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LABOR LAW—SAFETY DISPUTES—WALKOUTS UNDER SECTION 502 OF THE TAFT-HARTLEY ACT

The attainment of safe working conditions has plagued workers, employers, and governments since the Industrial Revolution began. Attempts to solve the problem have met with varying degrees of success. As workers and their representatives have become increasingly vocal in their concern for safety improvements on the job, attempts to remedy hazards have become more ambitious. For example, two major pieces of federal safety legislation, the Federal Coal Mine Health and Safety Act¹ and the Occupational Safety and Health Act,² have been enacted within the past few years. It has been estimated that OSHA alone applies to approximately 4.1 million businesses and 57 million employees.³

Aside from the health of employees affected, labor-management disputes often involve safety conditions. Such disputes generally concern the existence of safety hazards and the rights of interested parties once hazards are recognized. These disputes will likely increase in some rough correlation to the heightened safety-consciousness of workers and new legislation providing minimum safety standards.⁴

One federal statute which will frequently be invoked by workers in future safety disputes is section 502 of the Taft-Hartley Act of 1947.⁵ It extends job protection for those who refuse to work under hazardous conditions. The applicable part of the statute provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this chapter."⁶ Employees can,

¹30 U.S.C. §§ 801-960 (1971).

²29 U.S.C. §§ 651-76 (1971).

³Spann, *The New Occupational Safety and Health Act*, 58 A.B.A.J. 255 (1972).

⁴The United Mine Workers has announced that it is taking a "new tough posture" to force safety consciousness upon coal companies. *Charleston Gazette*, Aug. 23, 1973, § A, at 3, col. 1. Given the prevalence of coal mining in West Virginia, it is reasonable to expect that many safety disputes will occur within this State.

⁵29 U.S.C. § 143 (1971).

⁶*Id.* The first portion of the statute provides that the Taft-Hartley Act shall not be construed to compel employees to perform labor. Section 502 has been characterized as representing congressional deference to the thirteenth amendment to the United States Constitution which protects citizens from involuntary servi-

therefore, refuse to work under abnormally dangerous conditions without the threat of replacement and other economic reprisals. Therefore, section 502 is a practical tool labor organizations can use to assure their members will not be inhibited by fear of losing their jobs if they refuse to work in dangerous surroundings.

Until recently, section 502 had received little attention. This is understandable as the Taft-Hartley Act is not a safety code and safety-related employee walkouts have only recently become prevalent. Yet, with the burgeoning development in safety law noted earlier, there is a need for labor organizations, employers, and labor lawyers to become better acquainted with the traditional application of section 502 by the National Labor Relations Board and the federal courts, and with the limitations of the section. Furthermore, since the vast majority of labor disputes are settled long before any judicial intervention, there is a need for all concerned with labor relations to weigh the value of relying upon judicial interpretation of section 502 against the value of seeking job protection for employees who refuse to work under alleged abnormally dangerous conditions through contractual arbitration.

I. HISTORY AND CONSTRUCTION OF SECTION 502

Section 502 came into existence with one marked disadvantage for the courts and the NLRB: it had no recorded legislative history.⁷ Possibly, courts were reluctant to construe the statute since Congress failed to provide an interpretive aid. In any event, the federal courts apparently overlooked section 502 in two cases decided in the early 1950's that involved work stoppages allegedly caused by hazardous working conditions.⁸ Instead, these cases turned on whether the conduct of employees who stopped working was concerted activity protected by section seven of the National Labor Relations Act.⁹

tude. BUREAU OF NATIONAL AFFAIRS, *THE NEW LABOR LAW* (1947).

⁷Knight Morley Corp., 116 N.L.R.B. 140, 146 (1956).

⁸NLRB v. Kohler Co., 220 F.2d 3 (7th Cir. 1955); NLRB v. American Manufacturing Co., 203 F.2d 212 (5th Cir. 1953).

⁹29 U.S.C. § 157 (1971) provides:

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

One of these decisions, *NLRB v. Kohler Co.*,¹⁰ involved a work stoppage arguably protected by section 502. A group of employees worked in a paint shop located near a furnace room. They walked off the job when the employer shut down a blower system that cooled the shop and removed harmful enamel dust from the air. Instead of flatly refusing to work under these conditions, the employees reported for each shift and then left the working area to see the company physician. When some of the employees refused to return and complete their shift, they were discharged. The circuit court of appeals agreed with the NLRB, and held the employee action to be illegal, intermittent work stoppages.¹¹

An interesting comparison to *Kohler* is found in *NLRB v. Knight Morley Corp.*,¹² which was decided only two years later. The NLRB interpreted and applied section 502 for the first time in *Knight Morley*.¹³ As in *Kohler*, the alleged hazardous condition was a defective blower system. Unlike *Kohler*, the employees in *Knight Morley* refused even to report for their respective shifts, thus foreclosing the possibility that their action would be found to constitute intermittent work stoppages. After the employees had been discharged, their union filed an unfair labor practice charge against the employer with the NLRB. The trial examiner found that section 502 protected the employees in their refusal to work. The NLRB agreed, holding that the testimony demonstrated a work setting that constituted an abnormally dangerous condition under section 502.¹⁴ The fact that the collective bargaining agreement contained a no-strike clause could not remove the protected status of the discharged employees. The Board stated its belief that Congress drafted section 502 to give workers a protected status for such a walkout without regard to strike limitations, including no-strike clauses.¹⁵ The circuit court of appeals upheld the deci-

membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title.

¹⁰220 F.2d 3 (7th Cir. 1955). The NLRB decision is reported at 108 N.L.R.B. 207 (1954).

¹¹In *NLRB v. American Manufacturing Co.*, 203 F.2d 212 (5th Cir. 1953), the other early case in which section 502 was ignored, the court decided that the employees were lawfully discharged because they walked out before the management representative had a chance to investigate the matter. The walkout also violated safety provisions included in the contract to which labor and management had agreed on the day of the walkout.

¹²251 F.2d 753 (6th Cir. 1957).

¹³*Knight Morley Corp.*, 116 N.L.R.B. 140, 146 (1956).

¹⁴*Id.* at 144.

¹⁵*Id.* at 146.

sion.¹⁶

Two important evidentiary rules were established in *Knight Morley*. Workers in the alleged abnormally dangerous area were held competent to testify to the actual conditions present when the incident occurred.¹⁷ In addition, expert witnesses, such as industrial health experts, were permitted to testify as to whether such conditions were abnormally dangerous.¹⁸

By 1961, the NLRB had explicitly prescribed the proof necessary to prevail in proceedings involving section 502.¹⁹ Objective criteria must be met to establish the existence of an abnormally dangerous condition. The existence of the condition can be established by competent evidence and testimony in accordance with the evidentiary rules approved in *Knight Morley*.²⁰ The Eighth Circuit Court of Appeals also adopted this standard of proof in *NLRB v. Fruin-Colnon Construction Co.*²¹ The court held that a

¹⁶*NLRB v. Knight Morley Corp.*, 251 F.2d 753 (6th Cir. 1957).

¹⁷The employees' testimony concerned their allegation that the blower intended to cool them and to remove dust from the air was actually running in reverse. They also testified as to the temperature in the work area. 116 N.L.R.B. at 143.

¹⁸The industrial health expert testified that the conditions in the work area created a danger of heat disease which could result in death. *Id.* at 143-44.

¹⁹*Redwing Carriers, Inc.*, 130 N.L.R.B. 1208 (1961). This case might have presented a real challenge to the Board: Can employees who are required to cross another union's picket line as part of their employment claim the picketing workers to be an abnormally dangerous condition? In *Redwing*, the employees were truck drivers, and they claimed to have been threatened and jostled by another employer's workers who were on a picket line. They refused to attempt to cross the line again and were fired by their employer. The Board did not have to decide whether angry picketers could constitute an abnormally dangerous condition in any situation, since there was evidence in this case that fifty of the respondent's other truck drivers successfully crossed the picket line. Therefore, there could be no finding of an abnormally dangerous condition. *Id.* at 1211.

²⁰*Id.* at 1210.

²¹330 F.2d 885 (8th Cir. 1964). This decision is important to anyone contemplating the presentation of a case based on section 502. While interpreting section 502 in a manner consistent with other pertinent cases, the court reversed the Board and held that the finding of an abnormally dangerous condition was based on insubstantial evidence on the record as a whole. Among other considerations noted by the court, only four out of the five employees involved walked off the job site. The fifth employee testified that he did not consider the working conditions any more dangerous than those normally encountered as part of the job. Furthermore, the type of work was classified as extremely dangerous under optimum conditions. For working conditions to be abnormally dangerous, the degree of danger must be above the normal, inherent dangers of the particular occupation. The court also felt the Sixth Circuit had given an unwarranted construction to section 502 in *NLRB v. Knight Morley Corp.*, 251 F.2d 753 (6th Cir. 1957). One sentence in *Knight Morley*

good faith belief in the existence of an abnormally dangerous condition is not alone sufficient to afford workers protection under section 502. To afford section 502 protection, an abnormally dangerous condition must *actually exist*. In reviewing the findings of the Board as to the existence of such a condition, the circuit courts of appeals will determine only if the Board's findings are supported by substantial evidence in the record considered as a whole. This is the same test generally used to review federal administrative proceedings.²²

In *Curtis Mathes Manufacturing Co.*,²³ the Board appeared to turn its objective test into a two step procedure without explicitly labeling it as such. In addition to requiring proof by objective evidence that an abnormally dangerous condition existed, the Board required proof that the employees' good faith belief in the existence of an abnormally dangerous condition had a reasonable basis. In *Curtis Mathes*, the question of whether an abnormally dangerous condition actually existed was never reached. The Board found no reasonable basis for a good faith belief, since there was evidence that the same condition had occurred previously without a walkout. Furthermore, when the dismissed employees left the job site, they constituted only a small group of the workers. The workers in the most dust laden area remained on the job.²⁴ But this evidence goes more readily to the issue of the existence of the abnormally dangerous condition than it does to demonstrate the lack of a reasonable basis for a good faith belief in a dangerous condition. The fact that one or more fellow workers did not quit work runs contrary to the allegation that working conditions were dangerous.²⁵ The issue of whether the employees had a good faith belief is integral in those cases where the possibility of another motive for the walkout is presented. For example, if the employees

indicates that there need only be a finding that employees walked out due to a good faith belief in the existence of an abnormally dangerous condition. However, this reference is probably a result of oversight rather than intention by the Sixth Circuit as that court subsequently affirmed a Board order based on the conclusion that the existence of an abnormally dangerous condition had been proved by objective evidence. 330 F.2d at 892.

²²*Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1950).

²³145 N.L.R.B. 473 (1963).

²⁴*Id.* at 475 n.4.

²⁵Nevertheless, *Curtis Mathes* was later cited by the Board for the proposition that working conditions must be shown by competent evidence to be reasonably considered abnormally dangerous. *Stop and Shop, Inc.*, 161 N.L.R.B. 75, 76 n.3 (1966).

discharged in *Curtis Mathes* had had a dispute with management unrelated to the safety question shortly before the walkout, the issue of a good faith belief might come into play.

Recently, two circuits have rendered decisions that not only contain widely divergent treatments of section 502, but also raise fundamental issues concerning the best method for settling safety disputes. Both cases began when injunctions were sought against walkouts triggered by safety disputes. These cases were instituted by employers under section 301 of the Taft-Hartley Act,²⁰ which permits suits for violations of labor contracts to be brought by the employer or the employees in federal courts.

In *Hanna Mining Co. v. United Steelworkers*,²¹ the labor contract between the employer and the union had an accelerated procedure for settling safety disputes that bypassed the normal grievance steps and compelled immediate arbitration. However, this dispute never reached arbitration. By the contract, employees who refused to work because of an unsafe condition were to initiate the machinery for settling a safety dispute by filing a grievance with the employer. The employer in this case violated the clause by firing the employees before they were able to file their grievances. When workers in other parts of the plant learned of the dismissals, all union employees in the facility walked off their jobs. The employer sought an injunction in federal district court against this second walkout, claiming a violation of the contract's no-strike clause. The injunction was denied on two bases: (1) The employer had not shown that he was entitled to equitable relief; and (2) in spite of the contract provisions, the union was not required to arbitrate grievances involving safety.²²

The decision was reversed upon appeal. The court held that the very specific labor contract provision for settling safety disputes required arbitration of such grievances.²³ On the other hand, the court noted the employer's violation of the contract and or-

²⁰29 U.S.C. § 185 (1971).

²¹464 F.2d 565 (8th Cir. 1972). The safety incident concerned the dismissal of employees who refused to change grates on a conveyor belt that was continuously moving. The employer had added feeder rollers to the conveyor belt shortly before the incident took place, and the addition of the rollers sharply increased the speed of the belt. The employees believed it too dangerous to attempt changing grates while the belt was moving so rapidly.

²²*Id.* at 567.

²³*Id.* at 568.

dered the reinstatement of all employees without penalty.³⁰ At the appellate level, the employees argued that their action in refusing to work was protected by section 502. Following previous interpretations of section 502, the court denied this defense. The defense had not been raised at the trial court level, and there had been no proof that an abnormally dangerous condition existed. In addition, there had been no finding that the employees actually quit their labor in a good faith belief that an abnormally dangerous condition existed. Such a finding is, of course, necessary before section 502 can be brought into play.³¹

The second case, *Gateway Coal Co. v. United Mine Workers*,³² contained a factual setting less amenable to the application of section 502 than *Hanna Mining Co.* Yet, the court denied an injunction against the employees involved, basing its decision on section 502 and a general theory that arbitration of safety disputes should be avoided whenever possible. In *Gateway*, a large group of union employees voted not to work under assistant mine foremen who had falsified mine safety records. The foremen were suspended by their employer who later decided to reinstate them. The union then began a work stoppage. Attempts to reach arbitration proved futile, and the employer sought an injunction in federal district court against the union to order binding arbitration of the issue.³³ A preliminary injunction was awarded and binding arbitration ordered with the condition that the employer suspend the foremen until the arbitrator reached his decision.³⁴ The union appealed to the Third Circuit, but, in the meantime, the arbitrator found the issue arbitrable. He determined that there was no merit in the miners' contention that the presence of the foremen in the mine was abnormally dangerous. The foremen were allowed to return to work.³⁵ The case was reversed upon appeal, and the in-

³⁰*Id.* at 568-70.

³¹*Id.* at 567-68. The court made no mention of whether the actual existence of the alleged abnormally dangerous condition needs to be determined at the trial level.

³²466 F.2d 1157 (3rd Cir. 1972), *cert. granted*, 410 U.S. 953 (1973).

³³*Id.* at 1158-59.

³⁴*Id.* at 1158.

³⁵The incident began when it was found that the air flow in one area of a coal mine had been sharply reduced by the partial blockage of an intake airway. This problem was quickly remedied. Federal and state mine inspectors came to the mine to insure that repairs had been completed, and it was then discovered that the assistant foremen had falsified air intake measurements on the previous shift. After the foremen were suspended, the Pennsylvania Department of Mines notified the

junction was vacated.³⁶

The applicability of three important facets of section 502 to the facts of this case is questionable. First, what was the abnormally dangerous condition? The majority implicitly accepted the proposition that the word "condition" included in its meaning the idea of two negligent foremen in a mine. The court stated that the subject of safety disputes should not be limited to physical conditions.³⁷

Negligence is a valid subject of local safety disputes. Employees are free to protest to their employer that an employer representative or another worker is negligent in safety matters. Such complaints may be based on subjective reasons and even unsubstantiated opinions. Negligence, however, is not an appropriate justification for a walkout under section 502. Proof before a court of law or the NLRB that a human being is a continuing source of an abnormally dangerous condition does not readily lend itself to the objective test required by section 502. The negligence involved in *Gateway* could be termed willful or wanton. But safety hazards that are precipitated by human conduct appear more often to be traceable to fellow workers or supervisors who are accident prone or simply careless. If a hazardous act committed by such a person were corrected, and if he were reprimanded or given a remedial safety lecture, employees would be hard put to find a body that would sanction a walkout conditioned on the person's dismissal or transfer. The decision to reassign or discipline an employee for lapses in safety consciousness should be jointly made by the employer and the labor organization with advice by state and federal safety officials carrying great weight in the decision.

The next facet of section 502 to be considered is the basic requirement that an abnormally dangerous condition must be established as a basis for relief, or as a defense at the trial court level, by competent, objective evidence and testimony. There is no indication that the union in *Gateway* raised section 502 in the trial court as a defense against the injunction. In *Hanna Mining Co.*,³⁸ the appellate court refused to vacate the injunction granted in the trial court precisely because the employees had not offered section

employer that there were no objections to reinstating them. Subsequently, the foremen pleaded nolo contendere to a charge of criminal violation of safety requirements, and they were fined. *Id.* at 1157.

³⁶*Id.* at 1161.

³⁷*Id.* at 1160-61.

³⁸464 F.2d 565 (1972).

502 as a defense for their walkout. In *Gateway*, the court only stated that there was no finding the employees did not honestly believe their lives were in danger while the assistant foremen were working underground.³⁹ Thus, it appears the court excused the employees from their burden of proof.

Finally, who is permitted to walk off the job when a safety hazard is encountered and claim that such action is not a strike but is protected by section 502? This question has not been directly answered in the litigation of section 502. But, if it is agreed that the purpose of this section is to protect the employees' health, safety, and lives without fear of economic or job reprisals,⁴⁰ only those workers threatened by the condition should be permitted to walk off the job. In *Gateway*, all employees, including surface workers, initially left their jobs.⁴¹

The majority in *Gateway* decided that the labor contract between the employer and the union did not explicitly require binding arbitration of safety disputes.⁴² With this finding established, the court reasoned that since walkouts under section 502 cannot be deemed strikes in violation of contractual no-strike clauses, courts should avoid interpreting labor contracts to require arbitration of safety disputes whenever possible. The court stated that no-strike clauses and arbitration requirements were "opposite sides of a single coin."⁴³

This theory raises important problems for the settlement of safety disputes in general and section 502 disputes in particular. If courts avoid construing labor contracts to require compulsory arbitration of safety disputes, how are they to be settled? The federal courts have not designed a national policy with respect to settling *safety* disputes, but the general policy of settling *labor* disputes has been to favor arbitration.⁴⁴ In addition, the settlement of section 502 disputes has been restricted to two methods. Section 502 can be the subject of an unfair labor practice charge before the

³⁹466 F.2d at 1159.

⁴⁰Knight Morley Corp., 116 N.L.R.B. 140, 146 (1956).

⁴¹466 F.2d at 1161 (dissenting opinion).

⁴²466 F.2d at 1159. It is on this finding that the court in *Hanna* distinguished that case from *Gateway*. 464 F.2d at 567-68 n.2. but the difference is at most one of degree. The labor contract in *Hanna* contained a contract clause requiring arbitration of safety disputes. The contract in *Gateway* required arbitration for all local and district disputes.

⁴³466 F.2d at 1160.

⁴⁴United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960).

NLRB, or it can be litigated in the federal courts on the theory of breach of the labor contract under section 301.⁴⁵

II. SETTLING SECTION 502 DISPUTES

Two important aspects of section 502 should be kept in mind. Not all safety disputes that develop at the job site require consideration of this section. An abnormally dangerous condition suggests an immediate and serious hazard to life and limb that is beyond the normal hazards encountered in the particular employment.⁴⁶ Although anticipation of a major catastrophe probably is not required, many of the daily lapses in safety consciousness that occur in American industries would not be considered abnormally dangerous.

Also, section 502 is not the "blank check" given to workers that it might appear to be. For example, if a given number of employees believe they are working in proximity to an abnormally dangerous condition and walk off the job, the employer might disagree with their belief and dismiss them. Should the remainder of workers at the facility then walk out in protest, and all fail to prove the existence of the abnormally dangerous condition, the employees who claimed to have been protected by section 502 are properly dismissed, and the workers who walked out in protest are not unfair labor practice strikers and are subject to replacement.⁴⁷

⁴⁵29 U.S.C. § 185 (1971).

⁴⁶For example, underground coal mining would have to be classified as one of the more dangerous occupations remaining in the United States. In section 502 disputes, courts have noted if the occupation involved was more dangerous than most others. In *NLRB v. Fruin-Colnon Construction Co.*, 330 F.2d 885 (8th Cir. 1964), the Eighth Circuit recognized that the work was "hazardous even under optimum conditions," and noted that the employer considered the work to be "dangerous per se" owing to the inherent and uncontrollable perils involved. However, the circuit court of appeals refused to enforce an order of the NLRB which was predicated upon a finding of an abnormally dangerous condition. To support its decision, the court noted the many safety precautions taken by the employer to protect the workers.

The impression is made that it is more difficult to establish an abnormally dangerous condition in an occupation regarded as very dangerous. But the degree of danger normally encountered in any given occupation should not be used to determine whether a walkout is protected by section 502. Abnormally dangerous conditions can occur in practically all occupations. In fact, workers used to laboring in more dangerous occupations may be less likely than workers in safer jobs to misinterpret a situation as abnormally dangerous.

⁴⁷*See NLRB v. Knight Morley Corp.*, 251 F.2d 753, 760 (6th Cir. 1957). *See also NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) which initiated the principle that an employer may replace economic strikers.

Both the employer and his employees are gambling whenever a section 502 problem is taken before the NLRB or a court. If judicial sanction is given to the walkout, the employer can be faced with a lengthy delay in production. If the protection of section 502 is denied, the employees involved are in danger of losing their employment. Therefore, the interests of both parties as well as the overriding federal desire for stability in labor relations weigh in favor of arbitration, thereby minimizing gambling and emphasizing instead speedy adjustment and reconciliation. Under the theory embraced in *Gateway*, the only alternative for an employer who disputes the existence of an abnormally dangerous condition and desires to have the issue conclusively settled will be to discharge the employees concerned with the expectation they will file an unfair labor practice charge.

The majority opinion in *Gateway* conveys the misleading impression that the arbitration of safety disputes is a rare and unpopular practice in American industry. The practice might not be prevalent in the coal industry, but other industrial concerns involving serious daily work hazards have been arbitrating safety disputes at least since 1950.⁴⁸ It is noteworthy that arbitrators require a presentation of facts and satisfaction of burdens of proof in a manner strikingly similar to the trial requirements established by the NLRB and the federal courts in section 502 disputes.⁴⁹ With this in mind, it is difficult to believe that the safety of employees or the present "power" balance between labor and management will be sacrificed in the arbitration process.

Only one justification has been offered for excepting safety disputes from the federal policy favoring arbitration: decisions affecting the lives and safety of employees should not ultimately rest in the hands of arbitrators. According to the majority opinion in

⁴⁸Firestone Tire & Rubber Co., 14 Lab. Arb. 552 (1950).

⁴⁹Bethlehem Steel Corp., 54 Lab. Arb. 503 (1970) (employees proved the existence of an unsafe condition beyond normal hazards of the work involved); Carmet Co., 52 Lab. Arb. 790 (1969) (discharge of union men who led a walkout over an allegedly hazardous condition held valid since no dangerous condition existed); A.G. Sutor Construction Co., 52 Lab. Arb. 599 (1969) (walkout over hazardous working conditions held justified despite a contractual no-strike clause); Allied Chemical & Dye Corp., 31 Lab. Arb. 699 (1958) (chemical worker who left job site because of the alleged presence of ammonia gas held to have been properly dismissed when facts showed, among other things, that other employees continued to work on the job site without observing the presence of the gas); Firestone Tire & Rubber Co., 14 Lab. Arb. 552 (1950) (employees held to have burden of showing that a safety hazard actually existed).

Gateway, "The arbitrator is not staking his life on his impartial decision. It should not be the policy of the law to force the employees to stake theirs on his judgment."⁵⁰ But from the first decision involving section 502, it was evident that the courts would not allow employees alone to decide when they could refuse to work due to a safety hazard. The courts began to make impartial decisions affecting the lives and safety of industrial workers when the objective requirements necessary to satisfy section 502 were introduced. Under statutes such as the Federal Coal Mine Health and Safety Act and the Occupation Safety and Health Act, federal inspectors are charged with the duty to make impartial decisions pertaining to the existence of imminent danger on job sites.⁵¹ The inspector, too, is making decisions that affect the lives and safety of workers. Whether the third party settling a safety dispute is an arbitrator, a federal official, or a court, that party must dispatch his responsibilities with the knowledge of all potential consequences. There is no reason to believe that an arbitrator, who is in continuous contact with employees and their labor organizations, is less sensitive to the importance of his work than any other person charged with similar responsibilities.

At least two types of contract clauses have been drafted that can promote fair settlements of safety disputes by negotiation and arbitration while minimizing the possibility of hasty or faulty decisions that might sacrifice employee safety. The first of these⁵² allows the initial decision as to the existence of an abnormally dangerous condition to be made by representatives from both the labor group and the employer. If an employee believes that such a condition exists, he can notify his foreman and walk off the job. If there is no doubt of the existence of the condition, the employee cannot

⁵⁰466 F.2d at 1160.

⁵¹The pertinent section in the Federal Coal Mine Health and Safety Act is 30 U.S.C. § 814(a) (1971). It reads:

If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

The pertinent section of the Occupational Safety and Health Act is of similar import. 29 U.S.C. § 657(f)(1) (1971).

⁵²The elements of this clause can be found in *Hanna Mining Co. v. United Steelworkers of America*, 464 F.2d 565, 566 (8th Cir. 1972).

be reassigned to his prior task until the condition is remedied. Should the existence of the alleged condition be challenged, a management representative and the chairman of the union's grievance committee must inspect the condition and decide whether the employee was correct. If the union's representative finds an abnormally dangerous condition, and the management representative disagrees, the employee has the right to immediate reassignment to another task on the job site by filing a grievance. The dispute over the existence of the abnormally dangerous condition is immediately submitted to an arbitrator.

The National Bituminous Coal Wage Agreement of 1971 provides a more intricate method of settling safety disputes.⁵³ A Mine Health and Safety Committee, comprised solely of qualified employees picked by the local union, can inspect any portion of the job site. If they believe an imminently dangerous condition is present and recommend the removal of employees from that area, the employer must comply.⁵⁴ Presumably, if an employee feels that a condition is imminently dangerous, he can request inspection before continuing to work in that area of the mine. If a dispute then arises over the safety matter, the contract contains a four-step settlement procedure. A six member Joint Industry Health and Safety Committee, composed equally of persons appointed by labor and management, receives final power to settle the dispute if it is not resolved in one of the three lower steps.⁵⁵ This committee elects a neutral chairman, and decisions by the committee are binding on all parties.⁵⁶

These two contract clauses are only illustrative of the protection available at the local level to shield the worker from dangerous working conditions and from the threat of economic reprisals. The clauses also illustrate that questions and disputes concerning

⁵³National Bituminous Coal Wage Agreement of 1971, art. III, §§ (g), (h). The court in *Gateway* held that the National Bituminous Coal Wage Agreement of 1968 did not require arbitration of safety disputes. The 1971 agreement contains a separate section on settlement of health or safety disputes which has a procedure that parallels arbitration. *Id.* § (h).

⁵⁴*Id.* § (g)(1).

⁵⁵*Id.* §§ h(1), (2), (3). The first three steps require an attempted settlement respectively by: (1) the mine management and the mine health and safety committee; (2) the U.M.W. district safety coordinator and a representative of the employer; and if they fail to agree, a representative from the U.S. Bureau of Mines or an appropriate state agency must be consulted; and (3) the U.M.W. safety director and a representative of the employer.

⁵⁶*Id.* § (h)(4).

safety are being answered and settled every day at the local level in a scheme involving management, labor organizations, safety officials, and arbitrators. Wide acceptance of these extra-judicial methods of settling safety disputes involving abnormally dangerous conditions is essential to prevent employers from being forced to dismiss employees in order to have the legality of a walkout tested. Limiting the employer to this course of action not only exposes him to an unfair labor practice charge with all its ramifications, but also subverts the goal of industrial peace and harmony.

III. CONCLUSION

On its face, section 502 provides job security to employees who refuse to work under abnormally dangerous conditions. It was, at its inception, primarily a law for the economic protection of workers. But relying upon section 502 is a cumbersome and sometimes costly procedure. After a walkout has occurred, the employees involved must prove the existence of an abnormally dangerous condition in order to be protected. Yet, common experience teaches that it is better to remove oneself from a situation thought to be dangerous and be wrong, than to stay and discover the truth. Labor groups can counteract the penalty for being wrong by insisting on contract provisions that insure employees the right to temporarily leave their stations when they *believe* themselves to be in danger. This could be followed by bi-partisan determination of the actuality of the danger with the right to arbitrate any disagreement between the representatives of the bi-partisan committee.

These measures can only be successful if the federal courts grant arbitration of safety matters the same status they have given to arbitration in general. Until *Gateway*, there was no indication the courts would not do so.⁵⁷ Ultimately, the decision as to whether

⁵⁷The Third Circuit, which decided *Gateway* earlier decided *Philadelphia Marine Trade Association v. NLRB*, 330 F.2d 492 (3rd Cir. 1964), which indirectly involved the arbitration of a section 502 dispute. The employer's defense to an unfair labor practice allegation regarding a lockout was that it was only a tactic to force the union to arbitrate the particular safety dispute. Although the court found the employer to be the one actually preventing arbitration, it did not indicate that his efforts would have been fruitless in any event.

Even now that *Gateway* is history, the Third Circuit is less than settled in its policy for safety disputes. In *United States Steel Corp. v. United Mine Workers*, 469 F.2d 729 (3rd Cir. 1972), the court again vacated an injunction awarded in federal district court against employees who refused to work with a shift foreman who allegedly failed to show proper concern for mine safety. A federal district judge sitting with the court concurred because of the decision in *Gateway*. He indicated that he would otherwise have dissented.

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section 502 disputes are to be settled at the local level by arbitrators, before the NLRB, or in the courts will probably not affect the lives or safety of workers. Self-preservation always prevails, and workers will continue to walk off the job when they think they are in danger. But the decision to remove oneself from a dangerous situation is an intuitive reaction qualified by experience and observation, and the decision might be delayed if one realizes his livelihood could be lost if a wrong decision is made. Therefore, maximum protection is provided for employees when they have clothed themselves in contractual clauses that require speedy but knowledgeable determination of their insistence that working conditions are dangerous without any penalty for being wrong.

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