovered that they had gone home, the employer discharged all of the workers.⁸³

The U.S. Supreme Court held that the employer had violated sections of the NLRA that provided employees the right to engage in concerted activities for mutual aid or protection.⁸⁴ The Court reasoned that the term “concerted activities” must be given broad interpretation to give effect to Congress’s intent to protect workers.⁸⁵ Noting that the workers were wholly unorganized, the Court concluded that they should not have been expected to make formal demands to their employer before leaving in protest of the working conditions.⁸⁶ This holding provides greater protection to workers who are unorganized, as organized workers may be required to present such a formal demand.⁸⁷ The court therefore declined

such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1988).

78. *Id.* § 158.

79. The public policy provision explicitly addresses the situation of “the individual unorganized worker [who] is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor.” Wash. Rev. Code § 49.32.020 (1994). Section 7 of the NLRA grants workers the right to self-organization. 29 U.S.C. § 157 (1988).

80. 370 U.S. 9 (1962).

81. *Id.* at 11, 17.

82. *Id.* at 11–12.

83. *Id.* at 12.

84. *Id.* at 12–13 (citing 29 U.S.C. § 157).

85. *Id.* at 17.

86. *Id.* at 14–15.

87. Indeed, the Court of Appeals decision that was reversed by *Washington Aluminum* based its rejection of the workers’ claim on the fact that they had not presented a formal demand, citing a list of cases where workers made such formal demands before engaging in a walk-out. *NLRB v. Washington Aluminum Co.*, 291 F.2d 869, 877 & n.10 (4th Cir. 1961).

to require workers to join an official union in order to improve their bargaining position through the NLRA.

This principle that nonunion workers are particularly entitled to the protections of the NLRA has been reiterated by federal circuit courts.⁸⁸ In a recent case, *Halstead Metal Products v. NLRB*,⁸⁹ the Fourth Circuit held that a walkout of unorganized workers similar to that in *Washington Aluminum* warranted special protection from the Act: as a concerted activity.⁹⁰ The workers had gathered at an oak tree to protest a proposed schedule change, and telephoned an employee who had recently resigned because he could not work during the proposed hours.⁹¹ The employer agreed to a compromise on the schedule change, but refused to rehire the employee who had resigned, allegedly because he had attended the protest.⁹² The court reasoned that because unorganized workers must attempt to engage in concerted activities without the help of organized labor, they needed the Act's protection even more than unionized workers.⁹³

D. *The Bravo Decision*

Notwithstanding that background of state and federal law, the Washington Court of Appeals, in *Bravo v. Dolsen Cos.*,⁹⁴ held that the public policy provision of Washington's little Norris-LaGuardia Act

88. As early as 1949, courts recognized that the NLRA protected the concerted activities of nonunion workers. See *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 752 (4th Cir. 1949) (agreeing that "the 'concerted activities' protected by the act are not limited to cases where the employees are acting through unions or otherwise formally organized").

89. 940 F.2d 66 (4th Cir. 1991).

90. See *id.* at 70-71. Other cases that have held similar activities by nonunion workers protected include *NLRB v. McEver Eng'g, Inc.*, 784 F.2d 634 (5th Cir. 1986) (finding protection under NLRA for nonunion workers who engaged in work stoppage to protest dangerous conditions of work; allowing protection despite no formal demand as called for in the NLRA); *E.I. du Pont de Nemours & Co. v. NLRB*, 707 F.2d 1076 (9th Cir. 1983) (restating right of protection for nonunion workers who act as part of group); and *Vic Tanny Int'l, Inc. v. NLRB*, 622 F.2d 237 (6th Cir. 1980) (finding protection under NLRA for four unorganized workers who participated in walkout to present grievances to management).

91. *Halstead*, 940 F.2d at 68-69.

92. *Id.*

93. *Id.* at 70.

94. 71 Wash. App. 769, 862 P.2d 623 (1993), review granted, 124 Wash. 2d 1001 (1994).

applied only in cases involving union activity.⁹⁵ In holding that the Dolsen Companies had not violated the public policy provision, the court relied on the fact that *Krystad* and other cases interpreting the provision had all been cases involving unions.⁹⁶ The *Bravo* court also read the language of the public policy provision, that workers were to be free from interference in organizing and designating representatives, to include only union activity.⁹⁷ The court found no authority under state or federal law to extend the concept of “concerted activities” to a nonunion strike or picket line.⁹⁸ Consequently, because the strike in *Bravo* did not involve union activity, the court found no violation of the provision.⁹⁹

II. *BRAVO* LEAVES NONUNION WORKERS INADEQUATELY PROTECTED

In declaring that the public policy provision applied only in cases involving union activity, the *Bravo* court incorrectly interpreted Washington’s labor statutes and case law and created a decision at odds with persuasive federal authority and public policy concerns. The court failed to recognize the intent of the public policy provision of the little Norris-LaGuardia Act: that workers be allowed to gain stronger

95. *Id.* at 778, 862 P.2d at 629. For a summary of the facts of the case, see *supra* text accompanying note 1. The dairy workers did not have a remedy under the NLRA because, as agricultural workers, they were explicitly excluded from the Act. *Bravo*, 71 Wash. App. at 773, 862 P.2d at 626 (citing 29 U.S.C. § 152(3)).

96. *Id.* at 776, 862 P.2d at 628. Although alleged in the workers’ complaint, this Note does not address in detail the separate tort of wrongful discharge contrary to a clearly enunciated public policy. However, if the workers’ discharge is seen as a statutory violation of the public policy provision of the little Norris-LaGuardia Act, their claim for the tort of wrongful discharge would most likely be preempted. See *Bennett v. Hardy*, 113 Wash. 2d 912, 784 P.2d 1258 (1990) (dismissing claim of wrongful discharge contrary to public policy because discharge specifically covered by age discrimination statute). Likewise, if the workers’ claim does not fall under the provision, a court may feel, as the Court of Appeals did, that there is no clear statement of public policy being violated. *Bravo*, 71 Wash. App. at 778, 862 P.2d at 629. Thus, the wrongful discharge claim essentially begs the question of whether the public policy provision applies in this case.

97. *Bravo*, 71 Wash. App. at 774, 862 P.2d at 627 (citing Wash. Rev. Code § 49.32.020).

98. *Id.* at 776–77, 862 P.2d at 628.

99. *Id.* at 778, 862 P.2d at 629. While the court decided the issue based on the fact that there had been no union involved in the dispute, there is evidence to the contrary. The workers had alleged that Dolsen had refused to meet with their “representatives.” *Id.* at 777, 862 P.2d at 628–29. On appeal, the workers alleged that these representatives were in fact union members involved in the strike. See *Petition for Review to Washington Supreme Court, Bravo v. Dolsen Cos.*, No. 12600-5-III, at 8 (submitted Feb. 1, 1994) (citing Reply Brief of Appellants at 10 n.1). However, the court held that the complaint did not allege the fact of union involvement, so any evidence of such involvement could not be considered. *Bravo*, 71 Wash. App. at 777, 862 P.2d at 628–29.

bargaining positions with their employers.¹⁰⁰ Further, the court ignored that the statute nowhere mentions a requirement of union activity.¹⁰¹ The court's decision is also contrary to Washington case law, which recognizes the policy of allowing workers to be free from interference from employers in engaging in concerted activities,¹⁰² and is inconsistent with federal case law interpreting a similar provision, which does not make a distinction between union and nonunion employees.¹⁰³ Unlike these state and federal interpretations, the result reached by *Bravo* unnecessarily narrows the choices of workers in attempting to effectively bargain with their employers.

A. *The Bravo Court Incorrectly Interpreted the Statute*

The *Bravo* court misinterpreted the public policy provision of Washington's little Norris-LaGuardia Act by engrafting onto the plain language of the statute a requirement for unions. *Bravo's* interpretation runs contrary to the purpose of the statute: to allow workers more effective bargaining positions with their employers. Further, the *Bravo* decision is inconsistent with the language of the public policy provision. Finally, by forcing workers to join unions in order to protect themselves, the *Bravo* court also contradicts the language of the provision forbidding interference with a worker's freedom to engage in protected activities.

Washington's little Norris-LaGuardia statute was designed to provide an even playing field for employers and workers regardless of union membership. In the preamble to the statute, the legislature declared its intent, stating that it is necessary to protect a worker's attempts to organize with other workers.¹⁰⁴ Nowhere in the public policy provision of the statute does the legislature indicate that it was concerned only with unionized workers.¹⁰⁵ On the contrary, the language used is general in scope and recognizes the necessity not only of "self-organization" and "designation of representatives" but also of "other concerted

100. See Wash. Rev. Code § 49.32.020 (1994).

101. *Id.*

102. See *supra* part I.B.

103. See *supra* part I.C.

104. Wash. Rev. Code § 49.32.020 (1994); *supra* note 24 and accompanying text.

105. Wash. Rev. Code § 49.32.020 (1994).

activities.”¹⁰⁶ Further, the provision read as a whole evinces a concern for the bargaining position of the individual, unorganized worker.¹⁰⁷

That “self-organization” and the “designation of representatives” necessarily involve organized labor unions is not self-evident from the statute. Requiring the presence of a labor union would restrict the scope of the statute with results contrary to the import of the words used by the legislature. Individual workers can organize and designate representatives in many ways, such as by informally delegating one of their number to speak for the rest. The artificial requirement of a union would not allow a worker to choose from among the full range of options and to determine the method best suited for bargaining with an employer.

Even if one were to accept that self-organization and designation of representatives necessarily imply union involvement, the remainder of the public policy provision allows for nonunion activity. The wording of the statute indicates that “concerted activities” are considered separate from the self-organization and designation of representation. By stating that workers should be free from interference “in the designation of such representatives *or* in self-organization *or* in other concerted activities,”¹⁰⁸ the drafters set each category apart. Thus, “concerted activities” encompass all that the term itself indicates. “Concerted” has been defined as embracing the activities of employees who join together in order to achieve common goals.¹⁰⁹ The statute thus provides for a worker’s freedom to engage in activities mutually planned with other workers in order to bring about “mutual aid or protections.”¹¹⁰ That an organized labor union may make concerted activity more effective does not mean that such mutual planning can be achieved only through a union. A plain reading of the statute should thus allow a worker to choose whether to plan mutually with a union or with other nonunion workers.

Furthermore, by forcing workers to join unions in order to protect themselves, the *Bravo* court’s reading would turn the provision on its head, causing the provision itself to interfere with an individual’s freedom of self-representation and designation of representatives. In

106. *Id.*

107. *See supra* note 24 for the full text of the public policy provision.

108. *Id.* (emphasis added).

109. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 (1984). *See also* *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942) (including within concerted activities the action of workmen in a shop making common cause with a fellow workman over his separate grievance).

110. Wash. Rev. Code § 49.32.020 (1994).

many areas, there may be only one union available for workers to join. In such cases, *Bravo* would require the worker to join a union to have any protection for concerted activities, essentially depriving a worker of a meaningful choice. Also, the public policy provision specifically allows a worker freedom to decline to associate with other workers.¹¹¹ The narrow reading of the *Bravo* court, in direct contrast to these words of the provision, does not allow workers the freedom to decline to associate with unions if they wish to gain freedom of contract through concerted action.

B. *Bravo Is Contrary to Washington Case Law*

In addition to misinterpreting the statute, the *Bravo* court wrongly limited *Krystad* and the subsequent cases applying the *Krystad* rule. Contrary to the conclusion of the *Bravo* court, the principles set forth in *Krystad* apply with equal force to nonunion workers. The *Bravo* court also unfairly limits cases decided after *Krystad* that provide protection to workers who have not yet organized into a union and recognize that *Krystad* was founded on the broad principle of protecting employee bargaining power. Finally, *Krystad* should not be narrowly read because the legislature has implicitly approved of its holding by failing to enact contrary legislation throughout the opinion's twenty-nine year existence.

Although the *Krystad* court held that employees could not be discharged due to their union activities,¹¹² the broad principles espoused by the court apply equally well to nonunion workers. The *Krystad* court was deciding a case involving a discharge because of union activities and thus did not consider nonunion workers.¹¹³ However, the court stated that the right to join a union was only one of the rights that the public policy provision granted to employees, suggesting that the provision granted other rights.¹¹⁴ The *Krystad* court further noted that the words of the statute, taken as substantive rights, were consistent with the remainder of the statute providing workers freedom in choosing representatives without interference from their employer.¹¹⁵ The *Bravo* court's requirement of union activity to trigger the protections of the statute restricts this freedom of choice.

111. *Id.*

112. *Krystad v. Lau*, 65 Wash. 2d 827, 846, 400 P.2d 72, 83 (1965).

113. *Id.* at 829, 400 P.2d at 73.

114. *Id.* at 846, 400 P.2d at 83.

115. *Id.* at 844-45, 400 P.2d at 83.

Concerted Activities of Nonunion Workers

The *Bravo* court's holding that *Krystad* should be strictly limited to discharges based on union activities is also contrary to Washington case law, which demands a wider interpretation. In *Culinary Workers*, the Washington Supreme Court recognized the broader principle upon which *Krystad* was founded, that an employer cannot interfere with its employees' designation of a representative.¹¹⁶ Although a union was involved in *Culinary Workers*, its rationale would prevent nonunion workers from being forced into a union chosen by an employer. By holding that an employer may not threaten to discharge employees who failed to join a union, the *Culinary Workers* court implicitly recognized that an employee does not have to be a member of a union in order to gain the protections of Washington's little Norris-LaGuardia statute.¹¹⁷

The *Sand Point* decision further reiterates the theme of the public policy provision, stating that its purpose was to facilitate the achievement of an effective bargaining position for workers.¹¹⁸ The *Sand Point* court, like the *Krystad* court, phrased the employees' rights in terms of union activities. However, the court was not addressing the issue of nonunion activities.¹¹⁹ Moreover, allowing an employer to interfere with employees' rights merely because the employee had not joined a union would be inconsistent with *Sand Point*'s reiteration of the legislature's concern for workers to have an effective bargaining position.

There is no indication that the legislature has abandoned this concern. *Krystad* was decided more than twenty-five years ago,¹²⁰ and the Washington legislature must be aware of its holding. The Washington Supreme Court has recognized that the legislature may implicitly condone a judicial interpretation of a statute by failing to change the court's determination of the statute's meaning.¹²¹ In *Buchanan v. International Brotherhood of Teamsters*,¹²² the court held that an interpretation of Washington's little Norris-LaGuardia Act that had stood for seventeen years was presumed to be known by the legislature, whose

116. *Culinary Workers & Bartenders Union, Local No. 596 v. Gateway Cafe, Inc.*, 91 Wash. 2d 353, 370, 588 P.2d 1334, 1345 (1979). See *supra* notes 57-61 and accompanying text.

117. The court applied the public policy provision even though only one of the employees was a union member. *Id.* at 370, 588 P.2d at 1345.

118. *International Union of Operating Eng'rs Local No. 286 v. Sand Point Country Club*, 83 Wash. 2d 498, 502, 519 P.2d 985, 988 (1974).

119. *Id.*

120. *Krystad v. Lau*, 65 Wash. 2d 827, 400 P.2d 72 (1965).

121. *Buchanan v. International Bhd. of Teamsters*, 94 Wash. 2d 508, 617 P.2d 1004 (1980).

122. 94 Wash. 2d 508, 617 P.2d 1004 (1980).

inaction showed that it concurred with the interpretation.¹²³ Thus, even if the *Krystad* opinion could have been questioned at the time it was decided, its survival throughout twenty-nine years of legislative sessions supports the soundness of its policy.¹²⁴ Consequently, the holding of *Krystad* and its progeny should not be narrowed so as to contradict the legislature's intent in enacting the policy provision.

C. *The Bravo Decision Is Inconsistent with Federal Law*

The same policy concerns of the Washington legislature are also reflected in federal interpretations of the NLRA. Federal courts have long recognized the importance of protecting the concerted activities of nonunion workers.¹²⁵ *Washington Aluminum* reflected the U.S. Supreme Court's view of the purpose of section 7 of the NLRA, which is to protect the self-organization and concerted activities of workers. Likewise, Washington's little Norris-LaGuardia statute, as interpreted by *Krystad*, protects the self-organization and concerted activities of workers. Washington should therefore recognize the rationale of the Supreme Court in providing protection to nonunion workers, particularly where they are unorganized.¹²⁶

Not only is the reasoning of *Washington Aluminum* sound, but Washington's traditional deference to federal interpretations of similar statutes is justified in this case. The NLRA contains a descendant of the public policy provision from the federal Norris-LaGuardia Act,¹²⁷ and Washington's public policy provision and section 7 of the NLRA have the same purpose, protecting the unorganized worker.¹²⁸ Moreover, the differences between the NLRA and Washington's public policy

123. *Id.* at 511, 617 P.2d at 1006. See also *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 789, 719 P.2d 531, 537 (1986) (finding that failure of legislature to change judicial interpretation of statute for ten years indicates legislative approval); *State v. Fenter*, 89 Wash. 2d 57, 569 P.2d 67 (1977) (finding that statute not expressly overruling holding of previous case did not intend to change law because legislature must have known of previous holding). But see *Pringle v. State*, 77 Wash. 2d 569, 573, 464 P.2d 425, 427-28 (1970) (stating that rule of legislative silence indicating approval applies only when statute is ambiguous and legislature has considered issue subsequent to court interpretation).

124. In any case, the Washington Court of Appeals that decided *Bravo* was required to follow *Krystad* as binding precedent and thus should have respected the supreme court's reasoning. While the Supreme Court of Washington may overrule its previous decision, the soundness of its original interpretation and the subsequent legislative inaction indicate that the decision should stand.

125. See *supra* notes 89-91 and accompanying text.

126. See *supra* note 84-87 and accompanying text.

127. See *Morris*, *supra* note 76, at 1681-32.

128. *Supra* note 79 and accompanying text.

Concerted Activities of Nonunion Workers

provision are not sufficiently substantive to deprive an entire class of workers of this important protection. The differences between the statutes include that while section 7 of the NLRA is within a section of the statute specifically granting employee rights,¹²⁹ Washington's public policy provision is contained within the preamble.¹³⁰ However, the *Krystad* opinion minimized this distinction by holding that the public policy provision grants substantive rights to employees.¹³¹ Thus, the two sections of the statutes effect the same outcome.¹³² Also, while the NLRA provides for specific remedies if the employee's enumerated rights are violated, Washington's public policy provision does not mention remedies.¹³³ Again, the *Krystad* court felt that the lack of a remedy should not bar courts from providing one.¹³⁴ Therefore, the two statutes remain similar in the area of protecting the rights of employees to organize, designate representatives, and engage in concerted activities. Finally, the reasons why agricultural workers were excluded from the NLRA do not provide a persuasive reason not to use federal interpretations of the NLRA when considering disputes involving such workers.¹³⁵ Consequently, the rationale of federal interpretations should apply equally to agricultural and non-agricultural workers who must resort to state labor law.

D. *Bravo Is Inconsistent with Equitable Labor Policy*

Not only is *Bravo* inconsistent with federal law, but the *Bravo* decision also forecloses the option of concerted activity for a significant

129. 29 U.S.C. § 157 (1988).

130. Wash. Rev. Code § 49.32.020 (1994). NLRA § 7, entitled "Right of employees as to organization, collective bargaining, etc.," lists the rights of employees to organize and to engage in other concerted activities. 29 U.S.C. § 157 (1988). The language of Washington's statute is contained in a provision entitled "Policy enunciated" and discusses similar activities. Wash. Rev. Code § 49.32.020 (1994).

131. *Krystad v. Lau*, 65 Wash. 2d 827, 846, 400 P.2d 72, 83 (1965). Washington case law also indicates that the name of the statute does not necessarily dictate its meaning. See *Treffry v. Taylor*, 67 Wash. 2d 487, 491, 408 P.2d 269, 272 (1965) (holding that the title to a bill need not be an index to its contents, but it must give notice of its purpose so as to lead to reasonable inquiry by those affected), *appeal dismissed*, 385 U.S. 10 (1966).

132. See *supra* note 24 and accompanying text.

133. See 29 U.S.C. § 158 (1988); Wash. Rev. Code § 49.32.020 (1994).

134. *Krystad v. Lau*, 65 Wash. 2d 827, 840-41, 400 P.2d 72, 80-81 (1965). See also *supra* notes 41-43 and accompanying text.

135. See discussion *supra* part I.C.1.

class of people.¹³⁶ Since Washington has no comprehensive labor relations statute, the public policy provision of Washington's little Norris-LaGuardia Act remains the sole means for many workers like Bravo to be free from interference in attempting to bargain with employers as a group. If this provision is rendered meaningless for nonunion workers, a significant number of workers will be powerless to oppose the very dangers and deplorable situations that the legislature sought to address when enacting the statute.

Another unjust consequence of the *Bravo* decision will be to force workers into choosing union membership as the only means by which they can effectively bargain with their employers. Not only does this result conflict with the language of the public policy provision,¹³⁷ but it also can have particularly harmful effects in certain situations. If no union is available for workers to join, the worker is left with no protection against the superior economic bargaining position of an employer. If a union is available, a worker may not wish to join a union for political, personal, or practical reasons. Other workers may not believe that a union is the best way to associate in order to bargain with an employer. Still others may feel that a particular union is not concerned with their interests, colludes with the employer for personal financial gain, or is motivated by other influences corrupting its representation of employees. Further, employees may wish to form an independent union for bargaining with an individual employer. The *Bravo* holding does not allow employees to make such choices.

III. STATE LABOR LAW FOR THE FUTURE

Washington courts should interpret its little Norris-LaGuardia Act to protect workers' abilities to engage in concerted activities, regardless of union affiliation. In order to grant workers the protection necessary to have freedom of contract, Washington's public policy provision must cover as broad a scope of employees as possible. Accordingly, nonunion workers should be granted the same protection under state labor law as union workers. Courts should thus continue to interpret the public policy provision of Washington's little Norris-LaGuardia Act to provide protection to the individual worker. Courts must recognize, however,

136. Only fourteen percent of private-sector employees in 1990 were represented by a union. Michael H. Gottesman, *Whither Goes Labor Law: Law and Economics in the Workplace*, 100 Yale L.J. 2767, 2767 n.1 (1991) (reviewing Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (1990)).

137. See *supra* notes 114-15 and accompanying text.

Concerted Activities of Nonunion Workers

that in order to be fully effective, the Act must apply to all workers in the state not covered by federal law. Only then can a worker truly be free to choose how and whether to engage in concerted activities.

Failing such an interpretation, Washington should follow the example of other states that have enacted more comprehensive labor relations statutes.¹³⁸ Such a statute should specifically grant workers the right to engage in concerted activity.¹³⁹ Additional issues to be addressed in a labor relations statute, while beyond the scope of this paper, would include the creation of a labor relations board to decide disputes, whether to compel good faith bargaining on the part of the employer, and determination of other unfair labor practices.¹⁴⁰

[Editors' Note: On January 26, 1995, after this edition of *Washington Law Review* was in final form, the Supreme Court of Washington reversed the Court of Appeals decision in an opinion that reflects much of the analysis in the foregoing Note.[†]]

138. See, e.g., Cal. Lab. Code § 1140 (West 1989); Haw. Rev. Stat. § 21.377 (1985); Wis. Stat. Ann. § 111.01 (West 1988). Indeed most states have passed labor relations statutes modeled after the NLRA. Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 Yale J. on Reg. 355, 369 n.59 (1990).

139. The statute can be modeled after the NLRA, which makes it an unfair labor practice for an employer to interfere with an employee's efforts to engage in concerted activity. 29 U.S.C. § 157 (1988). As discussed above, such a prohibition does not depend on union involvement. See *supra* part I.C.

140. Examples of other unfair labor practices include regulation of picketing and boycotts, coercing union membership for particular employees, and certification procedures for bargaining agents. See 29 U.S.C. § 158 (1988) (defining unfair labor practices under the NLRA).

[†] *Bravo v. Dolsen Cos.*, 1995 Wash. LEXIS 53 (Jan. 26, 1995).

