

1-1-1984

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### Recommended Citation

Richard D. O'Connor and Frederick L. Dorsey, *AN ANALYSIS OF THE "NO-STRIKE CLAUSE" IN CONTEMPORARY COLLECTIVE BARGAINING AGREEMENTS*, 7 W. New Eng. L. Rev. 147 (1984), <http://digitalcommons.law.wne.edu/lawreview/vol7/iss2/1>

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Volume 7  
Issue 2  
1984

# WESTERN NEW ENGLAND LAW REVIEW

## AN ANALYSIS OF THE "NO-STRIKE CLAUSE" IN CONTEMPORARY COLLECTIVE BARGAINING AGREEMENTS

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### I. INTRODUCTION

Over the past forty-odd years, the National Labor Relations Board<sup>1</sup> has, aided and abetted by arbitrators and the circuit courts, developed at least three distinct interpretations of broad, general, no-strike language, which depend more upon the type of strike involved than on the language used. While perhaps lengthy and somewhat redundant, the typical no-strike language is hardly complex:

The union agrees that it will not collectively, concertedly or individually engage in or participate, directly or indirectly, in any strike, slowdown, stoppage or any other interference with or interruption of the work or operations of the employer during the term of this agreement; and the employer agrees that during the term of this agreement it will not lock out any of the employees in the bargaining unit covered by this agreement.<sup>2</sup>

Its interpretation, however, has produced some of the most lengthy

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1. Hereinafter referred to in text as the "Board" or "NLRB."

2. Although it may vary from one collective bargaining agreement to another, this language is typical in contemporary labor agreements.

and contradictory of labor litigations.<sup>3</sup>

Arbitrators originally construed no-strike language narrowly.<sup>4</sup> By the early 1950s, however, the NLRB had become involved and the Board and the courts became locked in a battle as to what it truly means to agree not to strike.

The debate over the proper interpretation of broad no-strike language is complicated by the various environments in which the question is presented. Arbitrators, usually the initial interpreters of contract language, operate in an informal (and legally favored) setting in which almost any evidence is admissible.<sup>5</sup> The NLRB, which has the power to interpret contractual language as part of its duty to enforce the National Labor Relations Act,<sup>6</sup> constitutes a second type of contract interpreter. Finally, the courts join the process in deciding whether to enforce decisions of both arbitrators and the Board, as well as directly interpreting contracts under section 301 of the Labor Management Relations Act.<sup>7</sup> The courts, however, are bound by more stringent rules of evidence and case law which grant broad deference to arbitration and Board decisions.<sup>8</sup>

Further confusing this matter is the fact that the Supreme Court has not ruled in a closely analogous case since 1953<sup>9</sup> and the proper interpretation of that case is still being debated.<sup>10</sup> Thus, parties are confronted with a convoluted array of arbitral, Board, and court decisions which make it virtually impossible to predict accurately the legal rights of parties who have agreed to broad no-strike provisions as part of their labor contract.

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3. See F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 46 (3d ed. 1973).

4. *Id.*

5. *Id.* at 254. Elkouri & Elkouri suggest:

Although strict observance of legal rules of evidence usually is not required, the parties in all cases must be given adequate opportunity to present all of their evidence and argument. Arbitrators are usually extremely liberal in the reception of evidence, giving the parties a free hand in presenting any type of evidence thought to strengthen and clarify their case.

*Id.*

6. 29 U.S.C. §§ 151-69 (1982). [Hereinafter referred to in text as the "Act]."

7. Labor Management Relations Act, § 301, 29 U.S.C. § 185 (1982).

8. *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 46 L.R.R.M. (BNA) 2414 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 L.R.R.M. (BNA) 2416 (1960); *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 46 L.R.R.M. (BNA) 2423 (1960); *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 40 L.R.R.M. (BNA) 2113 (1957).

9. *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 31 L.R.R.M. (BNA) 2432 (1953).

10. See, e.g., *International Union of Operating Eng'rs., Local 18*, 238 N.L.R.B. 652, 99 L.R.R.M. (BNA) 1307 (1978).

This article will explore the historic development of the interpretation of no-strike clauses in labor agreements, analyzing the existing approaches in the various fora available for the resolution of contractual disputes. Special attention will be given to the conflicting analyses developed by the Board and the courts to determine the scope of broad no-strike provisions. Finally, the authors will comment on and, if possible, synthesize these competing interpretations.

## II. ARBITRAL TREATMENT OF NO-STRIKE CLAUSES

Labor arbitrators provided the initial contractual interpretations limiting, or entirely prohibiting, employees' right to strike during the term of an existing collective bargaining agreement.<sup>11</sup> The arbitral prohibitions were implied from the very existence of the arbitration process itself, the employer's agreement to arbitrate work disputes forcing the implication that the union would not strike until it had utilized this contractual dispute resolution process. The implied no-strike limitations were narrowly applied to prohibit only strikes arising out of disputes subject to the contract's grievance and arbitration procedures. Limited restrictions were also placed on a union's ability to honor "illegitimate" picket lines of another union. Where, however, the contract contained express no-strike language, arbitrators held that fairness and logic required the no-strike language to be given its plain, broad meaning, except in those cases in which strikers were motivated to honor picket lines by a reasonable fear of violence.<sup>12</sup>

The arbitration process is a simple proceeding, voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding.<sup>13</sup> This process, which is favored by the courts as a "substitute for industrial strife,"<sup>14</sup> occurs in a more informal setting than courtroom litigation and does not require the strict observance of legal rules of evidence.<sup>15</sup>

Under these less formal procedures, arbitrators in early decisions implied the existence of no-strike commitments because of the parties' agreement to arbitrate disputes under the contract.<sup>16</sup> Such implied no-

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11. For a discussion of the no-strike clause and arbitration, see ELKOURI & ELKOURI *supra* note 3, at 6, 46.

12. See *infra* notes 16-49 and accompanying text.

13. ELKOURI & ELKOURI, *supra* note 3, at 6-7.

14. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 466 L.R.R.M. (BNA) 2416, 2418 (1960).

15. ELKOURI & ELKOURI, *supra* note 3, at 254.

16. See, e.g., *Waterfront Employees Ass'n.*, 4 L.R.R.M. (BNA) 1117, 1117-18 (Mar.

strike clauses were given relatively narrow scope outside situations in which there was a direct dispute between an employer and its employees over the interpretation of an existing collective bargaining agreement.<sup>17</sup>

A test of "legitimacy" developed to determine whether implied no-strike clauses prohibited employees covered by one collective bargaining agreement from observing the picket lines of employees covered by another bargaining agreement, a practice known as sympathetic or sympathy strikes.<sup>18</sup> As articulated by Arbitrator Kerr in *Waterfront Employers' Association of Pacific Coast*,<sup>19</sup> legitimate picket lines are those which have "grown out of a good faith labor dispute . . . each case must be considered on its own merits and must be judged in the light of surrounding facts and circumstances individual to the case."<sup>20</sup>

From this case-by-case analysis, several types of "illegitimate" picket lines were identified, including "hot cargo" disputes,<sup>21</sup> jurisdictional disputes,<sup>22</sup> demonstration picket lines,<sup>23</sup> and collusive picket lines.<sup>24</sup> Hot cargo disputes, found mainly in longshoremen operations, have been defined as "an effort to exert the pressure of obstructing loading and unloading of vessels on the employing stevedors and ship owners, for the purpose of assisting other crafts or unions in obtaining what they seek from other employers."<sup>25</sup> In such cases, the arbitrators felt it unreasonable and not in the interest of labor or of the employers<sup>26</sup> to disrupt the labor harmony between an employer and its em-

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2, 1939) (Morse, Arb.); *Waterfront Employers' Ass'n. of Pacific Coast*, 8 Lab. Arb. (BNA) 273, 277 (Aug. 12, 1947) (Kerr, Arb.).

17. See O. FAIRWEATHER, *PRACTICE AND PROCEDURE IN LABOR ARBITRATION* 62 (2d ed. 1983).

18. See FAIRWEATHER, *supra* note 17, at 547-49.

19. 8 Lab. Arb. (BNA) 273 (Aug. 12, 1947) (Kerr, Arb.).

20. *Id.* at 274.

21. *Waterfront Employers' Ass'n. of San Francisco*, 5 L.R.R.M. (BNA) 1177 (Aug. 31, 1939) (Morse, Arb.); *Waterfront Employers' Ass'n. of Pacific Coast*, 8 Lab. Arb. (BNA) at 274.

22. *Waterfront Employers' Ass'n. of Pacific Coast*, 8 Lab. Arb. (BNA) at 275-76.

23. *Id.* at 274; *John R. Evans & Co.*, 6 Lab. Arb. (BNA) 414 (Jan. 14, 1947) (Levy, Arb.).

24. *Waterfront Employers' Ass'n. of Pacific Coast*, 8 Lab. Arb. (BNA) at 274-75; *But see Waterfront Employers' Ass'n. of Pacific Coast*, 9 Lab. Arb. (BNA) 5, 14-15 (Nov. 13, 1947) (Miller, Arb.) (amended 8 Lab. Arb. (BNA) 273, Arbitrator Kerr's definition of collusion based on the previous unreported *Encinal decision of Arbitrator Morse*).

25. *Waterfront Employers' Ass'n. of San Francisco*, 5 L.R.R.M. (BNA) 1177, 1177 (Aug. 31, 1939) (Morse, Arb.).

26. *Waterfront Employers' Ass'n. of Pacific Coast*, 8 Lab. Arb. (BNA) at 275-76.

ployees because of a dispute which involved neither of these parties.<sup>27</sup>

A jurisdictional dispute involves two unions arguing over which of them should represent a given group of employees. This was declared to be an atypical labor dispute since it involved a disagreement between two labor factions rather than a disagreement between labor and employer.<sup>28</sup> In such cases equity demanded that an employer not be penalized for a dispute to which it was not a party.<sup>29</sup>

An example of demonstration picket lines can be found in *John R. Evans & Co.*,<sup>30</sup> in which a picket line was established by an industrial union to protest alleged police brutality encountered on the picket lines of another labor organization.<sup>31</sup> Arbitrator Levy determined this picket line to be illegitimate because it did not result from a dispute between labor and any person or persons acting as an employer, but from an attempt to protest the non-labor activities of another organization.<sup>32</sup>

Of particular interest in *John R. Evans & Co.* is the fact that the contract contained a very broad no-strike clause separate from the grievance procedure of the contract.

The "no-strike clause" contained in the present contract is one of the broadest which the Chairman has seen. It is also quite plainly and specifically worded. It would seem inescapable that a protest walkout, although not involving any dispute with the immediate employer and having for its purpose participation in a community demonstration upon what the employees believe to be a vital question, comes within the purview of a contractual clause providing that "there shall be no strikes, stoppages of work or slowdowns of any kind whatsoever."<sup>33</sup>

Faced with one of the first reported decisions interpreting express no-strike language, Arbitrator Levy relied not only on the illegitimacy of the picket line, but also on the plain meaning of the broad words of the no-strike clause to prohibit concerted refusals to work, even if the refusals did not result from disputes between the immediate employer and its employees.<sup>34</sup>

The last of the early illegitimate or collusive picket lines involved

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27. *Id.* at 274.

28. *Id.*

29. *Id.*

30. 6 Lab. Arb. (BNA) 414 (Jan. 14, 1947) (Levy, Arb.).

31. *Id.* at 419.

32. *Id.* at 418-19.

33. *Id.* at 418.

34. *Id.*

situations in which two unions, one a party to an agreement and the other not a party to the agreement, would decide that the nonparty union would strike and establish picket lines which would then make it possible for the party union to engage in a work stoppage by honoring the nonparty union's picket line.<sup>35</sup> The definition of a collusive picket line was further clarified in a later arbitration decision amending Arbitrator Kerr's award. In this subsequent *Waterfront Employers' Association of Pacific Coast*<sup>36</sup> case, Arbitrator Miller stated:

[W]hile granting the longshoremen a measure of freedom from the contractual restraint against work stoppages, to permit them to conform to traditional union principles in observing the legitimate picket lines of other unions, [the *Encinal* case] was carefully limited against possible abuse. It was never intended to sanction such conduct when picket lines are established as part of a collusive plan or strategy having as one of its objects either the securing of some specific gain or advantage to the longshoremen themselves, whether individually or collectively as a union organization, or the use of the economic force of the longshoremen as an aggressive weapon on behalf of some affiliated union or group.<sup>37</sup>

According to Arbitrator Miller, a union under an implied no-strike provision was free to observe picket lines in order to protect the general interest common to all union members to refrain from aiding an employer to defeat the strike efforts of its employees, but not to serve specific self-interests of the observing unions.<sup>38</sup>

Taken as a whole, the arbitrators in these early decisions were willing to imply no-strike prohibitions in cases where parties had agreed to settle disputes by arbitration. The scope of such implied provisions was limited, however, except for a few special circumstances, to disputes between the primary employer and its employees.<sup>39</sup> When the contract contained separate express no-strike language, such language was interpreted rather broadly based on the plain meaning of the language used.<sup>40</sup>

The use of plain language to interpret express, general no-strike provisions is further demonstrated in *New England Master Textile En-*

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35. *Waterfront Employers' Ass'n. of Pacific Coast*, 8 Lab. Arb. (BNA) at 274-75.

36. 9 Lab. Arb. (BNA) 5 (Nov. 13, 1947) (Miller, Arb.).

37. *Id.* at 14.

38. *Id.* at 15.

39. See, e.g., *Waterfront Employers' Ass'n. of San Francisco*, 5 L.R.R.M. (BNA) (Aug. 31, 1939) (Morse, Arb.); *Waterfront Employers' Ass'n. of Pacific Coast*, 9 Lab. Arb. (BNA) at 5.

40. *John R. Evans & Co.*, 6 Lab. Arb. (BNA) at 418.

*gravers Guild*,<sup>41</sup> in which Arbitrator Wallen accepted the company's position that no-strike language, which read "[t]here shall be no strikes, stoppages of work or slowdowns by the employees nor any lockouts by the Employers during the life of this agreement," specifically prohibited sympathetic work stoppages.<sup>42</sup> In a short opinion the arbitrator stated: "The contract between the Guild and the United Textile Workers forbids stoppages of work during its life. . . . In the arbitrator's view, neither fairness nor logic supports the Union's claim. . . ." <sup>43</sup> Looking at nothing but the contract language itself, then, Arbitrator Wallen had no difficulty in deciding that the union sympathy strike violated the contract's general no-strike clause.

Later decisions, however, provided for an exception to this broad interpretation of express no-strike language. In *Pilot Freight Carriers, Inc.*,<sup>44</sup> the company claimed it could discipline sympathy strikers, whose actions violated the contract, regardless of the employees' reason for honoring the stranger union's picket line.<sup>45</sup> Arbitrator Maggs found the no-strike clause contained in the collective bargaining agreement to prohibit employees from honoring picket lines established by other unions but he also found that the employer was not allowed to discipline employees who honored such picket lines if the employees were motivated by reasonable fear of violence in crossing the line.<sup>46</sup> He further concluded, however, that in this particular case the employees had no reason to fear for their physical safety and, therefore, the company's discipline, though not its strict contract interpretation, was upheld.<sup>47</sup>

More recent arbitration decisions tend to follow the general rule that no-strike provisions that are a part of or closely related to the grievance procedure of the contract are similar to implied no-strike clauses and are interpreted narrowly to proscribe only work stoppages that arise out of disputes between the primary employer and its employees.<sup>48</sup> Where, however, the no-strike provisions are separate from the grievance and arbitration provisions of the contract, the no-strike prohibitions are interpreted broadly based on the plain language of the

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41. 9 Lab. Arb. (BNA) 199 (Sept. 22, 1947) (Wallen, Arb.).

42. *Id.* at 199.

43. *Id.* at 201.

44. 22 Lab. Arb. (BNA) 761 (June 21, 1954) (Maggs, Arb.).

45. *Id.* at 762.

46. *Id.* at 765.

47. *Id.*

48. See, e.g., *Sears, Roebuck & Co.*, 35 Lab. Arb. (BNA) 757, 778-79 (Dec. 31, 1960) (Miller, Arb.).



contract.<sup>49</sup>

### III. THE BOARD'S TREATMENT OF NO-STRIKE CLAUSES

The NLRB provides a second line of authority for the interpretation of express no-strike language. The results, if not the actual analysis, of the Board's early decisions were not substantially different from those arrived at by arbitrators. Implied no-strike provisions were construed narrowly and employees were not allowed to honor "illegitimate" picket lines.<sup>50</sup> The Board, however, failed to act on its initial opportunity to rule on whether sympathy strikes violated express no-strike provisions and decided the case on other grounds.<sup>51</sup> The Board also identified a new type of strike, the unfair labor practice strike, which it decided was not prohibited by general no-strike obligations.<sup>52</sup> The Supreme Court refused to enforce the Board's sympathy strike treatment, finding that the broad no-strike provision in question prohibited sympathy strikes, but it accepted the Board's special treatment of unfair labor practice strikes.<sup>53</sup> The Board followed the Court's lead regarding sympathy strikes for several years before it radically changed its position on express no-strike language based on another doctrine developed by the Court in cases dealing with implied no-strike provisions.<sup>54</sup>

In *Rockaway News Supply Co.*,<sup>55</sup> the Board was asked to interpret broad no-strike provisions in a collective bargaining agreement. The Board did not, however, deal with the contractual no-strike language directly, but rather it concluded that the entire contract was void due to the overbreadth of its union security clause.<sup>56</sup> This case becomes important, not because of the Board's decision, but because both the

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49. National Homes Mfg. Co., 72 Lab. Arb. (BNA) 1127, 1129-30 (June 19, 1979) (Goodstein, Arb.); Westinghouse Transport Leasing Corp., 69 Lab. Arb. (BNA) 1210, 1213 (Dec. 7, 1977) (Sergent, Arb.).

50. *Rockaway News Supply Co.*, 95 N.L.R.B. 336, 337, 28 L.R.R.M. (BNA) 1314, 1315 (1951), *enforcement denied on other grounds*, 197 F.2d 111, 30 L.R.R.M. (BNA) 2119 (2d Cir. 1952), *aff'd*, 345 U.S. 71, 31 L.R.R.M. (BNA) 2432 (1953).

51. *Id.*

52. *Id.*

53. *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 80-81, 31 L.R.R.M. (BNA) 2432, 2436 (1953).

54. *See infra* notes 55-99 and accompanying text.

55. 95 N.L.R.B. 336, 28 L.R.R.M. (BNA) 1314 (1951), *enforcement denied on other grounds*, 197 F.2d 111, 30 L.R.R.M. (BNA) 2119 (2d Cir. 1952), *aff'd*, 345 U.S. 71, 31 L.R.R.M. (BNA) 2432 (1953).

56. *Id.* at 337, 28 L.R.R.M. (BNA) at 1315.

court of appeals<sup>57</sup> and the United States Supreme Court<sup>58</sup> found that the contract as a whole was not void and that the key to the question of whether the company had committed an unfair labor practice was the interpretation of the contract's broad no-strike provision. The United States Supreme Court determined that the no-strike language contained in the *Rockaway News* collective bargaining agreement covered not only direct economic strikes against the employer but also sympathetic strikes in support of the picket lines of another striking union.<sup>59</sup>

At the same time the Court was deciding that the broad no-strike language of *Rockaway News* prohibited sympathy strikes, the Board was determining whether strikes in protest over an employer's unfair labor practices were similarly prohibited by broad no-strike language. In *Mastro Plastics Corp.*,<sup>60</sup> rendered four days after the Court's holding in *Rockaway News*, the NLRB determined that strikes called in protest of employer unfair labor practices were not a breach of contractual no-strike clauses and constituted protected, concerted activity on the part of employees.<sup>61</sup>

The strike in *Mastro Plastics Corp.* was precipitated by the company's alleged discriminatory discharge of an employee because of his organizational activities in support of the incumbent union, which the employer was attempting to replace by means of coercive and threatening actions.<sup>62</sup> The Board determined that strikes in protest of such serious violations of the Act by the company were not contemplated by the employees when they agreed to the no-strike language in the contract and, therefore, did not constitute a contractual violation.<sup>63</sup> The Board's decision was later affirmed by both the court of appeals<sup>64</sup> and the Supreme Court.<sup>65</sup>

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57. NLRB v. Rockaway News Supply Co., 197 F.2d 111, 112-13, 30 L.R.R.M. (BNA) 2119, 2120 (2d Cir. 1952).

58. NLRB v. Rockaway News Supply Co., 345 U.S. 71, 76-79, 31 L.R.R.M. (BNA) 2432, 2434-36 (1953).

59. *Id.* at 79-80, 31 L.R.R.M. (BNA) at 2436. The Court's decision will be more fully analyzed in THE COURT'S INTERPRETATION OF NO-STRIKE PROVISIONS, *infra* notes 100-171 and accompanying text.

60. 103 N.L.R.B. 511, 31 L.R.R.M. (BNA) 1494 (1953), *aff'd*, 214 F.2d 462, 34 L.R.R.M. (BNA) 2484 (2d Cir. 1954), *aff'd*, 350 U.S. 270, 37 L.R.R.M. (BNA) 2587 (1956).

61. *Id.* at 515, 31 L.R.R.M. (BNA) at 1495-96.

62. *Id.* at 512, 31 L.R.R.M. (BNA) at 1494.

63. *Id.* at 514-15, 31 L.R.R.M. (BNA) at 1495.

64. *Mastro Plastics Corp. v. NLRB*, 214 F.2d 462, 34 L.R.R.M. (BNA) 2484 (2d Cir. 1954).

65. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 37 L.R.R.M. (BNA) 2587 (1956).

For years after the decisions in *Rockaway News* and *Mastro Plastics Corp.*, the Board used the Court's *Rockaway News* analysis consistently to hold that broad no-strike language included a prohibition of sympathy strike activities.<sup>66</sup> As late as 1969 the Board, in *Local 12419, International Union of District 50, United Mineworkers of America (National Grinding Wheel Co.)*,<sup>67</sup> held that a clause forbidding the union to cause or permit a strike by its members prohibited a sympathy strike.<sup>68</sup>

In *National Grinding Wheel*, the company and the Mineworker's union had separate contracts covering two different locals which represented the company's employees.<sup>69</sup> The first local, whose contract covered the company's production and maintenance employees, had agreed to a no-strike clause which read: "During the term of this agreement, the Company will not conduct a lockout at its plant, and the Union or Local Union will not cause or permit its members to cause any strike or slowdown, total or partial, of work at the Company's plant."<sup>70</sup>

The sister local, consisting of the company's clerical and office workers, instituted a primary economic strike as a result of stalled contract negotiations with the company.<sup>71</sup> The majority of workers in the production and maintenance local honored the clericals' picket line, refusing to report to work.<sup>72</sup> Sixteen of the production and maintenance workers, however, crossed the picket line and worked during the clerical strike.<sup>73</sup> The union instituted charges under its internal disciplinary procedures, resulting in fines against these sixteen individuals.<sup>74</sup> One of the individuals filed a charge with the Board against the union, claiming that she had crossed the picket line because the no-strike provisions of the contract prohibited her from engaging in a sympathy strike.<sup>75</sup> The Board's general counsel issued a complaint against the union, alleging a violation of section 8(b)(1)(a) of the Act.<sup>76</sup> The Board found the union to have violated the Act and in so

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66. See C. MORRIS, *THE DEVELOPING LABOR LAW* 1026-27 (2d ed. 1983).

67. 176 N.L.R.B. 628, 71 L.R.R.M. (BNA) 1311 (1969).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 628-29, 71 L.R.R.M. (BNA) at 1311.

73. *Id.* at 629, 71 L.R.R.M. (BNA) at 1311.

74. *Id.*

75. *Id.*

76. 29 U.S.C. § 158(b)(1)(a) (1982).

doing adopted the following statements of the administrative law judge:

Whether they did so in furtherance of their own demands or of a cause of the sister-local, their work stoppage suspended the continuity of their operations in either instance. This stoppage of work on their part was in the face of the language forbidding Respondent to "cause" it or even "permit" it. . . . *The basic point is that this no-strike clause meant what it said and governed the rights and obligations of the union and the employees covered by [it]. . . .* The conclusion is that the work stoppage of the members, and Respondent's adoption of it, was no less a breach of the no-strike clause, though done in deference to the sister-local's picket line and in furtherance of the latter's cause, than it would have been had the conduct been in furtherance of a direct demand of Respondent or its members.<sup>77</sup>

The administrative law judge, whose opinion was adopted by the NLRB, cited the Supreme Court in *Rockaway News* to find, on the basis of the plain meaning of the contractual no-strike clause, that the union sympathy strike violated its no-strike promise.<sup>78</sup>

By 1969, then, the Board had identified three specific types of strike activity—economic, sympathy, and unfair labor practice—and determined their respective relationships to broad contractual no-strike language. The primary strikes were, of course, precluded by no-strike language, as apparently were sympathy strikes.<sup>79</sup> Unfair labor practice strikes, however, were an exceptional situation and the right to engage in such strikes could be waived only if it was shown that employees actually intended to execute such a waiver.<sup>80</sup> These positions, while somewhat distorting the plain meaning of the language of broad no-strike clauses, are reasonable and consistent with the purposes of the Act.<sup>81</sup> These positions are also consistent with arbitral treatment of the subject.<sup>82</sup> During the 1960s, however, a line of court cases defining exceptions to the anti-injunction provisions of the Nor-

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77. *National Grinding Wheel Co.*, 176 N.L.R.B. at 629-30, 71 L.R.R.M. (BNA) at 1312-13 (emphasis added).

78. *Id.* at 630, 71 L.R.R.M. (BNA) at 1313.

79. *Id.*; *Redwing Carriers*, 137 N.L.R.B. 1545, 1546 n.5, 50 L.R.R.M. (BNA), 1440-41 n.5 (1962), *enforced sub nom*, *Teamsters, Local 79 v. NLRB* 325 F.2d 1011, 54 L.R.R.M. (BNA) 2707 (1963), *cert. denied*, 377 U.S. 905, 55 L.R.R.M. (BNA) 3023 (1954); *Rockaway News Supply Co.*, 95 N.L.R.B. at 337, 28 L.R.R.M. (BNA) at 1315.

80. *See supra* note 63 and accompanying text.

81. *See supra* note 3 and accompanying text.

82. *See supra* notes 11-49 and accompanying text.

ris-LaGuardia Act<sup>83</sup> developed. These cases would provide the Board with a new doctrine for interpreting no-strike language and would decidedly alter its position with regard to the effect of no-strike language in sympathy strike situations.

In 1962, the Supreme Court, in *Local 714, Teamsters v. Lucas Flour Co.*,<sup>84</sup> affirmed an award of damages resulting from an illegal strike, holding that the presence of an arbitration clause in a collective bargaining agreement creates an implied prohibition of strikes over matters subject to that clause, even in the absence of explicit no-strike language.<sup>85</sup> Such an implied no-strike obligation was necessary, according to the Court, "to promote the arbitral process as a substitute for economic warfare."<sup>86</sup> This doctrine, which was to become known as the "coterminous application doctrine,"<sup>87</sup> was the basis of the Court's decision to allow injunctive relief to stop strikes over matters which the parties were contractually bound to arbitrate, even if the contract did not contain an express no-strike clause.<sup>88</sup> In *Keller-Crescent Co.*<sup>89</sup> and *Gary-Hobart Water Corp.*,<sup>90</sup> the Board seized upon this doctrine and began to apply it to sympathy strike situations in which the no-strike provisions of the contract in question were a part of, or closely intertwined with, the arbitration provisions of the contract.

By 1978, however, the Board was ready to expand its application

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83. 29 U.S.C. §§ 101-115 (1982).

84. 369 U.S. 95, 49 L.R.R.M. (BNA) 2717 (1962).

85. *Id.* at 105, 49 L.R.R.M. (BNA) at 2721.

86. *Id.* at 105, 49 L.R.R.M. (BNA) at 2722. *See also* *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-81, 46 L.R.R.M. (BNA) 2416, 2418-19 (1960) (demonstrating the judicial approval of the arbitration process). Interestingly, in *Warrior & Gulf*, Justice Douglas indicated, "when, however, an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes." 363 U.S. at 583, 46 L.R.R.M. (BNA) at 2420. While admittedly dicta of the Court, this indicates a rather broad opinion of absolute no-strike clauses.

87. *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 382, 85 L.R.R.M. (BNA) 2049, 2055 (1974); *U.S. Steel Corp. v. NLRB*, 711 F.2d 772, 776, 113 L.R.R.M. (BNA) 3227, 3230 (7th Cir. 1983).

88. *Lucas Flour Co.*, 369 U.S. at 105, 49 L.R.R.M. (BNA) at 2721. For an analysis of the origins of the coterminous application doctrine, see generally *Ryder Truck Lines v. Teamsters Freight Local Union* 480, 727 F.2d 594, 115 L.R.R.M. (BNA) 2912 (6th Cir. 1984); *U.S. Steel Corp. v. NLRB*, 711 F.2d 772, 113 L.R.R.M. (BNA) 3227 (7th Cir. 1983). For further discussion of *Lucas Flour Co.* see *infra* notes 119-123 and accompanying text.

89. 217 N.L.R.B. 685, 687, 89 L.R.R.M. (BNA) 1201, 1202 (1975), *enforcement denied*, 538 F.2d 1291, 92 L.R.R.M. (BNA) 3591 (7th Cir. 1976).

90. 210 N.L.R.B. 742, 745, 86 L.R.R.M. (BNA) 1210, 1214 (1974), *enforced*, 511 F.2d 284, 88 L.R.R.M. (BNA) 2830 (7th Cir. 1975), *cert. denied*, 423 U.S. 925, 90 L.R.R.M. (BNA) 2921 (1975).

of the doctrine. In *International Union of Operating Engineers, Local 18 v. Davis-McKee, Inc.*,<sup>91</sup> the Board made a clean break from its position in *National Grinding Wheel*, stating "to the extent that *National Grinding Wheel* stood for the proposition that the right to engage in sympathy strikes is waived by a union's agreement to a broad no-strike clause, without more, it has been overruled, *sub silentio*, by *Keller-Crescent* and *Gary-Hobart*."<sup>92</sup> In *Davis-McKee, Inc.*, the Board was faced with (1) contractual language similar to *Gary-Hobart* in that the no-strike provisions were clearly intertwined with and a part of the contractual arbitration procedure,<sup>93</sup> and (2) facts virtually identical to *National Grinding Wheel* in that the union had fined members who had refused to participate in a sympathy strike.<sup>94</sup> As the concurring opinion of member Penello clearly indicates, the Board could have arrived at the same decision without overturning the holdings of *National Grinding Wheel*.<sup>95</sup> The majority, however, chose to apply the coterminous application doctrine to find that sympathy strikes would no longer be prohibited under any circumstances by general no-strike language.<sup>96</sup> It is at this point that the Board's position became inconsistent with that of the labor arbitrators who held that general no-strike language prohibited sympathy strikes.<sup>97</sup> Despite its lack of acceptance by several circuit courts,<sup>98</sup> the Board's position remained unchanged until 1985.<sup>99</sup>

#### IV. THE COURT'S INTERPRETATION OF NO-STRIKE PROVISIONS

The courts originally found that broad no-strike language prohibited sympathy strikes but did not prevent employees from striking in

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91. 238 N.L.R.B. 652, 99 L.R.R.M. (BNA) 1307 (1978).

92. *Id.* at 653-54, 99 L.R.R.M. (BNA) at 1309.

93. Compare the contractual clauses in *Davis-McKee, Inc.*, 238 N.L.R.B. at 658 n.36, 99 L.R.R.M. (BNA) at 1313 n.36 and *Gary-Hobart Water Corp.*, 210 N.L.R.B. at 742-43 n.4, 86 L.R.R.M. (BNA) at 1211 n.4.

94. *See supra* notes 67-76 and accompanying text.

95. *Davis-McKee, Inc.*, 238 N.L.R.B. at 658, 99 L.R.R.M. (BNA) at 1313 (Penello, member, concurring).

96. *Id.* at 653-54, 99 L.R.R.M. (BNA) 1308-09.

97. *See supra* notes 39-49 and accompanying text.

98. *See Ryder Truck Lines v. Teamsters Freight Local Union 480*, 727 F.2d 594, 599, 115 L.R.R.M. (BNA) 2912, 2916 (6th Cir. 1984); *U.S. Steel Corp. v. NLRB*, 711 F.2d 772, 777, 113 L.R.R.M. (BNA) 3227, 3230-31 (7th Cir. 1983); *Amcar Div., A.C.F. Indus. v. NLRB*, 641 F.2d 561, 566-67, 106 L.R.R.M. (BNA) 2518, 2522 (8th Cir. 1981); *NLRB v. Southern Calif. Edison Co.*, 646 F.2d 1352, 1364-65, 107 L.R.R.M. (BNA) 2667 (9th Cir. 1981); *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 457-58, 108 L.R.R.M. (BNA) 2817, 2818-19 (3d Cir. 1981).

99. *See infra* note 187 and accompanying text.

protest of unfair labor practices committed by the employer.<sup>100</sup> The courts also accepted the arbitral implication of no-strike obligations when the contract contained arbitration provisions but no express no-strike commitment.<sup>101</sup> Such implied obligations were, however, held to be "coterminous" with the scope of the contract's arbitration clause.<sup>102</sup> The courts found a similar limitation of no-strike clauses when employers sought injunctions against union strike activity.<sup>103</sup> Injunctions were allowed, notwithstanding the anti-injunction provisions of the Norris-LaGuardia Act,<sup>104</sup> when the underlying dispute was over an issue arbitrable under the provisions of the collective bargaining agreement.<sup>105</sup> The Board expanded these limited court holdings by applying the coterminous application doctrine to cases interpreting express no-strike provisions.<sup>106</sup> Such application has been enforced by the courts only in cases where the no-strike clause is a part of, or closely intertwined with, the contract's arbitration provisions.<sup>107</sup> The courts have, however, consistently required further evidence to show that broad no-strike language does not prohibit sympathy strikes.

The judicial history of the interpretation of no-strike clauses has developed into a consistent, if not entirely predictable, pattern. The leading authorities in this area are two United States Supreme Court cases, *NLRB v. Rockaway News Supply Co.*<sup>108</sup> and *Mastro Plastics Corp. v. NLRB.*<sup>109</sup> In *Rockaway News*, the Supreme Court affirmed the decision of the Second Circuit Court of Appeals in setting aside the Board's order to reinstate an employee discharged for refusing, in violation of the contract's no-strike provisions, to cross the picket line of another union.<sup>110</sup> The Board's finding was based on its conclusion that the collective bargaining agreement was void because of an overly broad union security clause.<sup>111</sup>

The Court found two problems with the Board's holding. First, while the inclusion of an illegal provision in the contract could possi-

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100. FAIRWEATHER, *supra* note 17, at 547.

101. MORRIS, *supra* note 66, at 900.

102. FAIRWEATHER, *supra* note 17, at 62-63.

103. *Id.* at 436, 543-49.

104. 29 U.S.C. §§ 101-115 (1976). *See supra* text accompanying note 83.

105. FAIRWEATHER, *supra* note 17 at 543-49.

106. *Id.* at 62-63.

107. *Id.*

108. 345 U.S. 71, 31 L.R.R.M. (BNA) 2432 (1953).

109. 350 U.S. 270, 37 L.R.R.M. (BNA) 2587 (1956).

110. 345 U.S. at 80-81, 31 L.R.R.M. (BNA) at 2436.

111. *Id.* at 76, 31 L.R.R.M. (BNA) at 2434.

bly justify the Board's attempt to void the contract as to future events, the Board could not completely ignore the contract in evaluating events which occurred prior to holding the contract void.<sup>112</sup> Second, the contract contained savings and separability clauses which provided that only the individual sections of the contract found to be illegal would be determined inoperative while other provisions would remain in full force and effect.<sup>113</sup>

Finding that the no-strike provisions of the contract remained viable notwithstanding the illegality of the union security clause, the Court then determined that the no-strike language prohibited the sympathy strike activities of the discharged employee and provided a defense to the unfair labor practice charges against the company.<sup>114</sup>

In *Mastro Plastics Corp.*, the Court decided, among other things, that a no-strike clause similar in breadth to the language of the no-strike clause in *Rockaway New* was not violated when employees struck in protest of the company's unfair labor practices.<sup>115</sup> The Court found the no-strike provisions of the contract to be

aimed at avoiding interruptions of production prompted by efforts to change existing economic relationships . . . .

To adopt petitioners' all-inclusive interpretation of the clause is quite a different matter. That interpretation would eliminate, for the whole year, the employees' right to strike even if petitioners, by coercion, ousted the employees' lawful bargaining representatives and, by threats of discharge, caused the employees to sign membership cards in a new union. Whatever may be said of the legality of such a waiver when explicitly stated, there is no adequate basis for implying its existence without a more compelling expression of it then appears in § 5 of this contract.<sup>116</sup>

The Court further determined that the contract must be read in light of the declared policy of the NLRA to balance a competitive business economy against the rights of labor to organize in an effort to better its conditions through the process of collective bargaining.<sup>117</sup> Based on this policy, the Court determined that waivers of employee rights to strike, such as contained in the no-strike provisions of the contract in question, could only contribute to the policies of the Act "provided the selection of the bargaining representative remains

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112. *Id.* at 76-77, 31 L.R.R.M. (BNA) at 2434-35.

113. *Id.* at 78-79, 31 L.R.R.M. (BNA) at 2436.

114. *Id.* at 81, 31 L.R.R.M. (BNA) at 2436.

115. 350 U.S. at 284, 37 L.R.R.M. (BNA) at 2593.

116. *Id.* at 282-83, 37 L.R.R.M. (BNA) at 2592.

117. *Id.* at 279, 37 L.R.R.M. (BNA) at 2591.



free.”<sup>118</sup> Allowing the company to engage in unfair labor practices which prevented the free selection of the employees’ bargaining representative without allowing employees the right to engage in a retaliatory strike would present a degree of imbalance which the Act did not anticipate. For these reasons, the Court would not imply a waiver of the employees’ right to strike in protest of the employer’s unfair labor practice.<sup>119</sup>

*Rockaway News* and *Mastro Plastics Corp.* remain the only Supreme Court decisions in which the Court has actually interpreted the scope of broad no-strike language. There is, however, another line of cases which has dramatically impacted on the interpretation of express no-strike language. In 1962 the Court decided *Local 174, Teamsters v. Lucas Flour Co.*,<sup>120</sup> a case in which the Court was asked to determine whether a strike called by the union violated the collective bargaining agreement, notwithstanding the absence of a no-strike clause.<sup>121</sup> The strike in *Lucas Flour* was called to protest the company’s discharge of an employee because of unsatisfactory work.<sup>122</sup> The collective bargaining agreement between the company and the employer did not contain an express no-strike clause, but did include an agreement to submit to binding arbitration “any difference as to the true interpretation of this agreement.”<sup>123</sup> The Court held that the duty to submit contractual disputes to final and binding arbitration implied a no-strike agreement covering issues to be decided by the contractual arbitration process.<sup>124</sup>

The Court further defined the rule of *Lucas Flour* in *Gateway Coal Co. v. United Mineworkers of America*.<sup>125</sup> Here again the Court was faced with a contract containing an agreement to submit contract disputes to binding arbitration, but not an express no-strike agreement.<sup>126</sup> The Court, relying on its previous decision in *Lucas Flour*, implied a no-strike obligation resulting from an agreement to arbitrate contractual disputes.<sup>127</sup> In limiting this implied obligation the Court stated that, where there is an arbitration agreement and no express negation of an implied no-strike obligation, “the agreement to arbi-

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118. *Id.* at 280, 37 L.R.R.M. (BNA) at 2591.

119. *Id.* at 284, 37 L.R.R.M. (BNA) at 2593.

120. 369 U.S. 95, 49 L.R.R.M. (BNA) 2717 (1962).

121. *Id.* at 106, 49 L.R.R.M. (BNA) at 2722.

122. *Id.* at 97, 49 L.R.R.M. (BNA) at 2718.

123. *Id.* at 96, 49 L.R.R.M. (BNA) at 2718.

124. *Id.* at 105, 49 L.R.R.M. (BNA) at 2721.

125. 414 U.S. 368, 85 L.R.R.M. (BNA) 2049 (1974).

126. *Id.* at 381-82, 85 L.R.R.M. (BNA) at 2054.

127. *Id.* at 382, 85 L.R.R.M. (BNA) at 2055.

trate and the duty not to strike should be construed as having coterminous application."<sup>128</sup> The Court also identified a limited exception to the implied no-strike obligation in those cases in which the strike resulted from a good faith fear of abnormally dangerous conditions in the workplace.<sup>129</sup>

The final cog in developing an understanding of recent judicial interpretations of express no-strike provisions is derived from the Supreme Court's decisions in *Boys Markets, Inc. v. Retail Clerks, Local 770*,<sup>130</sup> *Buffalo Forge Co. v. Steelworkers*,<sup>131</sup> and *Jacksonville Bulk Terminals v. ILA*.<sup>132</sup> In *Boys Markets*, the Court reexamined its decision in *Sinclair Refining Co. v. Atkinson*,<sup>133</sup> finding that the anti-injunction provisions of the Norris-LaGuardia Act<sup>134</sup> did not preclude the courts from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement.<sup>135</sup> The Court, however, indicated that its holding was a narrow one and that to properly grant injunctive relief against strike activity a court must first hold that the strike "is over a grievance which both parties are contractually bound to arbitrate . . . and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike."<sup>136</sup> The Court also added that the employer must prove that an injunction would be warranted under the following ordinary principles of equity: contract breaches are occurring and will continue to occur, or have been threatened and will be committed; that such breaches have or will cause irreparable injury to the employer; and that the employer will suffer more injury if the injunction is denied than the union will suffer through its granting.<sup>137</sup>

The limitations of the *Boys Markets* exception are shown by the Court's subsequent decisions in *Buffalo Forge Co. v. Steelworkers*<sup>138</sup> and *Jacksonville Bulk Terminals v. ILA*.<sup>139</sup> In *Buffalo Forge*, the Court indicated that the *Boys Markets* exception does not apply in

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128. *Id.* at 385-86, 85 L.R.R.M. (BNA) at 2056.

129. *Id.* at 381-82, 85 L.R.R.M. (BNA) at 2054-55.

130. 398 U.S. 235, 74 L.R.R.M. (BNA) 2257 (1970).

131. 428 U.S. 397, 92 L.R.R.M. (BNA) 3032 (1976).

132. 457 U.S. 702, 92 L.R.R.M. (BNA) 2665 (1982).

133. 370 U.S. 195, 85 L.R.R.M. (BNA) 2420 (1962).

134. 29 U.S.C. §§ 101-115 (1976).

135. *Boys Market*, 398 U.S. at 253, 74 L.R.R.M. (BNA) at 2264.

136. 398 U.S. at 254, 74 L.R.R.M. (BNA) at 2264 (quoting *Sinclair Refining Co. v. Atkinson*, 37 U.S. 195, 228, 50 L.R.R.M. (BNA) 2420, 2433 (1962) (Brennan, J., dissenting)).

137. *Id.* at 254, 74 L.R.R.M. (BNA) at 2264.

138. 428 U.S. 397, 92 L.R.R.M. (BNA) 3032 (1976).

139. 457 U.S. 702, 110 L.R.R.M. (BNA) 2665 (1982).

cases of sympathy strikes because the underlying dispute between the union and the employer is not subject to the arbitration provisions of the collective bargaining agreement.<sup>140</sup> The Court reasoned that the real issue underlying the sympathy strike was the union's desire to support another union's cause, not the union's contention that the employer had violated some provision in its collective bargaining agreement.<sup>141</sup> Since the reason for the strike was a dispute between the employer and union "B," the dispute could not be solved by arbitration between the employer and union "A" and, therefore, an injunction was not necessary to protect the arbitral process.<sup>142</sup>

In *Jacksonville Bulk Terminals*, the Court applied the same rationale to prohibit the issuance of an injunction to stop a strike called as a political protest to the Soviet Union's invasion of Afghanistan.<sup>143</sup> Since the dispute underlying the strike was not an issue between the union and the employer, and therefore not arbitrable under the contract, no injunction to stop the strike could be granted.<sup>144</sup>

In both *Buffalo Forge* and *Jacksonville Bulk Terminals*, the collective bargaining agreements contained express no-strike clauses.<sup>145</sup> The Court indicated that whether a union's actions violated such clauses was an arbitrable question.<sup>146</sup> Subsequent to an arbitration decision finding the union's activities to be a contract violation, a court

140. 428 U.S. at 407-08, 92 L.R.R.M. (BNA) at 3036.

141. *Id.* at 407, 92 L.R.R.M. (BNA) at 3036.

142. *Id.* at 410, 92 L.R.R.M. (BNA) at 3037.

143. 457 U.S. at 704-05, 110 L.R.R.M. (BNA) at 2665-66.

144. 457 U.S. at 721-22, 110 L.R.R.M. (BNA) at 2672-73.

145. The *Buffalo Forge* no-strike clause reads:

There shall be no strikes, work stoppages or interruption or impeding of work. No Officers or representatives of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activity. The Union recognizes its possible liabilities for violation of this provision and will use its influence to see that work stoppages are prevented. Unsuccessful efforts by Union officers or Union representatives to prevent and terminate conduct prohibited by this paragraph, will not be construed as "aid" or "condonation" of such conduct and shall not result in any disciplinary actions against the Officers, committeemen or stewards involved.

428 U.S. at 398 n.1, 92 L.R.R.M. (BNA) at 3033 n.1. The *Jacksonville* no-strike clause reads:

During the term of this Agreement: . . . the Union agrees there shall not be any strike of any kind or degree whatsoever, . . . for any cause whatsoever; such causes including but not limited to, unfair labor practices by the Employer or violation of this Agreement. The right of employees not to cross a bona fide picket line is recognized by the Employer . . . .

457 U.S. at 706, 110 L.R.R.M. (BNA) at 2666.

146. *Jackson Bulk Terminals*, 457 U.S. at 710-11, 110 L.R.R.M. (BNA) at 2668; *Buffalo Forge*, 428 U.S. at 410, 92 L.R.R.M. (BNA) at 3047.

could grant injunctive relief to enforce the arbitrator's award, but since the arbitrator's award would not settle the underlying reason for the strike, an injunction was not necessary "to implement the strong Congressional preference for the private dispute settlement mechanisms agreed upon by the parties."<sup>147</sup>

In neither of these cases, however, was the Court forced to interpret the no-strike provisions of the contracts. In *Boys Markets*, the contract violation was conceded by the parties<sup>148</sup> and in *Buffalo Forge* and *Jacksonville Bulk Terminals*, the Court's holding obviated the necessity to interpret the applicable no-strike provisions.<sup>149</sup>

As previously indicated, the Board began to apply the coterminous application doctrine of *Lucas Flour* to interpret express no-strike obligations holding that, regardless of the circumstances, the no-strike pledge was no broader than the arbitration clause of the contract.<sup>150</sup> This left the circuit courts with the problem of evaluating the Board's broad application of the Supreme Court's doctrine.

In early decisions, it appeared that the courts might be accepting the Board's extension of the doctrine to cases involving express no-strike clauses. In *Gary-Hobart Water Corp. v. NLRB*,<sup>151</sup> the Seventh Circuit enforced an order of the Board which found that a union's sympathy strike activity did not violate the no-strike obligation contained in that contract, stating: "Absent an explicit expression of such [other] intention . . . the agreement to arbitrate and the duty not to strike should be construed as having coterminous application."<sup>152</sup> The court then cited the no-strike/arbitration clauses and reasoned: "This language indicates an intention to treat the no-strike clause as having application co-extensively with that of the arbitration clause. That application is to 'any and all disputes and controversies arising under or in connection with the terms of provisions' of the bargaining agreement."<sup>153</sup> From these statements, it is not clear whether the court was holding that no-strike clauses were limited by the scope of the arbitration clause as a matter of law or because of the specific language of the contract in question.

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147. *Buffalo Forge*, 428 U.S. at 407, 92 L.R.R.M. (BNA) at 3036.

148. 398 U.S. at 254, 74 L.R.R.M. (BNA) at 2264.

149. *Jackson Bulk Terminals*, 457 U.S. at 722-24, 110 L.R.R.M. (BNA) at 2672-73; *Buffalo Forge*, 428 U.S. at 409-12, 92 L.R.R.M. (BNA) at 3037-38.

150. See *supra* notes 91-97 and accompanying text.

151. 511 F.2d 284, 88 L.R.R.M. (BNA) 2830 (7th Cir. 1975), cert. denied, 423 U.S. 925, 90 L.R.R.M. (BNA) 2921 (1975).

152. *Id.* at 287, 88 L.R.R.M. (BNA) at 2832 (citing *Gateway Coal Co.*, 414 U.S. at 382, 85 L.R.R.M. (BNA) at 2055).

153. *Id.* at 288, 88 L.R.R.M. (BNA) at 2832.

The court, however, did not leave this question open for long. In *NLRB v. Keller-Crescent Co.*,<sup>154</sup> another case involving the legitimacy of a sympathy strike in light of an express no-strike provision in the contract, the court reviewed its opinions in *Gary-Hobart* and *Hyster Co. v. Independent Towing and Lifting Machine Association*,<sup>155</sup> and stated:

We should not, however, read the language of judicial opinions without regard to the factual circumstances of the litigation in which it appears or to the analytic framework in which the language is used . . . .

Further, the *Hyster* opinion focused on the lack of a clear and unmistakable waiver, summarizing the holding of *Gary-Hobart* as establishing such a waiver as an essential prerequisite to the denial of employees' right to honor a stranger union's picket line. Yet the *Gary Hobart* holding depends in turn upon the factual circumstances of that controversy . . . .<sup>156</sup>

The *Keller-Crescent* court then looked to the specific facts of that case and refused to enforce the Board's order, finding a waiver of the right to sympathize even though there was no specific language prohibiting such strikes in the contract.<sup>157</sup>

Completing the Seventh Circuit picture is its recent decision in *U.S. Steel Corp. v. NLRB*.<sup>158</sup> In *U.S. Steel*, the court specifically deals with, and rejects, the Board's broad application of the coterminous application doctrine:

In the Board's view . . . any waiver of the right to engage in a sympathy strike may be found only "in express contractual language or in unequivocal extrinsic evidence bearing upon ambiguous contractual language." The Board's position is predicated upon the doctrine of coterminous application. . . . The doctrine, originating in the construction of contracts that were devoid of any express no-strike pledge, . . . means nothing more than that a court will not

154. 538 F.2d 1291, 92 L.R.R.M. (BNA) 3591 (7th Cir. 1976).

155. 519 F.2d 89, 89 L.R.R.M. (BNA) 2885, *cert. denied*, 428 U.S. 910 (1976). The *Hyster* court refused to apply the *Boys Market* anti-injunction exception (*see supra* notes 133-149 and accompanying text) to allow injunctive relief from sympathy strike activity. The contract contained a broad no-strike clause but the court determined that the dispute was not over a grievance arbitrable under the contract, therefore, no injunction could be issued. *Id.* at 93, 89 L.R.R.M. (BNA) at 2887. The court further indicated that the no-strike language did not constitute a clear and unmistakable waiver of the right to engage in a sympathy strike, as required under *Gary-Hobart*. *Id.*

156. 538 F.2d at 1299, 92 L.R.R.M. (BNA) at 3597.

157. *Id.* at 1298, 92 L.R.R.M. (BNA) at 3596.

158. 711 F.2d 772, 113 L.R.R.M. (BNA) 3227 (7th Cir. 1983).

imply a no-strike obligation broader than the arbitration clause from which it emanates. . . . The doctrine of coterminous application may also be invoked with respect to contracts containing an express no-strike clause when injunctive relief is sought for a violation of the no-strike obligation . . . .

Of course, in cases when an arbitration clause and an express no-strike clause are closely interwoven, it may be reasonable to infer that the parties intended the two provisions to have the same scope . . . .<sup>159</sup>

The *U.S. Steel* court decided the broad no-strike language of that contract prohibited sympathy strikes, finding the Board's coterminous application doctrine inapplicable to the interpretation of explicit no-strike clauses which are "functionally independent from the arbitration clause of the contract."<sup>160</sup> The court also found that, since no injunctive relief was being sought, the limitations of *Boys Market* and *Buffalo Forge* did not apply.<sup>161</sup>

A similar analysis was made by the Sixth Circuit in its recent *en banc* decision in *Ryder Truck Lines v. Teamsters Freight Local Union 480*.<sup>162</sup> In *Ryder Truck*, the court was dealing with an action filed by the employer under section 301 of the Labor Management Relations Act<sup>163</sup> claiming breach of the contract's express no-strike commitment.<sup>164</sup> The district court awarded damages to the employer but was reversed by a panel of the circuit court, which held that the no-strike clause prohibited strikes only over arbitrable disputes.<sup>165</sup> In the circuit's *en banc* decision, it traced the history of the coterminous application doctrine, finding that it originated in decisions interpreting contracts which contained an arbitration clause but not an explicit no-strike obligation and had also been applied in the context of the *Boys Markets* exception to the Norris-LaGuardia Act's<sup>166</sup> anti-injunction provisions.<sup>167</sup>

The Sixth Circuit Court of Appeals examined the decisions of *Boys Markets*, *Buffalo Forge*, and *Jacksonville Bulk Terminals*, finding support for its opinion that the coterminous application doctrine "applies only to determining the permissibility of enjoining strikes and not

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159. *Id.* at 776-77, 113 L.R.R.M. (BNA) at 3230-31 (footnotes omitted).

160. *Id.* at 777-78, 113 L.R.R.M. (BNA) at 3231.

161. *Id.* at 777, 113 L.R.R.M. (BNA) at 3231.

162. 727 F.2d 594, 115 L.R.R.M. (BNA) 2912 (6th Cir. 1984) (*en banc*).

163. 29 U.S.C. § 185 (1976).

164. 727 F.2d at 600, 115 L.R.R.M. (BNA) at 2917.

165. *Id.* at 595, 115 L.R.R.M. (BNA) at 2912.

166. 29 U.S.C. §§ 101-115 (1982).

167. 727 F.2d at 598, 115 L.R.R.M. (BNA) at 2915.

to determining the scope of an explicit no-strike clause."<sup>168</sup> The key to the court's reasoning was the Supreme Court's conclusion in *Jacksonville Bulk Terminals* that the issue of whether the strike violated the explicit no-strike clause contained in the collective bargaining agreement was a separate question from whether the strike was enjoined.<sup>169</sup> Based on this reasoning, and citing the Seventh Circuit's *U.S. Steel* decision,<sup>170</sup> the Sixth Circuit held that the doctrine of coterminous application was inapplicable to cases requiring the interpretation of express no-strike provisions.<sup>171</sup>

## V. ANALYSIS AND CRITIQUE

The history of interpreting no-strike agreements started with little conflict or complexity. Early arbitral decisions presaged later Board and judicial opinions by implying no-strike agreements into contracts that contained binding arbitration clauses, using the plain meaning of the written language to interpret express no-strike provisions and refusing to sanction illegitimate union use of picket lines.<sup>172</sup>

The courts and the Board also seemed to have little trouble when initially faced with the question of how to interpret broad no-strike language. When such obligations were created by express contract language separate from the arbitration provisions of the collective bargaining agreement, the no-strike obligation was interpreted to prohibit all work stoppages except those in protest of the unlawful conduct of the employer.<sup>173</sup>

For twenty-one years after the Supreme Court's decision in *Rockaway News*, the NLRB interpreted broad no-strike language to include

168. *Id.* at 599, 115 L.R.R.M. (BNA) at 2916.

169. *Jacksonville Bulk Terminals*, 457 U.S. at 721-22, 110 L.R.R.M. (BNA) at 2672-73. The Sixth Circuit indicated that the Supreme Court's holding in *Jacksonville Bulk Terminals* was wholly inconsistent with the "contention that under the doctrine of coterminous interpretation an express no-strike clause does not prohibit a strike over a nonarbitrable dispute. The Court's holding does illustrate, however, that where there is an express no-strike clause, strikes are enjoined only if over an arbitrable matter." *Ryder Truck*, 727 F.2d at 598, 115 L.R.R.M. (BNA) at 2916.

170. *U.S. Steel Corp. v. NLRB*, 711 F.2d 772, 113 L.R.R.M. (BNA) 3227 (7th Cir. 1983).

171. 727 F.2d at 599, 115 L.R.R.M. (BNA) at 2916-17.

172. See *supra* notes 16-49 and accompanying text.

173. See, e.g., *Mastro Plastics Corp.*, 350 U.S. 270, 37 L.R.R.M. (BNA) 2587 (Supreme Court affirmed the enforcement of a Board order indicating that unfair labor practice strikes are not prohibited by general no-strike language); *Rockaway News Supply Co.*, 345 U.S. 71, 31 L.R.R.M. (BNA) 2432 (Supreme Court found a sympathy strike to be prohibited by broad no-strike language); *National Grinding Wheel Co.*, 176 N.L.R.B. 628, 71 L.R.R.M. 1311 (BNA) (Board found broad no-strike language to prohibit sympathy strikes).

a prohibition of sympathy strikes.<sup>174</sup> It was not until the mid-1970s<sup>175</sup> that the Board began to adopt a more restrictive interpretation of broad no-strike language, relying upon Supreme Court decisions in cases where the Court was dealing not with the interpretation of contractual provisions, but with (1) the scope of anti-injunction legislation<sup>176</sup> or (2) the situations in which an express no-strike obligation was not found in the contract, but a limited no-strike obligation was nonetheless implied by the Court as a result of the parties' agreement to settle contractual disputes through binding arbitration processes.<sup>177</sup>

At this point, the Board's interpretation seems to have gone astray. The coterminous application doctrine, relied upon by the Board in fashioning its recent interpretations of no-strike provisions, was developed by the Court to protect the arbitral process from the erosive effect of allowing unions to substitute the economic pressure of strikes for arbitration.<sup>178</sup> To allow unions the option of striking to enforce their contractual views would render any agreement to arbitrate disputes meaningless and, contrary to the stated policy of the NLRA, would increase industrial strife.<sup>179</sup>

In rejecting what the courts feel is an inappropriate use of the coterminous application doctrine by the Board, the circuits look to extrinsic factors to determine whether the union has, through the no-strike clause, clearly and unmistakably waived the employee's right to engage in a sympathy strike. The circuits consider such factors as whether the no-strike clause is functionally independent of the arbitration clause;<sup>180</sup> whether the no-strike clause is a *quid pro quo* not merely for the arbitration clause, but also to achieve uninterrupted plant operation;<sup>181</sup> the intent of the parties as expressed by the con-

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174. See *infra* note 188 and accompanying text.

175. See, e.g., *Keller-Crescent Co.*, 217 N.L.R.B. 685, 89 L.R.R.M. (BNA) 1201 (1975), *enforcement denied*, 538 F.2d 1291, 92 L.R.R.M. (BNA) 3591 (7th Cir. 1976); *Gary-Hobart Water Corp.*, 210 N.L.R.B. 742, 86 L.R.R.M. (BNA) 1210 (1974), *enforced*, 511 F.2d 284, 88 L.R.R.M. (BNA) 2830 (7th Cir. 1975), *cert. denied*, 423 U.S. 925, 90 L.R.R.M. (BNA) 2921 (1975).

176. See *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 92 L.R.R.M. (BNA) 3032 (1976); *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 74 L.R.R.M. (BNA) 2257 (1970).

177. See *Gateway Coal Co. v. United Mineworkers of Am.*, 414 U.S. 368, 85 L.R.R.M. (BNA) 2049 (1974); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 49 L.R.R.M. (BNA) 2717 (1962).

178. See *supra* notes 120-124 and accompanying text.

179. See *id.*

180. *U.S. Steel Corp. v. NLRB*, 711 F.2d 772, 777-78, 113 L.R.R.M. (BNA) 3227, 3231 (7th Cir. 1983).

181. *Id.* at 778-79, 113 L.R.R.M. (BNA) at 3232.



tract language read as a whole;<sup>182</sup> the law relating to the contract when the no-strike agreement was made;<sup>183</sup> the bargaining history of the clause;<sup>184</sup> opinions concerning the scope of the no-strike clause expressed by union officials;<sup>185</sup> and any other relevant conduct of the parties which shows their understanding of the contract.<sup>186</sup>

The court's factors represent logical questions to ask if one were trying to unravel a complex or ambiguous provision governing the conduct of parties to a contract. The question remains, however, why such inquiries are necessary to interpret language which provides that "the union shall not collectively, concertedly or individually engage in or participate, directly or indirectly, in any strike, slowdown, stoppage, or any other interference with or interruption of the work or operations of the employer during the term of this agreement."<sup>187</sup> This language is clear, uncomplex, and with no limitation prohibits job actions of any sort during the term of the agreement. This language is not only unambiguous, it is repeatedly unambiguous, expressly prohibiting *any* strike, slowdown, stoppage, or *any* other interference with the employer's operation. Not even the most tortuous distortion of the English language would define this provision to be anything but an all-inclusive agreement not to refuse to work, regardless of the circumstances.

The astute practitioner, however, will disregard his or her dictionary when confronted with the necessity of interpreting express no-strike provisions in a collective bargaining agreement. Depending upon the forum in which one is proceeding, the results of a case will vary markedly. While the NLRB is by far more likely than arbitrators or the courts to allow employees to strike even in the face of express no-strike language, it is important to note that the Board's posture with respect to such issues is prone to change.<sup>188</sup> Given this Board's

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182. *Ryder Truck Lines v. Teamsters Freight Local Union* 480, 727 F.2d 594, 600, 115 L.R.R.M. (BNA) 2912, 2917 (6th Cir. 1984).

183. *Id.*

184. *NLRB v. Southern Calif. Edison Co.*, 646 F.2d 1352, 1366, 107 L.R.R.M. (BNA) 2667, 2675 (9th Cir. 1981).

185. *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 459, 108 L.R.R.M. (BNA) 2817, 2819-20 (3d Cir. 1981).

186. *Amcar Div., A.C.F. Indus. v. NLRB*, 641 F.2d 561, 567, 106 L.R.R.M. (BNA) 2518, 2522 (8th Cir. 1981).

187. *See supra* note 8 and accompanying text.

188. It is beyond the scope of this article to discuss whether NLRB decisions are more appropriately characterized as "labor law" or "labor policy." It is, however, important to note that the current Board's posture with respect to the no-strike clause changed during the drafting of this article. *See Indianapolis Power & Light Co.*, 118 L.R.R.M. 1201 (BNA) (1951) in which the Board concludes:

willingness to reexamine and overturn previous Board positions,<sup>189</sup> it is not surprising that the coterminous application doctrine has been successfully narrowed.<sup>190</sup>

Even if we accept the situation that strikes in protest of an employer's unfair labor practices are not prohibited by such language, it is difficult to understand why sympathy strikes should likewise be excluded. In unfair labor practice cases the employer enters the dispute with "unclean hands" and is hardly, if you will excuse the expression, a sympathetic figure. In the case of sympathy strikes, however, the employer is not only innocent of any wrongdoing, the very nature of the activity indicates that the dispute causing the strike is not caused by any actions of the employer toward the striking employees. Further, allowing such strikes, especially in the face of express no-strike obligations, is in direct conflict with the stated policy of the Act to prevent industrial strife.<sup>191</sup> Finally, logic dictates that any organization which has given up the right to act on its own behalf must surely have given up the lesser right of acting on the behalf of others.

Unfortunately, this "logic" has not been the deciding factor in many recent interpretations of no-strike language. Despite the recent no-strike position assumed by the Board, the labor attorney should advise clients to seek an express statement banning not only *all* strikes, but *also* all sympathy strikes. Absent such language, only overwhelming extrinsic evidence can be relied upon to protect employers from needless economic hardship.

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that the broad no-strike clause bar employees from honoring stranger picket lines . . . . Although previous Board decisions have held that sympathy strikes lie outside the scope of broad no-strike clauses, we can discern no logical or practical basis for the proposition that the prohibition of all "strikes" does not include sympathy strikes merely because the word "sympathy" is not used.

*Id.* at 1201.

189. See, e.g., *United Technologies*, 269 N.L.R.B. No. 162, 115 L.R.R.M. (BNA) 1281 (1984) and *Milwaukee Spring Div. of Illinois Coil Spring Co.*, 268 N.L.R.B. No. 87, 115 L.R.R.M. (BNA) 1065 (1984).

190. See *supra* note 188 and accompanying text.

191. 29 U.S.C. § 151 (1982). See also policy statement of 29 U.S.C. § 141(b) (1982).