

1975

Threats to Health and Safety: Employee Self-Help under the NLRA

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Threats to Health and Safety: Employee Self-Help Under the NLRA

James B. Atleson*

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Workers have long served as unwitting "guinea pigs," providing useful toxicological data which helped to protect the public. The effects of most environmental pollutants, such as carbon monoxide, lead, mercury and also of most human carcinogens were first detected in workmen; the in-plant environment is a concentrated toxic microcosm of that outside. . . .

. . . The demand of labor to participate actively in protecting the health and safety of workers is basic and inalienable and cannot be sacrificed to economic interests.¹

The [industrial] safety movement has dwelt unduly upon carelessness of the worker and has stressed too little the importance of safe tools, safe machines, safe practices, and safe construction. Carelessness and ignorance on the part of the worker are undoubtedly responsible for many accidents but chiefly for

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1. The quotation is from a statement by 28 prominent scientists in medical and related fields in support of a chemical workers' strike against Shell Oil Company that primarily developed over a "strong" health and safety clause. The draft was obtained from the Oil, Chemical and Atomic Workers' Union (OCAW). The union's efforts were also supported by 10 environmental and public interest organizations. OCAW Union News, May 1973, at 5. See also BUREAU OF NATIONAL AFFAIRS, OSHA AND THE UNIONS: BARGAINING ON JOB SAFETY AND HEALTH—A BNA SPECIAL REPORT (1973) [hereinafter cited as BNA SPECIAL REPORT].

the accidents of a minor character. . . . The constant presence of human fault must not be permitted to obscure the fundamental causes which can only be reached by the reformation of wrong conditions.²

Occupational hazards in American workplaces have only recently become matters of general concern. Yet the problem is not new and its dimensions are staggering.³ It is estimated that with a population of 80 million American workers, more than 10 million work-related diseases and injuries occur each year, of which over two million are disabling and 14,000 fatal.⁴ Industrial disability results in annual losses of approximately 250 million working days—ten times more than the losses due to strikes—costing an estimated 1.5 million dollars in wages and resulting in an annual loss to the gross national product of eight billion dollars.⁵ The average worker annually sustains six days of absence and more than sixteen days of restricted activity due to some type of job disability; one out of eight workers suffers a job-related injury each year.⁶

Despite the myth of progress in this area, the situation has been steadily deteriorating. Although new state and federal safety legislation has been enacted, the injury frequency rate for

2. Chaney & Hanna, *Can Serious Industrial Accidents be Eliminated?*, MONTHLY LABOR REV., Aug. 1917, at 2, 15.

3. The human issues involved in health and safety disputes and the anguish faced by American workers are described in R. SCOTT, *MUSCLE AND BLOOD* (1974). The long history of corporate, federal, and state indifference to the dangers of working with asbestos is reported in P. BRODEUR, *EXPENDABLE AMERICANS* 3-106 (1974). The book illustrates the extent to which one company exceeded even the consensus standard for exposure to asbestos, long after the health hazard had been generally acknowledged. *Id.* at 75-106.

4. "In only four years time, as many people have died because of their employment as have been killed in almost a decade of American involvement in Vietnam." H.R. REP. No. 1291, 91st Cong., 2d Sess. 14 (1970). See H. & A. SOMERS, *WORKMEN'S COMPENSATION: PREVENTION, INSURANCE AND REHABILITATION OF OCCUPATIONAL DISABILITY* 6 (1954).

5. Statement of 28 scientists in support of Shell strike, *supra* note 1. See Schauer & Ryder, *New Approaches to Occupational Safety and Health Statistics*, MONTHLY LABOR REV., March 1972, at 14. The article, written by an economist and a research analyst in the Bureau of Labor Statistics, points out that current figures understate the extent of occupational injury and illness. See also H. HEINRICH, *INDUSTRIAL ACCIDENT PREVENTION* 50 (1950). George Schultz, when Secretary of Labor, estimated that five times as many man-days are lost as a result of injuries as from strikes and that the economic cost is several billion dollars each year. *Hearings on S. 2193 & S. 2788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st & 2d Sess., pt. 1, at 77 (1970).

6. OIL, CHEMICAL AND ATOMIC WORKERS' UNION, *CITIZENSHIP-LEGISLATIVE DEP'T*, INFO FOR A LIVABLE INDUSTRIAL ENVIRONMENT 10 (1974).

all industry rose from 11.8 per million man-hours in 1961 to 15.2 in 1970, an increase of 29 percent.⁷ The most commonly cited statistics, although horrifying enough, probably underestimate the real tragedy. A recent study commissioned by the Department of Labor found that at least 25 million serious injuries and deaths go uncounted each year and that the discrepancy in the Department's figures due to underreporting could be as high as eight to ten percent.⁸

These statistics, moreover, primarily reflect accidents and injuries, not occupational diseases that often develop from long-term exposure to dust, noise, heat, cold, or various toxic chemicals. The cases of disease that are counted are only those which are recognized—those resulting from such extremely dangerous or unhealthy conditions that the cause of the disease is obvious. Uncounted are the millions of workers who die prematurely of common illnesses, such as heart and lung disease or cancer, caused or aggravated by the environmental influences of the workplace.⁹

7. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, REPORT NO. 406, INJURY RATE BY INDUSTRY 1970 (1972). American rates are higher than rates in Western Europe; American workers sustain 14 times as many deaths and five times as many injuries per year as do Europeans. For general views on federal safety regulations, see Moore, *Federal Occupational Safety and Health Act of 1970*, 45 WIS. B. BULL. 46 (1972); Schmidt, *Selected Important Features and Background of the New Federal Coal Mine Health and Safety Act of 1969*, 3 NATURAL RESOURCES LAW. 241 (1970); Spann, *The New Occupational Safety and Health Act*, 58 A.B.A.J. 255 (1972).

8. J. GORDON, *et al.*, INDUSTRIAL SAFETY STATISTICS: A RE-EXAMINATION; A CRITICAL REPORT PREPARED FOR THE DEPARTMENT OF LABOR (1971). See also J. Gordon, An Evaluation of the National and Industrial Safety Statistics Program, June 30, 1970 (report submitted to the Office of Planning and Wage and Labor Standards Administration, U.S. Dep't of Labor).

9. J. STELLMAN & S. DAUM, WORK IS DANGEROUS TO YOUR HEALTH 4 (1973) [hereinafter cited as STELLMAN]. The National Institute of Occupational Safety and Health stated in a 1972 report that 390,000 cases of job-related illnesses and 100,000 deaths from industrial diseases occur each year. PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH 111 (CCH ed. 1972). See also J. PAGE & M. O'BRIEN, BITTER WAGES: RALPH NADER'S STUDY GROUP REPORT ON DISEASES AND INJURY ON THE JOB (1973) [hereinafter cited as NADER]; F. WALLICK, THE AMERICAN WORKER: AN ENDANGERED SPECIES (1972) [hereinafter cited as WALLICK].

A recently completed study of factory and farm employees in the Northwest suggests that the incidence of occupationally related disease may be far more prevalent than estimated. The NIOSH-sponsored study found that diseases suffered by three out of every ten workers examined appear to be work related, a result three times greater than previously estimated. A far more chilling finding resulted when researchers compared individual examinations and government records: ninety percent of the work-related health conditions had not been reported. N.Y. Times, May 12, 1975, at 24, col. 1.

The potential extent of some occupational diseases has recently become a matter of public interest. There is, for example, an increased concern about workers exposed to potential carcinogens. Scientists predict that 1100 of 6000 Western uranium miners will die of lung cancer in the next 20 years. Of the approximately 500,000 workers now or previously exposed to asbestos, it is estimated that 100,000 will die of lung cancer, 35,000 of abdominal or chest cancer, and 35,000 of asbestosis (scarring of the lungs). The fate of the others might remain unknown for 20 years.¹⁰

A team of Public Health Service industrial hygienists conducted a "walk-through survey" of workplaces in over 800 randomly selected industrial plants in the Chicago area, measuring exposure to potentially dangerous substances such as benzene, carbon monoxide, carbon tetrachloride, lead, and free silica.¹¹ A projection of the survey findings suggests that "more than one-third of the 1,048,851 in-plant workers [in the Chicago area were] exposed to potentially hazardous working conditions and that approximately 63 percent of the exposures [were] poorly controlled."¹² A former United States Surgeon General, Dr. William H. Stewart, reported on a broader study:

In 1966-67, we studied six metropolitan areas, [and] examined 1,700 industrial plants which employed 142,000 workers. Because of the precise nature of the analyses, it can be statistically related to 30,000 plants, covering 650,000 workers. The study found that 65 percent of the people were potentially exposed to toxic materials or harmful physical agents, such as severe noise or vibration.

Our investigators examined controls that were in effect to protect these workers from toxic agents and found that only 25 percent of the workers were protected adequately. The remaining workers were plainly unprotected or working in conditions which needed immediate attention.¹³

10. STELLMAN, *supra* note 9, at 173. The news media are continually furnishing revelations of new dangers. For example, recently reported studies confirmed that employees working with inorganic arsenic are six or seven times as likely as the general population to develop lung or lymphatic cancer. N.Y. Times, Aug. 30, 1974, at 13, col. 1. See Wald, *Foreword to STELLMAN, supra* note 9, at xiv.

11. See McClure, An Occupational Safety and Health Survey of an Urban Area, table III, in *Hearings on Occupational Safety and Health Before a Select Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess., pt. 2, at 1230 (1969).

12. *Id.* at 1228, quoted in NADER, *supra* note 9, at 7.

13. *Hearings on H.R. 14816 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 2d Sess. 106 (1968).

Although over 15,000 industrial chemicals and physical agents are in widespread use,¹⁴ existing consensus health and safety standards deal with only a few of them and tend to ignore their delayed toxic effects:

[T]he long-term effects of the vast majority of chemical and physical agents used in industry have not been proved, and practically no research is being conducted to find out what these effects are. There are only a handful of medical centers and universities that have even a single researcher in occupational health. The Department of Labor, which controls many of the funding agencies for occupational health research, stood at the bottom of the list in the 1972 budget allocation for funds, receiving only a tiny fraction of the total commitment. Consequently, the research that is done is dominated by industry, and the results almost inevitably imply that a few or no real problems really exist.¹⁵

Concern for the general environment should not ignore studies demonstrating that workers often breathe air many times worse than the air city dwellers face during pollution alerts.¹⁶ As Stewart Udall has noted:

Of all the environments inhabited by Americans, the places where 80 million of us work and spend half our waking hours are among the most lethal. The blue-collar employee, in particular, merits hazardous duty pay. He is surrounded by unsafe machines. Toxic substances often seep into his lungs and blood stream. He may die of job-induced cancer, metal poisoning, quick crushing or slow suffocation from lung disease.¹⁷

The industrial environment prior to the passage of the Occupational Safety and Health Act (OSHA) was controlled, if at all, by privately established consensus recommendations referred to as threshold limit values (TLVs). They are usually less than standards thought proper for the general population, but many workplaces ignore even these modest goals.¹⁸ Moreover, industrial hygiene research and standard-setting is substantially dominated by industry,¹⁹ and there is little objective investiga-

14. D. MALLINO, *OCCUPATIONAL SAFETY AND HEALTH* 25 (S. Werner ed. 1973) [hereinafter cited as MALLINO].

15. STELLMAN, *supra* note 9, at 6.

16. See WALLICK, *supra* note 9, at 12. Although the Department of Health, Education, and Welfare recommends a carbon monoxide concentration no greater than 10 to 15 parts per million—the point at which adverse health affects will appear in a normal population—a consensus standard for workplaces sets the standard at 50 parts per million. *Id.* at 14-15; STELLMAN, *supra* note 9, at 157.

17. Quoted in WALLICK, *supra* note 9, at 25.

18. See *id.* at 26-27, 133.

19. A number of sources document the incestuous relationships between private industrial health research institutes and industry. See, e.g., R. SCOTT, *supra* note 3, at 174-203. The literature suggests that at

tion into proper standards.²⁰ For the 3000 new chemicals that are introduced into industrial use every year, safety and health standards are developed for only about a hundred.²¹ The problem is complicated by the use of new energy sources and processes such as atomic energy, lasers, ultrasonics, and microwaves.²²

The effectiveness of the TLVs is further limited by the small number of inspectors available for their enforcement; voluntary compliance does not seem to be widespread. The absence of an established system for monitoring chemicals in the air also contributes to a lack of effectiveness. Besides the fact that TLVs exist for only a small fraction of the industrial chemicals in use, they are designed to apply only to healthy workers, not to those disabled in any way. Moreover, even if workers are healthy, they are often exposed to more than one toxic chemical. The effect of such multiple exposure is not known, and TLVs do not take into account the possibility of interaction or cumulative effects.²³

I. THE LEGAL RESPONSE TO INDUSTRIAL HAZARDS

Almost hidden in the 1947 Taft-Hartley amendments²⁴ to the National Labor Relations Act (NLRA) is a concern for employee self-help in cases of perceived safety and health threats. Section 502, designated a "Saving Provision," provides in pertinent part 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 [Act].²⁵

The section, generally overlooked until recently, reflects a judgment that

[a] protest against unsafe working conditions, specifically protected by the Act, is as vital a union activity as a strike in support of bargaining activities.²⁶

least some institutes, especially those funded in large part by industry, are more concerned with continued production and productivity than with worker health and safety. See generally P. BRODEUR, *supra* note 3; STELLMAN, *supra* note 9, at 6-7.

20. See WALLICK, *supra* note 9, at 136.

21. STELLMAN, *supra* note 9, at 155-56.

22. See BNA SPECIAL REPORT, *supra* note 1, at 14.

23. STELLMAN, *supra* note 9, at 156.

24. 29 U.S.C. § 141 *et seq.* (1970).

25. *Id.* § 143.

26. NLRB v. Great Atl. & Pac. Tea Co., 340 F.2d 690, 696 (2d Cir. 1965).

The recital of horrors at the beginning of this Article is intended not only to indicate the magnitude of the problem of unsafe working conditions but also to spotlight the individual problems facing employees every day. This Article considers the extent to which federal law, especially section 502, permits employee self-help in response to workplace dangers; it will deal with the proper scope of section 502 and its role when employees are subject to discipline or injunction for taking self-help measures. The discussion will also examine the role of arbitration and no-strike clauses in collective bargaining agreements. First, however, it is necessary to place section 502 in the perspective of other legal responses to workplace health and safety threats.

Health and safety legislation has long focused on particularly hazardous industries. Early state activity was directed at railroads. Because "labor and passenger opinion spoke more forcibly" in legislatures than in the courts, legislation aimed at ameliorating the effects of industrialization in railroads began to appear in the states in the latter part of the nineteenth century.²⁷ Some statutes raised the standard of care applicable in tort actions, while others required the railroads to use particular kinds of equipment. Later in the century, legislatures began to deal with safety in mines and factories. Although safety administration was generally lax, these laws did influence civil litigation, as statutory violations were relied upon to establish breaches of the standard of care.

Nevertheless, the industrial accident rate continued to increase:

The railway injury rate doubled between 1889 and 1906. At the turn of the century, industrial accidents were claiming about 35,000 lives a year, and inflicting close to 2,000,000 injuries. One quarter of these were serious enough to disable the victim for a solid week or more.²⁸

It is probable that even these figures vastly underestimate the rate of industrial accidents.

As the accident rate increased, judges began, even in the absence of legislative guidance, to modify some of the more obnoxious obstacles to tort recovery, such as the fellow-servant rule.²⁹ While judges and juries were thus bending or modifying

27. For material in this section I am indebted to L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973), especially chapter VI on torts.

28. *Id.* at 422.

29. *Id.* at 424.

doctrine to aid injured workmen, the use of contingent fees was encouraging an increase in litigation. Not until the next century, however, would workmen's compensation statutes and federal acts like the Federal Employees Liability Act³⁰ substitute for a negligence system that was no longer (if ever) an efficient device for allocating the costs of industrial accidents. The movement toward industrial safety was encouraged by notions of risk-spreading and insurance as well as the growing power of workers.

Before the passage of the broad provisions of OSHA, however, protection against safety and health risks was inadequate. In 1969, for instance, the Bureau of Labor Standards of the Department of Labor estimated that 9.8 percent of the American work force fell completely outside any sort of safety protection afforded by state authority.³¹ Other statistics showed another aspect of the problem. At least eight states had no identifiable occupational health program at all. Four had no inspection personnel, and only three states had over 100 inspectors. The number of state inspectors prior to OSHA totalled only 1600. Of 82 state and local units dealing with occupational health, ten agencies were one-person operations and only 20 units in 11 states employed more than 10 people.³² One study indicated that states employed one and one-half times as many game wardens as safety inspectors.³³ Even many of these employees were not involved in work directly related to occupational health, but were involved, for example, in environmental services.³⁴ The problem was aggravated by the limited authority and less than rigorous enforcement policy of many state agencies.³⁵ Finally, states

30. 45 U.S.C. § 51 *et seq.* (1970).

31. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, ESTIMATED EMPLOYEE COVERAGE UNDER STATE SAFETY RULE-MAKING AUTHORITY (1969).

32. *Hearings on H.R. 14816 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 2d Sess. 711, table I (1968) (comparison of the number of safety inspectors with the number of fish and game wardens employed by specific states in 1968, appendix to testimony of George Meany, President, AFL-CIO).

33. V. TRASKO, STATUS OF OCCUPATIONAL HEALTH PROGRAMS IN STATE AND LOCAL GOVERNMENT 2 (1969) (report for the Bureau of Occupational Safety and Health (BOSH), U.S. Dep't of Health, Education, and Welfare).

34. See NADER, *supra* note 9, at 82-83. See also R. SCOTT, *supra* note 3, at 236-62.

35. New York, for instance, reported six fines in 1968, although employers committed over 10,000 violations and the state division of inspection referred 442 cases for prosecution. N.Y. DEP'T. OF LABOR, STATISTICS ON OPERATIONS, SUPPLEMENT TO 1968 ANNUAL REPORT 72, 77 (1969).

often fractionalized authority among many departments, making sustained and coordinated action all but impossible.³⁶

Federal concern prior to the passage of OSHA was also slight, and government hearings on industrial safety rarely involved nongovernment groups such as labor unions or professional organizations.³⁷ Federal legislation dealt primarily with specific industries.³⁸ The most notable multi-industry safety and health legislation was the Walsh-Healy Act of 1936,³⁹ enacted to regulate the hours, wages, and working conditions of employees working under federal contracts for the manufacture or furnishing of supplies and equipment in amounts exceeding 10,000 dollars. Under the Act, the federal government was prohibited from purchasing supplies or equipment manufactured under "working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees."⁴⁰ Service contracts exceeding 2500 dollars were covered by the McNamara-O'Hara Service Contract Act of 1966⁴¹ and construction contracts by the Construction Safety Act of 1969.⁴² Safety standards were included in all these acts but, again, resources and, perhaps, enforcement efforts were inadequate. Of 75,000 work establishments covered by the Walsh-Healy Act, only five percent were inspected in 1969.⁴³ Of the establishments that were inspected, violations were found in 95 percent; indeed, over 33,000 safety violations were found.⁴⁴ Yet, only 34 formal complaints were issued, only 32 hearings were held, and only two establishments received the ultimate sanction

36. See NADER, *supra* note 9, at 84.

37. *Id.* at 90. The dangers to health and safety in industry were spelled out in Freye, *Protecting the Health of Eighty Million Americans: A National Goal for Occupational Health*, reprinted in *Hearings on S. 2193 & S. 2788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st & 2d Sess., pt. 2, at 1727 (1970). The report outlined a new national program and recommended a budget of 50 million dollars to meet the perceived need.

38. See, e.g., Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801, 811 (1970); Atomic Energy Act of 1946, *as amended by Atomic Energy Act of 1954*, 42 U.S.C. § 2021 (1970); Federal Safety Appliance Act, 45 U.S.C. §§ 1-16 (1970); Merchant Marine Act of 1936, 46 U.S.C. § 1101 *et seq.* (1970); Federal Boating Act of 1958, Pub. L. No. 85-911, 72 Stat. 1754, *repealed by Act of Aug. 10, 1971*, Pub. L. No. 92-75, § 41(a), 85 Stat. 228. A further list can be found in G. GINSBURG, *CASES AND MATERIALS ON FEDERAL LABOR STANDARDS* 303 n.3 (1973).

39. 41 U.S.C. § 35 *et seq.* (1970).

40. *Id.* § 35(e).

41. *Id.* § 351.

42. 40 U.S.C. § 333 (1970).

43. NADER, *supra* note 9, at 95.

44. *Id.* at 100. See also *id.* n.14.

of blacklisting.⁴⁵ In explaining the lack of enforcement, the Deputy Associate Solicitor for Litigation of the Bureau of Labor Standards stated in apparent earnest:

The policy of the department has always been to treat the act as remedial, not punitive. If we treated it as punitive, we would have half the establishments in the country closed.⁴⁶

Considerable pressure in the 1960's for increased safety and health legislation led to the enactment of safety and health provisions in the McNamara-O'Hara Service Contract Act of 1966,⁴⁷ the National Traffic and Motor Vehicle Safety Act of 1966,⁴⁸ the Federal Metal and Non-Metallic Mine Safety Act,⁴⁹ and the Federal Coal Mine Health and Safety Act of 1969.⁵⁰ The last act amended the Coal Mine Safety Act and added disability benefits for black-lung disease.⁵¹ The 1969 amendments to the Contract Work Hours and Safety Standards Act established health and safety standards in the construction industry.⁵²

Although a variety of federal safety programs were eventually established, most were not adequately funded or staffed. Moreover, charges of political favoritism in their administration were commonly made, especially by the unions.⁵³ In addition, the statutes themselves were the result of the political process and often bear the imprint of successful lobbying by wealthy and well organized employer groups.⁵⁴

The purpose of the federal Occupational Safety and Health

45. *Id.* at 100.

46. *Id.*

47. 41 U.S.C. § 351 (1970).

48. 15 U.S.C. § 1381 *et seq.* (1970).

49. 30 U.S.C. § 721 *et seq.* (1970).

50. *Id.* § 801 *et seq.*

51. For a discussion of the ineffectiveness of the Federal Coal Mine Health and Safety Act of 1969, see J. FINLEY, *THE CORRUPT KINGDOM* 218-22 (1972).

52. 40 U.S.C. § 333 (1970).

53. Union concern with safety, as measured by contract provisions, has been slow to develop. Since the passage of OSHA, however, there has been a marked increase in the number of contract provisions dealing with workplace health and safety. 5 O.S.H.R. 1206 (1975). According to a recent BNA survey, twelve percent of the sample contracts permit employees to refuse to engage in hazardous work. See BNA SPECIAL REPORT, *supra* note 1.

54. A recent study suggests that, as early as the progressive period, coal operators supported federal safety legislation but opposed similar state legislation, because they feared the latter's adverse competitive effects. Graebner, *The Coal-Mine Operator and Safety: A Study of Business in the Progressive Period*, 15 LABOR HISTORY 483 (1974). The Bureau of Mines, created in 1910, was sponsored by operators. As might be expected, the Bureau had no investigatory or regulatory powers.

Act of 1970⁵⁵ is to reduce the incidence of job-related accidents and eliminate workplace health hazards. OSHA directs the Secretary of Labor to set and enforce safety and health standards for an estimated 4.1 million establishments with 57 million employees. Employers are required to provide a place of employment free from "recognized safety hazards" and to comply with specified safety and health standards.⁵⁶ They must also make investigations and keep extensive records. Thus, the OSHA is a labor standards act, more like the Fair Labor Standards Act⁵⁷ than the Taft-Hartley Act.⁵⁸

Federal regulation under OSHA is characteristically beset with totally inadequate enforcement capabilities. As of January 1, 1973, there were fewer than 500 inspectors and only 50 industrial hygienists available to examine 4.1 million workplaces.⁵⁹ An independent study estimated that with the planned complement of inspectors it would take the Department of Labor 58 years to inspect the work establishments covered by OSHA.⁶⁰ The lack of enforcement personnel is especially poignant when contrasted with the magnitude of the continuing problem as reflected in the inspection figures of the

55. Pub. L. No. 91-596, 84 Stat. 1590 (codified in various sections of titles 5, 15, 18, 29, 42, and 49, U.S.C.). For discussion of the legislative history of OSHA, see BUREAU OF NATIONAL AFFAIRS, ABC'S OF THE JOB SAFETY AND HEALTH ACT OF 1970, A BNA OPERATIONS MANUAL 13-22 (1971); NADER, *supra* note 9, at 137-89; Gross, *The Occupational Safety & Health Act: Much Ado About Something*, 3 LOYOLA L.J. 247 (1972). See also Horneberger, *Occupational Safety and Health Act of 1970*, 21 CLEVELAND ST. L. REV. 1 (1972); Moran, *A Critique of the Occupational Safety and Health Act of 1970*, 67 Nw. U.L. Rev. 200 (1972).

56. See Moran, *supra* note 55; Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988 (1973).

57. 29 U.S.C. § 201 *et seq.* (1970).

58. *Id.* § 141 *et seq.* A good, brief description of the enforcement procedure of OSHA is found in Morey, *supra* note 56, at 989-92.

59. STELLMAN, *supra* note 9, at 8.

60. NADER, *supra* note 9, at 247. In the face of such serious enforcement problems, the Department has attempted to surrender much of its authority to the states. *Id.* at 210-11. The Department has also suggested that state plans might be approved under section 18(c)(3) even though they do not include specific rights granted to employees in the federal act, e.g., the right of an employee representative to accompany the federal inspector on an inspection of the workplace or the authority to promulgate emergency standards. *Id.* at 219. For conflicting views on the effectiveness of OSHA, compare Page & Munsing, *Occupational Health and the Federal Government: The Wages Are Still Bitter*, 38 L. & CONTEMP. PROB. 651 (1974), with Stender, *Enforcing the Occupational Health and Safety Act of 1970: The Federal Government as a Catalyst*, 38 L. & CONTEMP. PROB. 641 (1974).

Occupational Safety and Health Administration. In September 1974 the agency inspected 6435 establishments, 4410 for the first time. Only ten percent of the inspections were the result of a complaint or an accident. Citations were issued for 4306 violations,⁶¹ though inspectors were not even permitted to take the air samples necessary for determining whether legal concentration limits were exceeded. Such samples could be taken only by one of the Labor Department's 50 industrial hygienists.⁶² Moreover, whereas standards set by the Environmental Protection Agency, for example, are based solely on health considerations,⁶³ the standards under which the OSHA inspectors acted take into account "economic feasibility."⁶⁴

II. HEALTH AND SAFETY AND THE NATIONAL LABOR RELATIONS ACT

Section 7 of the National Labor Relations Act (NLRA) broadly protects the right of employees to strike and take other concerted action for "mutual aid or protection."⁶⁵ The "reasonableness" of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists and section 7 applies.⁶⁶ Thus, a strike over safety or health conditions would clearly be protected under section 7.⁶⁷ A union, how-

61. 4 O.S.H.R. 837 (1974).

62. STELLMAN, *supra* note 9, at 8.

63. See 42 U.S.C. §§ 1857c-3(a)(2), -4 (1970).

64. The Secretary of Labor derives standards from semiofficial bodies like the American National Standards Institute, whose "consensus standards" set maximum levels of health hazards in the context of economic feasibility to employers. STELLMAN, *supra* note 9, at 9. Stellman notes that the Government has recommended a new noise standard at 90 decibels. U.S. DEPT OF HEALTH, EDUCATION, AND WELFARE, HSM No. 73-11001, CRITERIA FOR A RECOMMENDED STANDARD: OCCUPATIONAL EXPOSURE TO NOISE (1972). Even this standard, lower than that demanded by industry, is a compromise which will result in a hearing loss to a large percentage of persons exposed to noise of that intensity. The Government, however, does not deem this loss an "impairment," because a worker would still be able to communicate. STELLMAN, *supra* note 9, at 10. OSHA's proposed noise standard has been criticized as inadequate under the Environmental Protection Standard. 4 O.S.H.R. 1608 (1975).

65. 29 U.S.C. § 157 (1970). See generally Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951); Getman, *The Protection of Economic Pressure by Section 7 of The National Labor Relations Act*, 115 U. PA. L. REV. 1195 (1967).

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

67. C & I Air-Conditioning, Inc., 193 N.L.R.B. 911 (1971). See Oldham, *Organized Labor, The Environment and the Taft-Hartley Act*, 71 MICH. L. REV. 935, 981-1002 (1973).

ever, may waive the sheltered right to strike by agreeing to a contractual no-strike clause. Violation of this clause generally leads to discharge under the contractual grievance system, since the no-strike clause is held to establish a rule of conduct for employees.⁶⁸ Conduct in violation of such a clause is also considered unprotected under section 7.⁶⁹

The significance of section 502⁷⁰ is that it protects some work stoppages which would otherwise run afoul of the contractual no-strike clause. Since in the absence of a no-strike clause a strike over an alleged safety hazard would be clearly protected under section 7,⁷¹ section 502 has operational value only when a no-strike clause is otherwise applicable.⁷² In such a case, section 502 operates as a rule of construction for private agreements, much like the federal policy discussed in *Mastro Plastics Corp. v. NLRB*.⁷³ In *Mastro* the Supreme Court decided that, because of the need to effectively enforce the Act, the normal no-strike clause would not preclude strikes in response to serious employer unfair labor practices. Similarly, a common no-strike clause does not encompass strikes over abnormally dangerous conditions, because of the obvious human interest reflected in section 502.⁷⁴

The potential applicability of section 502 is great indeed. No-strike clauses are common,⁷⁵ and safety hazards, real or mistakenly perceived, are widespread. Passage of OSHA testifies to increased congressional concern over safety hazards in the

68. *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962).

69. *American Beef Packers, Inc.*, 196 N.L.R.B. 875 (1972).

70. For the pertinent statutory language, see text accompanying note 25 *supra*.

71. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *NLRB v. Belfrey Coal Corp.*, 331 F.2d 738 (6th Cir. 1964); cf. *NLRB v. Southern Silk Mills, Inc.*, 209 F.2d 155 (6th Cir. 1953) (spontaneous walkouts and temporary work stoppages protected by section 7; no no-strike clause in evidence).

72. See *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). Another level of analysis exists, since an interpretation of the no-strike clause might reveal that safety strikes are excluded from its scope. Thus, there would be no contractual restriction on otherwise protected conduct.

73. 350 U.S. 270 (1956).

74. Since the critical right to strike can be waived by a no-strike clause, however, it is possible that even the benefit of section 502 could be waived by clear contract language.

75. A recent survey by the Bureau of National Affairs found that no-strike clauses appear in 90 percent of all collective bargaining agreements. Moreover, the survey reported a trend toward unconditional bans on strikes. See BUREAU OF NATIONAL AFFAIRS, LABOR RELATIONS YEARBOOK 1970, at 44 (1971).

workplace, and employee concern also seems to be growing. Many potentially important questions concerning the scope of section 502, however, have not been systematically considered. The most basic question is whether a good faith belief that an abnormally dangerous condition exists is sufficient to invoke the protection of section 502 or whether the test is an objective one.⁷⁶ If the test is objective, how are abnormally dangerous work conditions defined? What if the industry or job itself is inherently highly dangerous? What is the role of federal and state safety standards?⁷⁷ If conditions are abnormally dangerous, no matter how defined, which employees are protected from employer retaliation for engaging in self-help?⁷⁸ Does section 502 permit concerted economic action or only the refusal of particular employees to work under unsafe conditions?

It should be irrelevant that a walkout is not authorized by the union.⁷⁹ If a no-strike clause is present, even an authorized walkout would normally be barred unless protected by section 502. It could be argued that a no-strike clause applies *only* to authorized activity, since it is the *union's* promise not to strike. Although this argument might have some vitality in damage or injunction cases,⁸⁰ it seems that no-strike clauses do set a standard for employees under section 7.⁸¹ Section 502, however, should be interpreted to protect even an unauthorized walkout. The section is aimed at protecting employees and not unions. Often there may not be time for real authorization—abnormal hazards cannot be postponed for Robert's Rules and union by-

76. Compare *NLRB v. Knight Morley Corp.*, 251 F.2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958) (only good faith required) with *NLRB v. Fruin-Colnon Constr. Co.*, 330 F.2d 885 (8th Cir. 1964) (no reasonable basis for belief that conditions were abnormally dangerous). See also *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

77. See NLRB, REPORT OF THE GENERAL COUNSEL (June 29, 1972).

78. See *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

79. See *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963); *R.C. Can Co.*, 140 N.L.R.B. 588 (1963); Craver, *Minority Action versus Union Exclusivity: The Need to Harmonize NLRA and Title VII Policies*, 26 HASTINGS L.J. 1, 33-39 (1974); Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195 (1967); Gould, *The Status of Unauthorized and "Wildcat" Strikes under the National Labor Relations Act*, 52 CORNELL L.Q. 672 (1967). For a brief summary of the legal response to wildcat strikes, see Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 OHIO ST. L.J. 751, 773 (1973).

80. See *Sinclair Oil Corp. v. Oil Workers Union*, 452 F.2d 49 (7th Cir. 1971); 86 HARV. L. REV. 447 (1972).

81. *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962).

laws.⁸² At a minimum, the section should protect refusals to work at dangerous tasks. The existence of an applicable grievance system, however, raises difficult questions. Part III discusses these questions.

III. SECTION 502 AND THE INTEGRITY OF THE GRIEVANCE PROCESS

Section 502 clearly serves as a defense to a disciplinary proceeding, but under section 301⁸³ an injunction may be sought against a strike allegedly in breach of a contractual no-strike clause. Section 502 should prevent such an injunction as well as disciplinary action, even though the strike involves a grievable matter, because a walkout within that section is statutorily defined not to be a "strike." This result would seem obvious, except for recent decisions stressing the Supreme Court's commitment to the peaceful resolution of all contract disputes. These decisions have muddled the consideration of a strike arguably protected under section 502 but involving a matter made arbitrable under the contractual grievance system.

In *Boys Market, Inc. v. Retail Clerks, Local 770*,⁸⁴ the Court overruled a 1962 decision⁸⁵ and held that strikes in violation of a contractual no-strike promise could be enjoined, despite the anti-injunction provisions of the Norris-LaGuardia Act.⁸⁶ The decision was not based on the presence of a no-strike clause, but rather on the fact that a strike had occurred over an arbitrable grievance.

In the recent case of *Gateway Coal Co. v. United Mine Workers*,⁸⁷ the Supreme Court addressed the two main questions raised in an injunction proceeding under section 301. First, was the strike over a matter falling within the arbitration clause? Second, if so, did the "duty to arbitrate give rise to an implied no-strike obligation supporting issuance of a *Boys Market* injunction?"⁸⁸ It seems, however, that the second question has little vitality. In *Local 174, Teamsters v. Lucas Flour Co.*,⁸⁹ the Court recognized for purposes of damages an implied no-strike promise

82. I have urged greater tolerance of wildcat strikes even without reference to section 502. See Atleson, *supra* note 79.

83. 29 U.S.C. § 185 (1970).

84. 398 U.S. 235 (1970).

85. *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962).

86. 29 U.S.C. §§ 101-15 (1970).

87. 414 U.S. 368 (1974).

88. *Id.* at 374.

89. 369 U.S. 95 (1962).

concurrent with an arbitration clause; therefore, an affirmative answer to the Court's first question would normally resolve the second. Indeed, the *Gateway* Court expressly held that injunctions could be granted on the basis of a judicially inferred undertaking not to strike.⁹⁰ The second question would have meaning only if the agreement should contain an express negation of a no-strike pledge, an agreement the Court would permit although it would certainly find it distasteful.⁹¹

Presumably, a "strike" over a safety issue within the purview of section 502 does not violate a no-strike clause, whether express or implied, irrespective of whether the remedy sought is a damage award or an injunction. The decision in *Boys Market*, however, turned on the arbitrable nature of the underlying dispute. A serious question arises, therefore, if the safety matter is arbitrable and, thus, arguably enjoined under *Boys Market*. But for section 502, *Boys Market* would seem to apply. The question to be faced is whether section 502 protects a walkout over a dispute that is arbitrable. Given the approach in *Boys Market*, the answer is not altogether clear. After all, the Norris-LaGuardia Act was seemingly a stronger barrier to strike injunctions than section 502.

There is virtually no legislative history relating to section 502, but, since the section was passed at the same time as section 301, it would seem difficult to argue that it does not apply in section 301 situations. Moreover, if it does not apply, unions would be discouraged from agreeing to safety clauses and the arbitrability of safety and health issues. Since safety has become a major employee concern, it is foreseeable that a weakening of section 502 would encourage unions to forego the arbitration of safety and health disputes in favor of self-help. More importantly, the premise of section 502 must be that safety and health matters often need instantaneous action which cannot wait for the operation of grievance systems.⁹²

Safety stoppages are clearly concerted activities within section 7 unless waived by a contractual no-strike promise. Section 502 provides that certain stoppages will not be considered "strikes," and the only rational interpretation is that these stoppages are thus not "strikes" within the meaning of a no-strike

90. 414 U.S. at 381-82.

91. See *id.*

92. Other parts of section 502 demonstrate a concern for basic human rights and human responses. See *United States Steel v. United Mine Workers*, 74 L.R.R.M. 2613 (3d Cir. 1970).

clause. Because this is the case, the activity not only is protected in the sense that discipline would violate the NLRA, but it should also be protected against injunctive remedies.

The Court, however, has treated section 301 as an independent avenue of relief,⁹³ and the development of section 301 illustrates the Court's hostility to strikes during the term of a contract.⁹⁴ Thus, for instance, a section 301 action may be brought, even though the activity involved is encompassed by the unfair labor practice provisions of the NLRA.⁹⁵ Whereas unfair labor practices are enforced by the NLRB independently of the judicial enforcement of section 301, however, section 502 operates to define the scope of no-strike promises in collective bargaining agreements. A walkout which falls within the ambit of section 502 should therefore not be a "strike" violating a no-strike promise in a section 301 injunction action. Nor should it matter that the underlying dispute is arbitrable, since the issue is not enforcement of the arbitration clause alone but, rather, the enjoining of self-help meant to be protected by section 502. An injunction would force back to work employees who have a statutory right to cease work because of a safety hazard. The Senate report on the Taft-Hartley amendments referred to section 502 as establishing that "no provision of the act is to be construed as compelling an employee . . . to work under abnormally hazardous conditions."⁹⁶

Since a work stoppage encompassed by section 502 does not violate the no-strike clause, therefore, neither damages nor an injunction should be available. The policy of section 502, enacted prior to *Boys Market*, is obviously to provide a measure of protection to employees facing grave health and safety risks. Indeed, the section represents a federal interpretation of collective agreements so as to exclude these stoppages from the scope of no-strike clauses. Remedies under section 301, therefore, would thwart the protection meant to be provided by section 502. Of course, the propriety of such a walkout can be tested in a section 301 action or in an arbitration proceeding. Many decisions favor an objective reading of section 502, meaning that employees act at their peril. That "peril" will be determined by the outcome

93. See, e.g., *NLRB v. C. & C. Plywood Corp.*, 385 U.S. 421 (1967); *Carey v. Westinghouse Corp.*, 375 U.S. 261 (1964).

94. *Boys Market v. Retail Clerks Local 770*, 398 U.S. 235 (1970); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

95. See, e.g., *Carey v. Westinghouse Corp.*, 375 U.S. 261 (1964).

96. S. REP. No. 105, 80th Cong., 1st Sess. 30 (1947).

of the section 301 or arbitration proceeding. Yet, although the propriety of the walkout can be properly adjudicated, once the walkout is determined to fall within section 502, no injunction should be granted despite *Boys Market*.⁹⁷

IV. GATEWAY COAL: SAFETY WALKOUTS AND INJUNCTIONS

Many of the problems discussed in the preceding section were highlighted in *Gateway Coal Co. v. United Mine Workers*, a case illustrating the relationship of section 502 to broader issues involving the enforcement of collective agreements. Workers at a Pennsylvania mine refused to work so long as three foremen, who had failed to carry out certain required mine safety procedures, remained in the employ of Gateway. As in many mine safety cases, the hazard was a substantially reduced flow of air, increasing the danger of the accumulation of dust and flammable gas and the risk of an explosion. Pursuant to a request by the union, federal and state inspectors had toured the mine and found that the three foremen had made entries in their log books that failed to disclose the true air flow. The company suspended the foremen, but later reinstated two of the three (the third elected to retire) despite the fact that criminal proceedings had also been brought against them.⁹⁸ When the foremen returned to work, the union employees left the job.

The company sought and received an injunction against the walkout and an order for binding arbitration of the controversy. In addition, the trial court suspended the controversial foremen pending the outcome of the arbitration proceeding. The arbitrator subsequently decided that the foremen could be returned to work and held that the situation did not present a safety hazard. The union appealed the continuing injunction but not the arbitration award. Thus, although the union had denied the arbitrability of the walkout and of the safety issue underlying it, the union focused upon the propriety of the injunction.

97. In any event, most of these strikes will tend to be of short duration, making injunctive remedies less valuable. The damage remedy is problematic. A union is not liable unless it authorizes, ratifies, or supports a walkout, and it is not yet clear whether section 301 provides a remedy against wildcat or unauthorized walkouts. See *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962); *Sinclair Oil Corp. v. Oil Workers Union*, 452 F.2d 49 (7th Cir. 1971).

98. The foremen pleaded *nolo contendere* to a charge of criminal violation of safety requirements. Each was fined 200 dollars.

A. ARBITRABILITY AND THE PROPRIETY OF AN INJUNCTION

The issues recognized by the appellate court were whether the safety issue was arbitrable, and, if so, whether *Boys Market* permitted the enjoining of the strike. The court seemed content to assume that the absence of a no-strike clause did not necessarily foreclose the granting of a section 301 injunction, but the second issue was not reached, since the court held that safety disputes were not arbitrable under the contractual grievance system.

Although the collective bargaining agreement contained a grievance provision covering "any local trouble of any kind,"⁹⁹ the court refused to apply to safety disputes the presumptive arbitrability concepts set out in the famous *Steelworkers Trilogy*.¹⁰⁰ The Supreme Court had held that "[i]n the absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . ."¹⁰¹ The federal policy favoring arbitration enunciated in those cases was based upon the belief that industrial stability would be promoted by encouraging resolution of industrial disputes through private dispute-resolving procedures. The key to industrial peace, thought the Supreme Court, was the "inclusion of a provision for arbitration of grievances in the collective bargaining agreement."¹⁰² Arbitrators were seen as more competent than courts to resolve these disputes in a way that would lead to industrial harmony.

The Court of Appeals for the Third Circuit, however, felt that safety disputes were "sui generis," of a "special and distinguishing character," unlike "ordinary" economic disputes.¹⁰³ Since the effect of performing unsafe operations could be drastic, the court seemed to feel that self-restraint would be neither possible nor wise:

Considerations of economic peace that favor arbitration of ordinary disputes have little weight here. Men are not wont to submit matters of life or death to arbitration and no enlightened

99. *Gateway Coal Co. v. United Mine Workers*, 466 F.2d 1157, 1159 (3d Cir. 1972).

100. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

101. 363 U.S. at 584-85.

102. *Id.* at 578.

103. 466 F.2d at 1159.

society encourages, much less requires, them to do so. If employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be. 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.¹⁰⁴

Section 502, said the court, represents the view of an enlightened society that employees should not suffer when in good faith they refuse to work because of the fear of imminent harm.¹⁰⁵ Rather than using section 502 to directly protect the walkout from an injunction, the court of appeals employed the provision to support its narrow interpretation of the miners' arbitration clause. Section 502 should motivate a court "to reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration."¹⁰⁶

The court, therefore, used the policy of section 502 to limit the scope of the arbitration provision, thus finessing the *Boys Market* issue.¹⁰⁷ Relying on the Supreme Court's oft repeated quid pro quo argument,¹⁰⁸ the court of appeals decided that the statutory policy protecting safety strikes argued for their exclusion from general arbitration clauses. Although the miners' arbitration clause was broad, and safety concerns were included in the contract,¹⁰⁹ the union had argued that no prior safety

104. *Id.* at 1160.

105. It could not have been unimportant that coal mining is one of the most hazardous employments in the United States. The injury rate in coal mining is nearly three times that for manufacturing and two times that for construction. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, REP. NO. 406, INJURY RATES BY INDUSTRY 1970, at 3 (1972). See also 1971 STATISTICAL ABSTRACT OF THE UNITED STATES 639. The court did not limit its discussion to mining, however, and seemed to distinguish safety disputes generally.

106. 466 F.2d at 1160.

107. This argument was immeasurably stronger than a previous argument that safety disputes were nonarbitrable because their arbitrability was neither "particularly stated nor unambiguously agreed in the labor contract and the practice of the parties has been to the contrary." 466 F.2d at 1159. On the use of practice to decide questions of arbitrability, see Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017 (1961). See also *Pacific Tel. & Tel. Co. v. Communication Workers*, 199 F. Supp. 689 (D. Ore. 1961); R. SMITH, L. MERRIFIELD & D. ROTHSCHILD, *COLLECTIVE BARGAINING AND LABOR ARBITRATION* 260 (1970); Aaron, *Judicial Intervention in Labor Arbitration*, 20 STAN. L. REV. 41 (1967); Jones, *The Name of the Game is Decision—Some Reflections on Arbitrability and Authority in Labor Arbitration*, 46 TEX. L. REV. 865 (1968).

108. See cases cited in note 100 *supra*.

109. The contract provided that a mine had to be closed if the local's

dispute had been handled through arbitration.¹¹⁰ Although the evidence was far from clear, the court might well have been on firmer ground if it had relied upon this history to negate arbitrability.¹¹¹

The viability of the decision was in grave doubt given the Supreme Court's strong views on arbitrability and the avoidance of labor strife. Indeed, the decision in *Boys Market* had actually relied more on the scope of the arbitration clause than the presence of a no-strike clause to justify a strike injunction.¹¹² The court of appeals may have correctly determined that the policies of section 502 protect the *walkout* from section 301 remedies, but arbitrability remains a separable issue. The court's analysis was handicapped by its feeling that arbitrability of safety disputes necessarily barred strikes over the same issue. Thus, the court focused on the issue of arbitrability, the issue that the union had not directly appealed.

On this issue, the court's decision is weakest. There was no prior judicial indication that safety disputes, unlike "ordinary" economic disputes, would be excluded from the broad scope of the *Trilogy's* presumptions.¹¹³ Moreover, such presumptions are

mine safety committee found it dangerous. In *Gateway*, the local itself voted to strike. The court, however, did not rely on this portion of the contract.

110. See *United States Steel Corp. v. United Mine Workers*, 74 L.R.R.M. 2613 (3d Cir. 1970).

111. Doubt exists as to the substantiality of evidence required to overcome the presumption of arbitrability. *Warrior & Gulf* required "positive assurance" or the "most forceful evidence." Although bargaining history was ignored by the Supreme Court in *Warrior & Gulf*, one court has relied upon such history to overcome the presumption. *Pacific N.W. Bell Tel. Co. v. Communication Workers*, 337 F.2d 455 (9th Cir. 1964). But see *Communication Workers v. Southwestern Bell Tel. Co.*, 415 F.2d 35 (5th Cir. 1969). Compare Lesnick, *Arbitration as a Limit on the Discretion of Management, Union, and NLRB*, N.Y.U. 18TH ANNUAL CONFERENCE ON LABOR 7, 9-18 (1966), with Aaron, *supra* note 107, at 42.

112. The Court of Appeals for the Third Circuit has had to remind lower courts, which have too hastily awarded injunctions, that the scope of the arbitration clause is a critical issue. See *United States Steel Corp. v. United Mine Workers*, 74 L.R.R.M. 2613 (3d Cir. 1970). See also *Barnes & Tucker v. United Mine Workers*, 338 F. Supp. 924 (W.D. Pa. 1972).

113. In a 1961-62 Bureau of Labor Statistics study of 1,609 agreements containing arbitration provisions, only nine agreements were found to specifically exclude questions of health and safety from arbitration. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, *ARBITRATION PROCEDURES* 12 (1966). Correspondingly, safety clauses are appearing in greater numbers of collective agreements. Some agreements specifically declare that safety disputes are subject to arbitration. *Id.* For example,

not necessary to protect safety walkouts under section 502 so long as the section is read to protect health and safety walkouts from discipline, injunctions, and damage awards. Such a result, as argued by Judge Rosenn in dissent, would harmonize the interests in workers' safety and in the peaceful resolution of labor disputes. Indeed, the trial court's injunction against the strike was arguably a proper harmonization of those interests because it was coupled with the suspension of the very foremen whose conduct had led to the walkout.

Judge Rosenn argued that even if the strike injunction was improper, section 502 did not bar an order to arbitrate the dispute. In other words, there was no reason to ignore the federal policy in favor of arbitration. Indeed, someone must determine whether section 502 applies, and Judge Rosenn felt that the arbitrator was qualified to do so. This argument seems sound, for if self-help is permissible in the interim, an arbitration proceeding would not prolong the period that workers would be faced with unsafe working conditions. The only problem is that the arbitrator might confine his inquiry to the literal terms of the contract unless section 502 is binding on arbitrators as well as courts.

The majority, however, felt that safety disputes not only involve the need for a fair settlement under a consensual dispute-resolving procedure but also require that the dispute be decided correctly and expeditiously. It did not doubt an arbitrator's competence to decide the dispute and would have been hard pressed to ignore an arbitration clause which clearly included safety matters.

The application of the presumption of arbitrability in a *Boys Market* situation means that the judicial order may include not simply a directive to arbitrate but also an injunction against the strike. In the context of a safety dispute, an injunction forces employees back to work under conditions they feel are dangerous. The arbitrator, furthermore, may subsequently find that

section 14(c) of the basic steel agreement provides for the arbitration of disputes of employees "who believe they are being required to work under conditions which are unsafe or unhealthy beyond the normal operations in question." It will be difficult to argue, however, that violations of safety clauses are subject to arbitration *only* when there is such an express provision. Indeed, unions may prefer to arbitrate safety grievances, especially when expedited arbitral procedures are available. See Philadelphia Marine Trade Ass'n, 138 N.L.R.B. 737, *aff'd*, 330 F.2d 492 (3d Cir. 1964).

the dispute is not arbitrable.¹¹⁴ If, on the other hand, the court abandons the presumption of arbitrability, it would next have to decide whether the parties had in fact agreed to arbitrate safety disputes.¹¹⁵ The distinguishing feature of the appellate court's *Gateway* decision was the application of a *presumption of nonarbitrability* of safety disputes, without a thorough look at the past practices of the parties. Section 502 played a major role:

[T]he strong and explicit legislative mandate that protects work stoppages caused by good faith concern for safety should influence a court to reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration.¹¹⁶

Because the effect of section 502 is to protect strikes despite a comprehensive no-strike clause, and because the “[c]onsiderations of economic peace that favor arbitration of ordinary disputes have little weight here,”¹¹⁷ the court held that the contract should not be construed as providing for compulsory arbitration of safety disputes.

The court could have reached the identical result on firmer ground if it had affirmatively employed section 502. Indeed, the court did adopt a broad reading of that section, stating that “good faith apprehension of physical danger is protected activity and not enjoined”¹¹⁸ Moreover, the court felt that careless administration of safety regulations fell within the scope of section 502 just as much as dangerous physical conditions. Had section 502 encompassed the *Gateway* walkout, even an express no-strike clause would not have barred the activity. Thus, the court could have upheld the order to arbitrate while refusing to enjoin the strike.¹¹⁹ Alternatively, arbitrability could have been rejected because of the absence of an applicable no-strike clause or because of the operation of section 502. Although the miners’ arbitration clause might be broader than a no-strike

114. See Note, *Labor Injunctions, Boys Market, and the Presumption of Arbitrability*, 85 HARV. L. REV. 636, 641 (1972); Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1602 (1970).

115. Safety matters had apparently not been previously handled through arbitration under the contract at issue in *Gateway*. 466 F.2d at 1159.

116. *Id.* at 1160.

117. *Id.*

118. *Id.*, citing Philadelphia Marine Trade Ass’n, 138 N.L.R.B. 737, *aff’d*, 330 F.2d 492 (3d Cir. 1964); Knight Morley, 116 N.L.R.B. 141, *aff’d*, 251 F.2d 753 (6th Cir. 1957).

119. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

clause, the Supreme Court's *quid pro quo* doctrine could suggest that the causes of strikes which are not encompassed by a no-strike clause should not, at least presumptively, fall within the arbitration clause. Such an argument would foreclose the possibility that *Boys Market* would be used to undercut the policy of section 502.

The appellate court's decision is noteworthy for its broad reading of section 502 and the sympathy shown for the plight of workers facing unsafe conditions. Rather than denigrating the perceived risks because mining is inherently dangerous, the court used the inherent danger to stress the strong sensitivity of miners to safety issues.

The Supreme Court, however, overwhelmingly¹²⁰ rejected the appellate court's decision. The Court held that the arbitration clause was sufficiently broad to encompass the dispute, and it rejected the appellate court's view that safety disputes were "sui generis."¹²¹ The Court noted that section 502 seemed "to bear more directly on the scope of the no-strike obligation than on the arbitrability of safety disputes."¹²² Moreover, the Court explicitly applied the *Trilogy's* presumptions of arbitrability to safety disputes.¹²³

The only dissenter, Justice Douglas, argued that the *Trilogy's* presumptions of arbitrability should not apply because of section 502. That section, however, literally goes only to the issue of whether a "strike" has occurred and not to the issue of the arbitrability of the dispute. It would be possible to permit arbitration yet refuse to grant an injunction, either because of federal policy under sections 301 and 502 or because of a contractual bar. Justice Douglas went further and found that the Federal Coal Mine Health and Safety Act¹²⁴ "displace[s] all agree-

120. The decision was 8-1 with only Justice Douglas dissenting.

121. 414 U.S. at 376.

122. *Id.* at 377 n.8. The statement is ironic in light of the Court's assumption in *Lucas Flour* that the presence of an arbitration clause permits the inference of an implied no-strike promise. *Boys Market* itself stressed that federal court injunctions were based on the arbitrability of the underlying dispute. 398 U.S. at 254. The role of the no-strike clause was not made clear.

123. 414 U.S. at 377-78. The language in *Boys Market*, however, did suggest that the presumption of arbitrability might not apply in injunction cases. The Court had said that a strike over an arbitrable grievance could not be enjoined until the district court "first holds that the contract does have that effect." 398 U.S. at 254, citing *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 228 (1962).

124. 30 U.S.C. § 801 *et seq.* (1970).

ments to arbitrate safety conditions."¹²⁵ This argument was neither argued before the Court nor supported by legislative history. Although that Act permits the setting of safety regulations, and provides detailed ventilation requirements,¹²⁶ the Act was not relied on by the United Mine Workers. Indeed, the union would not be content to rely on federal regulation which it feels is unsympathetic and ineffective.

The appellate court's argument that safety and health disputes are distinguishable from other contractual disputes is not without some foundation. The Supreme Court has stressed the social values inherent in the peaceful settlement of contract disputes, and it has deemed strikes to be the alternative to arbitration.¹²⁷ In the Court's view, strikes over contractual disputes denigrate the arbitral system, a system specially designed to settle such disputes. The source of arbitration disputes is the contract, even though the substantive sources may only be implicit.¹²⁸ The strike is an attempt to force a particular result, perhaps at variance with the terms of the contract.

Safety disputes, however, are quite different. Employees perceiving threats to their safety and health can often be expected to act immediately rather than direct their claims to the cooler procedures of the grievance system. In a previous article on wildcat strikes, I noted that workers often do not consider arbitration the appropriate mode for resolving contract disputes, especially those involving perceived diminution of traditional benefits.¹²⁹ The same may be said of safety disputes. Ordinary contract disputes do not often generate a felt need for immediate action, but a safety dispute might well create such a motivation. It is in this sense that "men are not wont to submit matters of life or death to arbitration."¹³⁰

The normal rule in industrial jurisprudence is that employees must comply with work orders and file a grievance thereafter. This general rule that "production cannot wait for exhaustion of the grievance procedure" is supported by the notion that the "grievance procedure is capable of adequately recom-

125. 414 U.S. at 394.

126. 30 U.S.C. § 863 (1970).

127. *But see* H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 47-90 (1968).

128. *See* *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

129. *See* Atleson, *supra* note 79.

130. 466 F.2d at 1160.

pending employees for abuse of authority by supervision."¹³¹ This notion provides the principal justification for treating safety disputes differently from economic conflicts. In safety matters the cost of delay in exhausting the grievance procedure should be placed upon the employer.¹³² Situations of imminent peril are not subjects for which arbitration is well suited. Competing concerns for continued production are more easily balanced in normal contract disputes than in safety dispute situations. Moreover, the action of the employees might be based not on a perceived breach of contract by their employer but simply on a perceived threat to their health and safety. Given the urgency of the situation and, perhaps, the uncertainty of arbitrability, employees can hardly be expected to always opt for arbitration instead of immediate action. In addition, the substance of safety disputes will often be directed to sources outside the contract, such as state or federal statutes and regulations governing safety and health. Although such disputes could be settled by arbitrators, they clearly do not involve the kind of competence lauded in the *Trilogy*.

A similar situation arises when a strike occurs in response to an unfair labor practice of an employer. *Mastro Plastics Corp. v. NLRB*¹³³ held that such a strike did not violate an ordinary no-strike promise and therefore constituted protected conduct under the NLRA. *Mastro* was decided before *Boys Market*, however, and may have been undercut by the latter decision, at least to the extent that an employer's action could be said to violate both the NLRA and the contract. Since *Mastro* protected concerted activities over matters which could have been resolved under NLRA procedures, safety strikes, expressly protected by section 502, may present an even stronger case for exemption from section 301 remedies.

Unlike *Boys Market*, where the dispute seemed clearly arbitrable, arbitrability existed in *Gateway* only because of the Court's application of the presumption in its favor. Since the arbitration clause did not contain an express exception, ordering arbitration was consistent with precedent. This is not to deny the human concerns of the court of appeals, but rather to suggest

131. Ford Motor Co., 3 Lab. Arb. 779, 781 (1944) (Shulman, Arbitrator).

132. Expedited arbitration can accelerate this process. See, e.g., Agreement between United States Steel Corporation and The United Steelworkers of America, August 1, 1971, § 14(c), BNA COLL. BARG. NEG. & CONT. § 28.40 (1971).

133. 350 U.S. 270 (1956).

that its concerns should have been directed primarily to the appropriateness of the injunction rather than to the issue of arbitrability. Employees might be willing to "submit matters of life and death to arbitration" if arbitration did not entail the enjoining of a contemporaneous strike. There is surely no inherent reason why arbitration must necessarily occur in a situation free of economic pressure—arbitration frequently occurs in situations of tension. Just as economic weapons are "part and parcel" of collective bargaining, so that unprotected slowdowns do not demonstrate that contemporaneous bargaining is in bad faith,¹³⁴ a walkout, especially over a safety issue, does not threaten the integrity of the arbitration process.

The Supreme Court, however, clearly perceives arbitration and simultaneous strikes to be incompatible with its view of federal policy; the function of such a strike must be to affect the decision of the arbitrator or to negate the effectiveness of the arbitrator's ruling. This concern of the Court led it to infer a no-strike promise coextensive with the arbitration clause in *Local 174, Teamsters v. Lucas Flour Co.*,¹³⁵ an inference which may not always reflect the intentions of the contracting parties. The Court went further in *Gateway*, permitting an injunction based upon implied arbitrability and an implied promise not to strike.

Although the normal arbitral rule is that employees must perform disputed work and then file a grievance,¹³⁶ arbitrators do recognize exceptions,¹³⁷ such as the right to refuse to perform hazardous work.¹³⁸ Section 502 is rarely mentioned, but the outcome is often similar. The normal arbitral approach is significant because most employees will attempt, at least initially, to use the grievance process rather than the National Labor Relations Board (NLRB). The number of safety walkouts reflected in NLRB decisions is small,¹³⁹ and the Board may defer consideration of an alleged NLRA violation until the grievance process has been pursued.¹⁴⁰

134. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

135. 369 U.S. 95 (1962).

136. *See, e.g., Ford Motor Co.*, 3 Lab. Arb. 779 (1944) (Shulman, Arbitrator). *See generally* F. & E. ELKOURI, *HOW ARBITRATION WORKS*, 154-59 (3d ed. 1973).

137. F. & E. ELKOURI, *supra* note 136, at 156-57.

138. *Id.* at 671-76.

139. NLRB decisions, of course, do not reflect the great number of cases which are administratively closed prior to formal decision. *See* Atleson, *Disciplinary Discharges, Arbitration and NLRB Deference*, 20 *BUFFALO L. REV.* 355 (1971).

140. *See National Radio, Inc.*, 198 N.L.R.B. 150 (1972).

Some foreseeable difficulties could be avoided if arbitrators would apply section 502 as a federal canon of construction in interpreting no-strike clauses. The role of arbitrators in applying federal law is far from clear, and many arbitrators do not feel it is their responsibility as "creatures of the contracting parties" to do so, although there seems to be a strong feeling that contract provisions should be read to be consistent with federal law if possible.¹⁴¹ Without entering the entire debate, it is worth noting that many arbitrators are not lawyers and there is a strong possibility that applying federal law, *rather than* the contract, is beyond the arbitrator's authority. In *United Steelworkers v. Enterprise Wheel & Car Corp.*,¹⁴² an ambiguous arbitration award was enforced under section 301 because it could have been read as "embodying a construction of the agreement."¹⁴³ But, said the Court, the award might have been read as "based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission."¹⁴⁴ The arbitrator may, of course, interpret a no-strike or "just cause" provision so as to be consistent with federal law, and some feel that recognition of the arbitrator's exalted position under the *Trilogy*, in addition to the NLRB's policy of deference to arbitration awards, requires that federal law be enforced *irrespective* of the agreement. *Enterprise Wheel* suggests that arbitrators may be bound by the contract despite the "requirements of enacted legislation."

The question addressed here, however, is the validity of a strike, not the mere refusal to perform unsafe work.¹⁴⁵ Although arbitral recognition of safety and health concerns has generally not encompassed collective action,¹⁴⁶ arbitrators have recognized a right to take some job actions in certain situations, even though the underlying dispute may be arbitrable. Thus, if the strike is protected by section 502—or simply not contractually barred—it could continue despite contemporaneous arbitration of the underlying dispute.

141. See articles cited in R. SMITH, L. MERRIFELD, D. ROTHSCHILD, *COLLECTIVE BARGAINING AND LABOR ARBITRATION* 242 (1970).

142. 363 U.S. 593 (1960).

143. *Id.* at 598.

144. *Id.* at 597.

145. There may be no difference in some situations, for example, where all the strikers perform work that is affected by the perceived hazard.

146. F. & E. ELKOURI, *supra* note 136, at 671.

Even if the strike does not fall within section 502, it nevertheless is enjoined only if the union has promised not to strike. Although the Court's ruling in *Gateway* permits inference of a no-strike promise, an explicit disclaimer of such a promise would apparently protect the walkout. The walkout would similarly be protected if it was encompassed by section 502. Thus, the inconsistency seen by the Court between the promotion of arbitration and the protection of concerted activity is not necessarily inevitable. Even if the strike aims at altering a situation which could be resolved by arbitration, there is no necessary inconsistency. The Court has noted that collective activity is "part and parcel" of the collective bargaining process¹⁴⁷ and arbitration is certainly a phase of the collective bargaining process. Since there is no requirement that the employer alter the allegedly unsafe condition pending the outcome of the arbitral proceeding, strikes over safety matters can be expected to occur irrespective of the law.

I have always been disturbed by the notion that an arbitration clause requires employee obedience and the subsequent filing of a grievance.¹⁴⁸ In all disputes, the employee acts at his or her peril. If the employer is found at fault, there is often little penalty. The risk to employees in safety situations, however, is potentially very great. But the arbitration process does not necessarily require employee passivity. It is possible to permit employees to resist and then test the *propriety of such resistance* in the arbitral proceeding. The inquiry would consider the perceived peril and not just the question of disobedience. Thus, strike activity cannot be said to necessarily "substitute individual action for collective bargaining and to replace the grievance procedure with extra-contractual methods."¹⁴⁹ Even if it is correct in general that labor policy requires that "production cannot wait for exhaustion of the grievance procedure,"¹⁵⁰ it is not at all clear that employees faced with safety hazards need to eschew self-help in the name of production.

147. NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960).

148. See, e.g., Nathan Mfg. Co., 7 Lab. Arb. 3 (1947). The notion is roughly similar to the necessity of obeying an injunction and appealing its propriety rather than testing its propriety in a contempt proceeding. See Walker v. Birmingham, 388 U.S. 307 (1967). Even in this area, the merits may be reached if time is of the essence and an appeal would nullify the value of the enjoined action. In any event, no official tribunal has yet addressed this issue in the context of an employment situation, and arbitrators do not necessarily defer to management interpretation of contract language or events.

149. Nathan Mfg. Co., 7 Lab. Arb. 3, 6 (1947).

150. *Id.*

B. THE UMW AGREEMENT

The *Gateway* Court's only support for its extension of *Boys Market* to an agreement not containing a no-strike promise was a reference in a footnote to *Boys Market*, suggesting that damages was an ineffective remedy for breach of a promise not to strike.¹⁵¹ The reference sidesteps the critical question of whether there was a promise not to strike. If no such promise was made, then obviously a strike would not have been a breach of a contractual obligation and the question of effective remedies would not have been relevant. The Court's decision permits injunctions as well as damages for breach of "implied" promises not to strike. Although there is little need to add to Justice Black's biting dissent in *Lucas Flour* criticizing the Court's desire to mold collective bargaining in its own image,¹⁵² one certainly could add that, in the light of labor history, an injunction against a strike is qualitatively much more drastic than an award of damages.

The Court, as other section 301 decisions have shown,¹⁵³ seems confident of its ability to make agreements for the parties, a right it strenuously denies the NLRB in other, sometimes similar, contexts.¹⁵⁴ Despite the Court's strong feelings that unions should not strike over arbitrable matters, it would apparently feel constrained by a clause clearly permitting such strikes.¹⁵⁵ The Court's presumptions, however, heavily influence the determination of intent. Unions will be barred from striking over arbitrable matters unless a clause clearly permitting such strikes is present; since it is obviously easier for unions to resist the inclusion of a no-strike clause than to obtain a clause permitting such strikes, the Court's presumptions alter the bargaining balance between the parties and, ultimately, affect the substantive provisions of collective agreements.¹⁵⁶ Even this deference to the intent of the parties is hedged by the requirement that the clause permitting strikes be clear. Since strikes are permit-

151. 414 U.S. at 381 n.14.

152. 369 U.S. at 107.

153. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

154. *E.g.*, *NLRB v. Burns Internal Security Servs.*, 406 U.S. 272 (1972); *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

155. *See* 414 U.S. at 382.

156. *See* H. WELLINGTON, *supra* note 127, at 116-17. The 1974 negotiations in the coal industry illustrate the problem of placing upon the union the burden of obtaining explicit contractual authority to strike over grievances.

ted by sections 7 and 13 of the NLRA, the irony of the Court's requiring a clause in the agreement permitting strikes, let alone an explicit clause, should not be lost. Clearly, the Court's assumption that strikes are simply inconsistent with arbitration is the principal bench mark of its opinion. It is not at all clear why this is necessarily so, especially since the contract *may* contain a clause *permitting* strikes. Given the Court's firmly held position, however, it is not surprising that it found no contractual permission to strike in *Gateway* and, subsequently, that section 502 presented no bar to an injunction.

There were two provisions in the United Mine Workers (UMW) agreement which could have indicated that the union had reserved the right to strike. The Court's consideration of these provisions was limited to discovering whether they "excepted safety disputes from the general no-strike obligation."¹⁵⁷ The very reference to exceptions from general obligations indicates that exceptions will be hard to find. The Court thus began a search for intent with the assumption that intent—a "general no-strike obligation"—already existed. The issue as seen by the Court is, apparently, whether the contract demonstrates a view of labor-management relations at variance with the view held by the Court.

Section (e) of the UMW contract provides for a mine safety committee empowered to inspect and report its findings to management, and in "special instances where the committee believes an immediate danger exists," "requires" the employer to follow a committee recommendation to remove all mineworkers from the unsafe area.¹⁵⁸ If the committee acts arbitrarily in closing down an unsafe area, "members . . . may be removed from the committee."¹⁵⁹ Grievances which might arise by the employer's request to remove members of the committee are subject to arbitration.

Although perhaps insufficient to overcome the Court's presumptions of arbitrability, the section does not affirmatively provide that safety disputes are arbitrable. The employer's only recourse for arbitrary behavior under the clause is the replacement of the members of the mine safety committee. Only the propriety of this action is explicitly made arbitrable. The clause seems to permit a shutdown even if the underlying dispute is arbitrable. The Court, however, avoided confrontation of the

157. 414 U.S. at 382.

158. *Id.* at 383.

159. *Id.*

clause by asserting that it had not been invoked by the union. Although the Mine Safety Committee had investigated, there was no showing that it had found imminent danger and reported such a finding to management.

The Court's task, however, is to determine whether a no-strike promise exists. If it does not exist—and section (e) tends to support the argument that it does not—the failure to comply with the provision may suggest a breach of contract but not necessarily justify an injunction. The local's membership did vote to close the mine. Since the membership is a body superior to the safety committee, sufficient compliance with section (e) may have occurred.¹⁶⁰ The Court's reply was that compliance was a contractual question which should be submitted to arbitration, a reply not responsive to the question whether the union had a right to strike.¹⁶¹

Although the Court did seem to separate the issues of arbitrability and the propriety of an injunction, the Court's analysis inferred a no-strike clause from the presence of a broad arbitration clause. The contractual provision permitting the mine safety committee to close down the mine, however, is a contrac-

160. The Court expressed some disbelief that the clause could require the employer to follow a decision of the mine safety committee to remove workers from the area, while giving the employer only the power to remove committee members if they act arbitrarily. Yet this is a literal reading of the provision. One commentator reads the clause the same way. See J. FINLEY, *THE CORRUPT KINGDOM* 231-32 (1972). It is fairly clear that the committee's power to close mines has not been frequently used. See J. McATEER, *COAL MINE HEALTH AND SAFETY: THE CASE OF WEST VIRGINIA* 48-49 (1973) [hereinafter cited as McATEER]. It is no doubt relevant that shutting down a mine cuts off royalty payments to the miners' welfare and retirement fund.

161. The arbitrator had found the issue to be arbitrable, but the decision was not free from ambiguity. Rather than finding that section (e) had not been invoked, the arbitrator found that no "immediate danger" had existed to justify pulling out the workers, and thus the walkout was arbitrable. 7 *LAW REPRINTS, LABOR SERIES*, No. 4, at 42-43 (1973/1974) [hereinafter cited as *LAW REPRINTS*]. The implication is that a walkout justified under section (e) would not have been contractually barred. The section itself, however, seems to make the removal of committeemen for arbitrary closure the *only* arbitrable issue. The arbitrator apparently acknowledged this in his order, by noting that the company had not asked for the removal of the committee members. *Id.* at 47.

The arbitrator, moreover, did not discuss any no-strike obligation, express or implied. Since he had already found no immediate danger under section (e), it is unclear on what basis the walkout was ruled to have violated the agreement. The ruling seems to have been based on a perceived violation of a clause giving management the power to direct the work force. See *id.* at 46. The arbitrator did not order the employees back to work, but the district court had already done that in its restraining order.

tual right to cease work, indicating that safety disputes are not to be exclusively resolved "peacefully" by arbitration. A contractual right to cease work could, under the Court's analysis, indicate that safety matters are not arbitrable. In other words, the quid pro quo argument could operate in reverse. The Court overlooked this possibility.

Furthermore, the Court's analysis of section (e) completely overlooked the history of that provision, a history which suggests that the provision was far more meaningful than the Court was willing to acknowledge. The 1941 Appalachian Joint Wage Agreement provided for a Mine Safety Committee which could investigate and make reports to management but which had no power to close a mine. In addition, the agreement contained a broad no-strike clause.¹⁶² Negotiations in 1946 on a new agreement included a union demand for improved mine safety, including the right to stop work over safety disputes. Negotiations deadlocked, and a nationwide stoppage induced President Truman to seize the mines.¹⁶³

Shortly thereafter, the UMW and the United States executed a new agreement, known as the Krug-Lewis agreement. Under this agreement, local union safety committees were expressly given the authority to initiate safety stoppages, although the Federal Coal Mines Administrator could halt such a stoppage if he found the authority was misused.¹⁶⁴

Following the Centralia Mine explosion in 1947, the Senate subcommittee investigating the disaster held hearings which involved the safety provision. The Federal Coal Mines Administrator, Julius Krug, testified that granting miners the right to close unsafe mines was one of "the two most important moves toward safety in the history of the soft coal industry."¹⁶⁵ He further testified that the agreement permitted the safety committees to "pull out the men in all cases of immediate danger."¹⁶⁶ Moreover, Krug testified to the necessity for self-help measures in a statement that is as relevant now as in 1947:

Federal inspectors could never achieve continuous mine safety without the day-to-day participation of the miners themselves.

162. *Id.* at 154 (union's brief).

163. *See* Exec. Order No. 9728, 3 C.F.R. 539 (1946).

164. LAW REPRINTS, *supra* note 161, at 155 n.21 (union's brief).

165. *Investigation of Mine Explosion at Centralia, Ill., Before a Special Subcomm. of the Senate Comm. on Public Lands, 80th Cong., 1st Sess. (1947).*

166. *Id.* at 305, 312.

. . . Without minute-by-minute vigilance of these men, each one a safety expert in his own right, the mine is bound to revert to unsafe conditions or practices.¹⁶⁷

On July 8, 1947, the union and the private coal operators executed the National Bituminous Coal Wage Agreement of 1947, which, like the agreement with the United States, granted miners the unqualified right to engage in safety walkouts.¹⁶⁸ That provision is similar to section (e) in the 1968 agreement involved in the *Gateway* litigation. This history, therefore, strongly suggests that there was no promise to refrain from safety strikes, an inference which substantially undercuts the *Gateway* Court's analysis of the propriety of the strike.

A second provision pertinent to the *Gateway* litigation also stems from the 1947 agreement. This was a rescission of previous no-strike promises in the Appalachian Joint Wage Agreement of 1941 and the National Bituminous Coal Wage Agreement of 1945.¹⁶⁹ The union's interest in rescission was undoubtedly heightened by the injunction and contempt proceedings prosecuted against it.¹⁷⁰ Another reason for its interest, however, was the passage one month earlier of the Taft-Hartley Act, which provided in section 301 for federal jurisdiction of breach of contract actions. Thus, the rescission occurred after the enactment of, and partly in response to, section 301. As one court noted, the purpose of the rescission was to "remove the danger that the union might be sued for breach of contract under the new statute."¹⁷¹

The Supreme Court accorded little significance to the clause expressly abrogating no-strike promises. The Court read the clause to merely abrogate prior no-strike agreements, holding that it had no effect on the "implied" no-strike duty in the current agreement.¹⁷² It is hard to understand why the parties would abrogate prior no-strike promises and yet "agree" to an *implied* promise in the current agreement. If it is assumed that the specifically mentioned contracts have expired, thus terminating express no-strike pledges, the logical purpose of the rescission clause, especially in the absence of a specific no-strike promise,

167. *Id.* at 298, 301.

168. LAW REPRINTS, *supra* note 161, at 160 n.34 (union's brief).

169. *Id.* at 161 n.34 (union's brief).

170. *United States v. United Mine Workers*, 330 U.S. 258 (1947).

171. *United Mine Workers v. NLRB*, 257 F.2d 211, 216 (D.C. Cir. 1958).

172. 414 U.S. at 384-85 n.15.

is to indicate that the union did not waive the right to strike.¹⁷³ The mine safety committee provision, after all, supports the notion that work stoppages were at least permitted over safety issues.¹⁷⁴

The Court's handling of the miners' contractual provisions suggests that contractual rights to strike must be as clear as exceptions to arbitration clauses. This approach overlooks the historical and emotional differences between arbitration and concerted activities, as well as the importance of employee strike activity.¹⁷⁵ Moreover, injunctions against strike activity involve the exercise of extraordinary federal power against otherwise protected activities.

173. Even if prior no-strike clauses had some application, it is possible to argue that abrogation of such clauses would not necessarily be meaningless. The function could be to preserve the right to strike over matters not made subject to the arbitral procedure. See, e.g., *Lewis v. Benedict Coal Corp.*, 259 F.2d 346, 351 (6th Cir. 1958), *aff'd by an equally divided Court*, 361 U.S. 459 (1960). The argument, of course, does not help decide what matters are subject to arbitration, but the presumption of the *Steelworkers Trilogy* is used to narrow an abrogation clause, an analysis which does not involve the intention of the parties.

174. The miners' contract suggests a critical difference from *Lucas Flour*, where a no-strike promise was premised on a finding that the arbitration was to be final and binding and that arbitration was to be the exclusive dispute-resolving procedure. See, e.g., *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Section (e) of the miners' contract, at least, indicates that not all disputes were to be resolved solely by arbitration.

175. The 1974 Bituminous Wage Agreement has expanded the safety and health protections afforded miners. Although "[e]very employee . . . is entitled to a safe and healthful place to work," art. III(a), *UMW Journal*, Nov. 1974, at 15, it is unclear if the language is much more than hortatory. The contract again requires the employer to "remove" employees from any area in which the committee finds an "imminent danger" exists.

A significant addition permits an individual employee to refuse to work "under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." Art. III(i) (1), *id.* at 16. Even if the danger is disputed, the company must nevertheless assign the employee to "other available work."

The new clause permits individual self-help, conditioned only upon a good faith belief of danger, and does not require initial action by the safety committee. Although the employee's good faith may be tested in an arbitration proceeding, the employee is permitted to initially refuse the work. Since this refusal is allowed only in cases where a good faith perception of danger exists, it does not significantly alter normal arbitral principles. In addition, the new coal agreement makes safety and health grievances arbitrable, providing a separate grievance process for resolution of these claims. Art. III(p), *id.* at 17-18.

C. GATEWAY COAL AND THE SCOPE OF SECTION 502

Having dispensed with the contract, the Court turned to section 502. The Court acknowledged that section 502 operated as a statutory exception to a no-strike promise and that "a work stoppage called solely to protect employees from immediate danger is authorized by § 502 and cannot be the basis for either a damages award or a *Boys Market* injunction."¹⁷⁶ It believed, however, that the court of appeals had read section 502 to encompass an "honest belief" that a hazardous condition exists, "no matter how unjustified."¹⁷⁷ The Court aligned itself with a narrower reading of the provision, requiring "objective evidence that such conditions actually obtain."¹⁷⁸ Thus, a good faith belief would be insufficient in the absence of "ascertainable, objective evidence supporting [the employees'] conclusion that an abnormally dangerous condition for work exists."¹⁷⁹ The nature and required persuasiveness of such "objective" evidence was not discussed nor did the Court explain why the prior activity of the foremen was not sufficient.¹⁸⁰

The appropriate scope of section 502 will be discussed in Part V of this Article. It is unfortunate that the *Gateway* Court faced the issue in an inquiry primarily directed to other questions. The Court was concerned to limit strikes over arbitrable matters, and a narrow reading of section 502 was unfortunately consistent with the thrust of the entire opinion.¹⁸¹

The union had read the court of appeals decision to hold that safety disputes were not arbitrable, and, therefore, no injunction could lie. Even if safety disputes were arbitrable, the union argued that the contract negated any no-strike obligation. Thus,

176. 414 U.S. at 385.

177. *Id.* at 386.

178. *Id.*

179. *Id.* at 387, quoting 466 F.2d at 1162 (Rosenn, J., dissenting). It is possible to interpret the Court as requiring only "objective evidence" supporting the employees' conclusion, rather than evidence proving that an unsafe condition within section 502 existed in fact. See, e.g., *Banyard v. NLRB*, 505 F.2d 342, 348 (D.C. Cir. 1974). A reading that objective evidence is required to support only the *reasonableness* of the employees' perception would be similar to the view suggested in Part VI *infra*. The Court's language, however, makes such a reading problematical. See text accompanying note 178.

180. The Court, for instance, ignored the appellate court's finding that the *nolo contendere* pleas were objective criteria.

181. The Court noted that even if section 502 applied, the district court's order resolved the issue by conditioning the injunction on the suspending of the two foremen pending arbitration. 414 U.S. at 387. The arbitrator, however, did not effectively determine the scope of section 502.

although the union found the policy of section 502 favorable to its position on safety walkouts, it did not stress the role of section 502 as an independent source of protection:

Respondents' fundamental insistence is that this is a contract case, calling for the purposive construction and application of a particular bargaining agreement. The contractual provision at the heart of the case pertains specifically to safety disputes, but it is not strictly necessary for this Court to consider the special congressional policies in the area of job safety in order to affirm the right of the Gateway miners to engage in self-help.¹⁸²

The court of appeals had used section 502 only to support its reverse presumption of arbitrability. Thus, there was no significant analysis of the applicability of section 502 to the walkout and, hence, no significant analysis of the scope of the provision.

Because there is some doubt concerning the scope of employee self-help under section 502, the union's argument that it possessed a contractual right to strike was an attempt to protect a general shutdown. The amicus brief of the AFL-CIO noted that a work stoppage "to compel the employer to abate the particular unsafe condition" is protected by section 502 only with respect to those employees directly affected by the health hazard.¹⁸³ The brief asserted, however, that the safety hazard at the Gateway mine did indeed affect all miners. The contention of the UMW throughout was that the matter was not arbitrable. It is doubtful, moreover, that section 502 was considered at the time of the walkout.¹⁸⁴

In summary, the Court in *Gateway* first applied the presumption of arbitrability to safety disputes and permitted the application of *Boys Market* in such a case of presumed arbitrability. Second, the Court applied the presumption of *Lucas Flour* to find an implied no-strike clause. Third, the Court required that the contractual right to strike over arbitrable matters be clear. Finally, the Court read section 502 narrowly.

Gateway is especially poignant for having arisen in the most dangerous American industry.¹⁸⁵ Coal mining is more dan-

182. LAW REPRINTS, *supra* note 161, at 180 (union's brief). See also *id.* at 186 (union's brief).

183. *Id.* at 213-14 n.6.

184. Safety problems at the Gateway mine were discussed by miners at the 1970 hearings before a Senate subcommittee. Miners complained of supervisory negligence as well as the failure to test for gas. *Hearings on Health and Safety in the Coal Mines Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 27, 351 (1970).

185. See Enterline, *Mortality Rates Among Coal Miners*, 54 AM. J. PUB. HEALTH 758 (1964). In 1965 there were over 10,000 reported injuries in bituminous coal fields, resulting in an average of more than 40

gerous today than it was twenty or thirty years ago. In West Virginia in 1948, 277 miners out of a work force of 125,669 were killed; among the 41,573 miners in 1968, there were 152 fatalities. Twenty years ago, a miner's chance of being killed in West Virginia was one in 453; by 1968, it had increased to one in 273.¹⁸⁶

Coal mining takes place in physical surroundings which are inherently dangerous.¹⁸⁷ Nevertheless, safety records developed in other countries are better than the American average.¹⁸⁸ Productivity advances in coal mining have unfortunately had an adverse effect on safety. New mining machinery has meant increased coal dust and a growing incidence of lung disease along with increased coal production.¹⁸⁹ Moreover, safety training in

days lost from work. That same year one man in thirteen was killed or injured on the job. U.S. BUREAU OF MINES, DEP'T OF INTERIOR, INFORMATION CIRCULAR NO. 8389 (1968).

186. McATEER, *supra* note 160, at x. According to the same census data the mortality rates for miners are 1.4 times that for the total male population for coronary heart disease, 217 times the mortality rate for stomach cancer, 1.9 times the rate for respiratory cancer, and 4.9 times the rate for diseases of the respiratory system. *Id.* Yet, in 1971, the mining industry showed a return on stockholders' equity of 12 percent, fifth highest among all industries. FORTUNE, May 15, 1973, at 207-08. Even while the mining industry showed a 13 percent production decrease, it led the list of all industries in its return on sales with 11 percent. It has been estimated that the general profit margin for the industry ranges between 12.5 and 15 percent. McATEER, *supra* note 160, at 5.

187. The occupational injury frequency rate for mining is 40.92 injuries per million man-hours compared to 10.55 for all industries. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, STATISTICS (1973).

188. McATEER, *supra* note 160, at 25. Statistics demonstrate that the largest coal companies are also the largest killers of men, and effectively refute the belief that accidents occur predominantly in small mines. The 25 largest companies produce over 73 percent of all coal produced in West Virginia; these companies also account for over 82 percent of all fatal and 73 percent of all nonfatal accidents. *Id.* at 24.

189. The relatively high American injury rate for miners occurs in an industry vastly more productive than counterparts in West Germany and England. While the American worker produces twenty tons of coal per day, miners in Great Britain and West Germany produce three tons. This productivity is due in large part to mechanization, which causes safety hazards. Dr. Irving Tabershaw has said:

Increased mining efficiency leads also to increased production of dust, more noise and the generation of more heat at the coal face. Mining efficiency may well be the cause of the increased incidence of coal workers' pneumoconiosis which was noted in U.S. coal miners starting in about 1950. This increase has been ascribed to better medical diagnosis methods, but it is more likely due to the fact that there was more exposure to coal dust from the increased use of mining machinery which began about that time.

OIL, CHEMICAL AND ATOMIC WORKERS' UNION, INFO FOR A LIVABLE INDUSTRIAL ENVIRONMENT 3 (1974). See also McATEER, *supra* note 160, at 60.

the coal industry is inadequate,¹⁹⁰ and the attitude toward accidents remains largely fatalistic.¹⁹¹ As Joseph Finley has written:

But the coal miner dies so often. The equipment he takes with him is not to protect his life, but to pull out more coal. His overlords have shown through all the history of his digging an almost total unconcern about preserving his being. Decades of acceptance have taught him the brooding expectancy of death, and he has given his willing compliance. . . .

Yet death goes on, as it has in America for all the recorded time of coal mining. In a century of keeping records, 120,000 men, an average of a hundred human beings every month for a hundred years, have died violent deaths in coal mines. When mining was in its primitive stages, men were killed in small numbers in many localized tragedies. As the mines grew in size, so did the capacity to wipe out human life.¹⁹²

Nor can the Bureau of Mines be relied upon to effectively enforce mine safety legislation.¹⁹³ Even when serious and repeated violations have been found, enforcement has been minimal or nonexistent.¹⁹⁴ The interest of the Bureau of Mines in safety and health seems secondary to its interest in conservation and development of mineral resources.¹⁹⁵

The facts of *Gateway* hardly suggest that strike-happy employees were involved. Although not reported in the Court's opinion, the mine involved is classified by the Bureau of Mines as "especially hazardous."¹⁹⁶ Such a designation under the Federal Coal Mine Health and Safety Act mandates special inspection procedures to ensure the safety of employees.¹⁹⁷ The "hazardous" designation refers to large amounts of methane gas produced in the mine, a condition making the operation of the ventilation system critical, since gas, if permitted to accumulate, could explode from sparks caused, for example, by mechanized mining machines.

The miners were understandably outraged at the falsification of the entries on air flow, measurements required by the federal act within three hours preceding any shift and "before any miner in such shift enters the active workings of a coal mine."¹⁹⁸

190. McATEER, *supra* note 160, at 14.

191. *Id.* at 50.

192. J. FINLEY, *supra* note 160, at 206.

193. See R. SCOTT, *MUSCLE AND BLOOD* 204-35 (1974).

194. See, e.g., J. FINLEY, *supra* note 160, at 210-12; McATEER, *supra* note 160, at 190-202.

195. McATEER, *supra* note 160, at 197, 208, table 12.

196. LAW REPRINTS, *supra* note 161, at 142 (union's brief).

197. 30 U.S.C. § 813(i) (1970).

198. *Id.* § 861(d) (1).

The company had recognized the dangerous condition by initially withdrawing the work force. The miners subsequently voted to refuse to work under the foremen involved, a decision apparently based in part on past safety grievances,¹⁹⁹ and the walkout occurred after the suspended foremen were reinstated. The right to refuse to work with certain employees, especially in construction, has traditionally been recognized under the NLRA.²⁰⁰ The question is whether an "enlightened society" will penalize similar refusals when miners refuse to work under supervisors whose attitude toward safety is indifferent at best.

V. THE DEFINITION OF ABNORMALLY DANGEROUS WORKING CONDITIONS

The critical language of section 502 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 [Act].²⁰¹

The interpretive questions under this section which have received the greatest administrative and judicial attention involve the operational role of the "good faith" standard and its relationship to "abnormally dangerous conditions."

In the absence of clear legislative history,²⁰² the most logical reading of the statute would require a motivational test—the employees must in good faith *believe* the condition to be abnormally dangerous—and a causal test—the perceived condition must be the *cause* of the walkout. The motivational test overcomes the fear of "unwarranted" interference with production. The causal test is aimed at avoiding a walkout, purportedly in response to an unsafe work environment, but in fact motivated by other concerns. Whether the work condition is dangerous in fact would not seem to be relevant; to invoke the protection of the statute it would be sufficient that the employees (1) in good faith *believe* conditions to be abnormally hazardous and (2) walk out *because* of those conditions. It may be difficult, of course, to

199. LAW REPRINTS, *supra* note 161, at 145 n.2 (union's brief).

200. *See, e.g.*, § 8(e), 29 U.S.C. § 158(e) (1970) (construction industry proviso).

201. 29 U.S.C. § 143 (1970) (emphasis added).

202. There is apparently no legislative history of section 502. The original H.R. 3020 did not include the section; it was introduced without significant discussion in the Senate.

prove what in fact caused a walkout, but similar determinations are required in other contexts.²⁰³

The suggested reading of section 502 does not require the employees' belief to be correct or even reasonable, although the unreasonableness of the belief would certainly cast substantial doubt upon the employees' good faith. The good faith criterion, like other "state of mind" criteria, is based in large part upon reasonable inferences drawn from the evidence. The actual dangerousness of the work condition, then, is relevant to the determination, at least to the extent that such evidence tends to show the reasonableness of the employees' perceptions. The employees must perceive "abnormal" dangerousness. The requirement of such a perception is a further protection against pretextual walkouts.

A requirement that the employees be correct in their belief that the work condition is abnormally dangerous would substantially undercut the obvious purpose of section 502. The section assumes that employees may refuse to work when abnormally hazardous conditions are perceived and provides protection, partly because such action is reasonably foreseeable and partly out of humanitarian considerations. No real function would be served by the subsequent penalizing of employees who erroneously act out of a good faith belief that a condition is dangerous. Requiring an accurate evaluation, later to be tested by an administrative or judicial tribunal, would place the employee in an untenable and unfair position.²⁰⁴ Dangerousness in fact can often be determined only from scientific information and the opinions of experts, evidence not available to employees at the times they must decide whether to engage in self-help or subject themselves to a perceived danger.

A. INTERPRETATION OF SECTION 502

The proposed reading of section 502 was seemingly adopted in an early decision in the Sixth Circuit. In *NLRB v. Knight*

203. Thus, for instance, the cause of strikes said to violate sections 8(b)(4), 8(b)(7), or 8(d) of the NLRA must be determined.

204. Unfortunately, some provisions of the NLRA do require employees to act at their peril. Thus, although employees have the right to respect a picket line, they must correctly judge the legality of the picket line. Similarly, a strike in response to an unfair labor practice of the employer is protected even in the face of a no-strike clause but, apparently, only if the employees correctly evaluate the legality of the employer's conduct. See Getman, *The Protection of Economic Pressure by Section 7 of the NLRA*, 115 U. PA. L. REV. 1195 (1967).

Morley Corp.,²⁰⁵ the court held that a subjective belief in the abnormal dangerousness of the challenged working conditions was sufficient to invoke the protection of section 502.²⁰⁶ There was apparently no question that the uncomfortable conditions were indeed the cause of the walkout.

Unfortunately, recent decisions have rejected this reading of section 502. The Court of Appeals for the Eighth Circuit, for example, has required an "objective" test for abnormally dangerous working conditions,²⁰⁷ and the NLRB has followed suit.²⁰⁸ The "objective" test thus recognizes a third requirement in the consideration of employee action: the employees must be *correct* in their belief that the situation is abnormally dangerous. Therefore, employees act with the risk that a later tribunal, not affected by the "heat" of the situation or personally endangered by the peril, will find the danger only "normal." This reading, however, effectively ignores the good faith requirement. If the situation is in fact abnormally dangerous, there is little need to determine if employees actually believed in good faith that it was dangerous. Since the employees must in any event prove that their walkout was in fact "because of" the dangerous condition, good faith could be presumed. Indeed, there would be little need to prove even a causal connection between the walkout and the perceived condition, unless one assumes that employees who face a condition *in fact* abnormally dangerous will walk out for some other reason. As a matter of reasonable interpretation, "good faith" is the critical term; the prepositional phrase, "because of . . .," refers to the necessary causal relationship between the perception and the activity.

In *Knight Morley* a breakdown occurred in the blower system of a plant buffing room. The blower was required by state law to carry off dust from emery wheels, grinders, and other machinery. A series of difficulties resulted in the morning shift of buffers being sent home after only two hours of work. After some repair work, the blower still blew dirt, grit, and abrasives

205. 251 F.2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958).

206. An objective test could conceivably have led to the same result, since the humidity, dust, and heat affecting the employees was caused at least in part by the malfunctioning of a ventilation blower required by state law.

207. *NLRB v. Fruin-Colnon Constr. Co.*, 330 F.2d 885 (8th Cir. 1964).

208. *See, e.g., Anaconda Aluminum Co.*, 197 N.L.R.B. 336 (1972); *Stop & Shop, Inc.*, 161 N.L.R.B. 75, 76 n.3 (1966); *Curtis Mathes Mfg. Co.*, 145 N.L.R.B. 473 (1963); *Redwing Carriers, Inc.*, 130 N.L.R.B. 1208 (1961).

into the operators' faces. In addition, the weather was hot and humid; the thermometer inside the buffing room indicated 110 degrees.

If the buffers had not been represented by a union, a walkout at this point would clearly have been protected activity under section 7.²⁰⁹ There was union representation, however, and the collective bargaining agreement contained a no-strike clause. Thus, section 502, which excludes safety stoppages from the coverage of no-strike clauses, became relevant in determining the protected nature of the work stoppage.²¹⁰

The buffers on the afternoon shift complained through their union representatives, but were informed that work must continue on pain of discharge. All seventeen buffers subsequently walked out of the plant and were discharged.²¹¹

The NLRB found the walkout protected under section 502 and thus not a "strike" under the contractual no-strike clause.²¹² The concerted activity, therefore, fell under the general umbrella of protection provided by section 7.²¹³ The Board found that the work situation was abnormally dangerous because of the "danger of 'heat disease' and the physical ailments which the 'dust' would and did cause."²¹⁴ The fact that no one contracted "heat disease" was not deemed dispositive, since the walkout itself may have prevented such occurrences. Although the good faith of the employees would have been supported by the fact that they requested amelioration of the dusty condition, suggested how that could be achieved, and walked out only when the company refused to correct the faulty fan, the NLRB seemed confident that abnormally dangerous conditions existed in fact, and the good faith of the strikers was therefore not relied upon as the

209. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *NLRB v. Southern Silk Mills*, 209 F.2d 155 (6th Cir. 1953).

210. Of course, even without section 502, which applies only to strikes in response to abnormally dangerous conditions, the no-strike clause could be read to exclude stoppages in relation to merely unsafe working conditions. The influence of section 502, however, may retard such a development of federal common law under section 301.

211. On the following day, the blower was repaired when the company, responding to suggestions made by employees the day before, reversed the blower wires.

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

213. *See United Auto Workers v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949); *NLRB v. Kohler Co.*, 220 F.2d 3 (7th Cir. 1955); *Getman*, *supra* note 192. *See also Philadelphia Marine Trade Ass'n v. NLRB*, 330 F.2d 492 (3d Cir. 1964), *aff'g* 138 N.L.R.B. 737 (1962).

214. 116 N.L.R.B. at 144.

basic consideration.²¹⁵ Member Rodgers, however, felt compelled to write a concurring opinion, stressing that a subjective standard would be insufficient under section 502.²¹⁶

Although there is much stress on the "good faith" standard of section 502 in the affirming opinion of the court of appeals, the decision does not represent an unequivocal reliance upon a "subjective" test; there is some indication that objective evidence of "hazardousness" was required. In response to the employer's challenge to the testimony of employees as to the condition of the buffing room and to the testimony of an industrial health expert that conditions were abnormally dangerous, the court held that (1) employees were competent to testify as to the physical conditions they had observed and (2) an industrial hygienist was competent to testify about the health dangers involved.²¹⁷ The discussion was aimed at the competence of particular kinds of testimony; the relevance of objective evidence was not doubted, and there was evidence that hazardous conditions in fact existed. Although the court concluded that the conditions "might reasonably [have been] considered 'abnormally dangerous,'" the context suggests that the court may have been referring to the weight of the evidence of hazardousness rather than suggesting that reasonable belief was sufficient.²¹⁸

Despite these ambiguities, *Knight Morley* is often cited as authority for the subjective test of good faith. The Court of Appeals for the Third Circuit itself, in its *Gateway* decision, cited *Knight Morley* for the proposition that "a refusal to work because of good faith apprehension of physical danger is protected activity and not enjoined."²¹⁹ The dissenter, however, cited *Knight Morley* to support his belief that section 502 required "objective evidence supporting [the union's] conclusion that an abnormally dangerous condition for work exists."²²⁰ Finally, the decision was cited as authority for the Supreme Court's *Gateway* holding that "objective evidence" is required.²²¹

The Board's oft-cited interpretation of section 502 in *Redwing Carriers, Inc.*,²²² is also not free from ambiguity. The Board re-

215. *Id.*

216. *Id.* at 154.

217. *NLRB v. Knight Morley Corp.*, 251 F.2d 753, 758-59 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958).

218. *Id.* at 759.

219. 466 F.2d at 1160.

220. *Id.* at 1162 (Rosenn, J., dissenting).

221. 414 U.S. at 387.

222. 130 N.L.R.B. 1208 (1961).

jected the argument that "the state of mind of the employee or employees concerned" was controlling and held that the proper test was "whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'"²²³ If the "actual working conditions" must only be "reasonably" considered abnormally dangerous, then the Board would seem to have adopted the very "subjective" test it purported to reject.²²⁴ The Board's decision, however, relied upon an express finding that abnormally dangerous conditions did in fact exist, and separated this issue from the question of the employees' "good faith." In *Redwing Carriers*, then, the Board seems to have adopted an interpretation requiring more than subjective good faith, despite the rather vague language of its opinion.

The Court of Appeals for the Eighth Circuit has also rejected a subjective test, thus forcing employees to act at their peril, an unhappily ironic result given the purpose of section 502. In *NLRB v. Fruin-Colmon Construction Co.*,²²⁵ employees had been working to widen a vertical shaft from the top of a mountain to a horizontal tunnel several hundred feet below. Employees considered the footing dangerous because of wetness and an up-draft in the shaft. For this reason, employees refused to go down the shaft on the day in question. The court found the work "hazardous," but not "abnormally hazardous," and found that the evidence failed to demonstrate that the employees' good faith belief was in fact correct.

The facts illustrate the inhumanity of the objective test. The work was part of a hydroelectric project to be used by a utility company. There was to be a reservoir on the top of a mountain, and the shaft in which the employees were working was located in the basin of the planned reservoir. Their work consisted of enlarging the entire shaft through the use of dynamite. The holes for blasting were so drilled that the floor of the widened shaft sloped downward toward the narrow pilot hole to aid the fall of blasted rock to the horizontal tunnel below. As the shaft was widened, workers would be lowered in a cage or open elevator.

Concurrently with the widening of the shaft, construction of the reservoir on top of the mountain involved the erection

223. *Id.* at 1209.

224. *Redwing* cited as authority both the court of appeals and NLRB decisions in *Knight Morley*. *Id.* n.3. See *Banyard v. NLRB*, 505 F.2d 342, 348 (D.C. Cir. 1974).

225. 330 F.2d 885 (8th Cir. 1964).

of a large dike or wall of rock. The rock and soil for the dike, obtained from the leveling of the mountain, were continually dumped from large trucks along the course of the dike. While the loads were being dumped, two sluicing monitors compacted the dike by continually washing the dumped material with large quantities of water. Work on the dike progressed in close proximity to the shaft in which the miners were working.

The preceding shift of miners reported that conditions were "rough." A boulder had been seen rolling from the dike and striking the crane that operated the cage in the shaft. The temperature that morning at the top of the shaft was 29 degrees, the coldest since the widening began. Although the crew was reluctant to proceed, supervisors inspected the base of the widened shaft and ordered work to proceed. Work was hampered by water gushing down the shaft and seeping out of the walls above the miners' heads. There was also a strong updraft from the pilot hole, which caused the falling water, mixed with dirt and mud from the walls and floor of the shaft, to blow back up to the top deck of the cage and spray the men on the lower section of the cage. Miners found it difficult to drill dynamite holes and maintain a safe footing on the sloped floor. After 20 minutes of work, the men returned to the surface to warm and dry themselves and asked for temporary work elsewhere or, in the alternative, for the temporary halting of the rock dumping and sluicing operation. The stoppage led to the termination of their employment.

The employer admitted that the work in the shaft was "hazardous under the best conditions,"²²⁶ but noted that other miners had worked in the shaft both before and after the work stoppage. The trial examiner found that the work was abnormally dangerous,²²⁷ defined as "deviating from the normal condition or from the norm or average," a finding he held to be objectively supported.²²⁸ Thus, the protected nature of the walkout turned only on those events which made the critical day substantially more dangerous than usual. This reading of section 502 limits its usefulness as a tool in achieving safe environments but is probably required by the language of the provision.²²⁹ The trial examiner

226. *Fruin-Colnon Constr. Co.*, 139 N.L.R.B. 894, 903 (1962).

227. *Id.*, citing *Redwing Carriers, Inc.*, 130 N.L.R.B. 1208 (1961).

228. *Id.* at 904-05.

229. The result is that the trial examiner must exclude from consideration evidence that the work was generally unsafe. Thus, the trial examiner did not consider evidence that the cage and attached harnesses

did not place great weight on the fact that later shifts had worked in the shaft since those employees "might have been motivated to assume the risks involved to avoid termination of their jobs."²³⁰ This response was supported by the evidence, indicating that some employees will work in situations which a tribunal will later find to be objectively hazardous.

The court of appeals refused to uphold the reinstatement order.²³¹ After a detailed review of the facts, the court held that the trial examiner had unreasonably inferred "abnormally dangerous" circumstances from the record as a whole. The court's detailed review of the evidence and its findings at variance with those of the trial examiner make painfully apparent the difficulties of the "objective approach." The General Counsel, the trial examiner, and the NLRB were convinced that the evidence demonstrated abnormally dangerous conditions in fact, but the court disagreed. No one disputed the good faith of the employees. Three of the four complainants had long experience with mining and the dangers of water, and all four had worked in other phases of the mining operation.

The court agreed that the work was hazardous, involving "inherent, uncontrollable perils."²³² Nevertheless, the work of employees prior and subsequent to the shift in question helped to convince the court that the "record as a whole" did not support the Board's findings. How the hazard was made less than abnormal by the failure of others to object was not made clear.²³³

The court distinguished *Knight Morley*, involving a clearly less frightening situation, because of the presence of expert testimony in that case,²³⁴ although the Act does not require a particular source of evidence relating to working conditions. Indeed, the court was quite willing to make its own safety findings, inconsistent with those of experienced miners whose safety had been at stake. Expressing doubt that *Knight Morley* held good faith to be sufficient to invoke section 502, the court stated unequivocally that the employees' good faith would not be suffi-

were unsafe. 139 N.L.R.B. at 899 n.19. See also *Curtis Mathes Mfg. Co.*, 145 N.L.R.B. 493 (1963).

230. 139 N.L.R.B. at 905.

231. 330 F.2d at 885.

232. *Id.* at 891.

233. Nor does the danger seem normal because only a small number of employees walk out. See *Curtis Mathes Mfg. Co.*, 145 N.L.R.B. 473, 475 n.4 (1963). The court apparently gave some weight to the fact that the employer took some safety precautions and awarded extra compensation for the work.

234. 330 F.2d at 892.

cient "should proof later of the physical facts fail to support [the employees'] prior belief."²³⁵

The court's primary concern is perhaps best illustrated by the statement that employees "run the risk of discharge . . . for participating in the unprotected activity of dictating to management their own terms and conditions of employment."²³⁶ Apparently, if the employees' good faith belief were supported by the "physical facts," they would no longer be "dictating" to management. The bugaboo of "dictation" by employees runs through many of the judicial opinions relating to wildcat activity and safety walkouts but generally has little basis in the facts of particular cases. This is especially true in *Fruin-Colnon*. The employees had asked for temporary reassignment or the halting of operations they felt were interfering with their work as well as endangering their lives.

A similar concern commonly asserted is that the adoption of a subjective test would open "the door to 'quickie' work stoppages and walkouts at any time the employees so desire by the expedient of claiming that conditions of work are unsuitable."²³⁷ But the fear that the claimed "abnormally dangerous" condition is an "expedient" should be overcome by the requirement of a causal connection. The real risk is not expedience or pretext, but that employees who in good faith believe that abnormally dangerous conditions exist and who stop work because of this fear will later be proved wrong. This is the *only* situation protected by the subjective test but not by the objective test. Moreover, the choice seems clear between the risk that employees will erroneously, albeit in good faith, believe conditions to be abnormally dangerous and the risk that the fear of job loss will motivate them to continue to work in danger. There is little threat to economic stability in the subjective approach; employees do not generally enjoy strikes²³⁸ or frivolously contemplate the risk

235. *Id.*

236. *Id.*

237. *Knight Morley Corp.*, 116 N.L.R.B. 140, 154 (1956) (Member Rodgers, concurring).

238. The Steelworkers have set out to obtain contract rights to "refuse without penalty to work under unsafe and unhealthy conditions." Statement by Ben Fischer, Director, Contract Administration, United Steelworkers, cited in NADER, *supra* note 9, at 228. The aim is not only to secure protection from discharge, which is all that section 502 allows, but also to guarantee the right to pay or to transfer to another job when work time would be lost because of the hazards of the regular job. The right has been granted in a number of Steelworker collective bargaining agreements, but workers act at their peril in identifying an unsafe condi-

of job loss. The very factor relied upon by the *Fruin-Colnon* court, the work by later shifts of employees, suggests that employees will often trade wages and job security for safety. The paucity of section 502 cases suggests that there is little compelling reason to restrict the scope of the section.

The objective test, moreover, places weight on expert testimony which for obvious reasons is more available to the employer than to the protesting employees.²³⁹ The critical moment in safety disputes is when employees are faced with a dangerous condition, a time when no "experts," or perhaps only the employer's experts, are available. There is little in policy or fairness to justify the Hobson's choice of working, thereby possibly risking life or limb, or stopping work, thereby risking loss of employment because a later trier of fact finds that the "physical facts" do not support the employees' belief. The problem is one not so much of logic as of simple humanity. The problem is made more serious, and unfair, by reliance upon experts in an area where little is known and one side has greater resources.²⁴⁰

If the standard is objective, and the Board has recently reaffirmed this position,²⁴¹ the character and quantum of proof required to establish that abnormally dangerous conditions existed is the next question that must be addressed. Because of the wide

tion over and above the normal hazards of the job. *NADER, supra* note 9, at 229.

239. The Board has upheld a trial examiner's finding, based in part upon the testimony of a safety engineer employed by the employer's insurance carrier, that abnormally dangerous conditions did not exist. *Stop & Shop, Inc.*, 161 N.L.R.B. 75, 76 n.3 (1966), *aff'd sub nom. Machaby v. NLRB*, 377 F.2d 59 (1st Cir. 1967). *See also Philadelphia Marine Trade Ass'n*, 138 N.L.R.B. 737 (1962), *aff'd* 330 F.2d 492 (3d Cir. 1964).

240. *See, e.g., Myers Indus. Elec.*, 71 L.R.R.M. 1425 (1969). The facts in *Curtis Mathes Mfg. Co.*, 145 N.L.R.B. 473 (1963), were strikingly similar to *Knight Morley* where the Board had found abnormally dangerous conditions to exist. The most significant difference from *Knight Morley* was the absence of expert testimony relating to the health hazard. In *Curtis Mathes* the evidence showed that the shutdown of the dust suction system in a woodworking plant caused thick and unpleasant dust conditions, made breathing difficult, and decreased visibility, adding to the danger of operating certain machines. Company witnesses admitted that the conditions were probably as "unpleasant" as they had ever been in the plant.

The trial examiner stressed that the statute dealt with danger, not discomfort. The dangers caused by dust, however, are not completely unknown, and a concentration which hampers visibility and breathing is more serious than mere discomfort. *See NLRB v. Knight Morley*, 251 F.2d 753, 758-59 (6th Cir. 1957) (discussion of expert testimony). *See generally STELLMAN, supra* note 9, at 22-28, 167-83.

241. *Anaconda Aluminum Co.*, 197 N.L.R.B. 336 (1972).

range of types of work and their relative "safety," it would be difficult to find a general norm from which to determine deviations. The Board has assumed that abnormal danger refers to danger in excess of the norm in the particular workplace. Thus, usual work dangers will not be sufficient to protect the stoppage. Inquiry will tend to focus on the precise time the walkout occurred. Many walkouts, however, are caused by pent up grievances, with the immediate cause being a particular perception of danger.²⁴²

If the danger must be "abnormal," it will be necessary to inquire into the "normal dangers" of the workplace. In the case of the miners in *Fruin-Colnon*, there was no question that the work was inherently dangerous, but the actions of the miners themselves suggest that the danger had increased. The court of appeals, however, relied upon the inherent danger of the work to overrule the Board.²⁴³ The work of employees before and after the stoppage as well as the employer's alleged safety precautions were used to show that the hazard was not abnormal. This approach is similar to the tort notion of assumption of risk and makes it difficult to apply section 502 in dangerous occupations. Courts may be so impressed by the "normal" hazards of particular work that "abnormal" conditions become impossible to prove. In fact, however, employees' acceptance and performance of normally risky employment might strengthen the implication that their concern for their safety at a time of perceived abnormal danger is indeed genuine.²⁴⁴

Going even further in *Anaconda Aluminum Co.*,²⁴⁵ the Board has apparently required circumstances which "change the character of the danger." A molten metal operation, the Board stated, was recognized and accepted by employees as inherently dangerous and did not become "abnormally dangerous" merely because employee patience with prevailing conditions wears thin or their forbearance ceases.²⁴⁶ The employees are said to have

242. See Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 OHIO ST. L.J. 750 (1973).

243. 330 F.2d at 891.

244. The employees in *Fruin-Colnon* did not technically strike but rather asked to be assigned to work in the tunnel, which, as indicated by the identical premium pay for such work, was also recognized as hazardous. Indeed, the employees were willing to continue working in the shaft if the employer would discontinue the sluicing and dumping operations adjacent to the mouth of the shaft. 139 N.L.R.B. at 905.

245. 197 N.L.R.B. 336 (1972).

246. *Id.* at 344, citing *NLRB v. Fruin-Colnon Constr. Co.*, 330 F.2d 885 (3d Cir. 1964).

“accepted” their lot by not striking or quitting. As the cases demonstrate, however, striking involves great risks, and the incidence of strikes over perceived safety hazards is not known. Yet the more dangerous the work, the less hope employees have of convincing a tribunal that the particular situation was abnormally hazardous. The fact that no prior walkouts have occurred is surely not the kind of “objective evidence” of danger one would expect to be required by the courts in these cases. It is hard to see how this information is more relevant than the perceptions and good faith of the employees involved. Finally, while the Board expresses its disdain for a stoppage, even in good faith, caused “merely” by the ceasing of employee patience or forbearance, it is unclear why employees must act immediately or forfeit the opportunity under a statute protecting walkouts over abnormally dangerous conditions at the place of work. The good faith test requires in part a causal link, and there is no inherent reason why forbearance should imply forfeiture. The problem, of course, stems from the adverb “abnormally,” but since the motivation for the provision must have been concern for safety and health, there seems little reason to use an unsafe work situation against employees. Thus, although there had always been a danger of explosions at Anaconda, and indeed some explosions had occurred, it does not follow that a situation which may increase the chance of an explosion does not create abnormal danger. Abnormal danger does indeed include a situation which increases the likelihood of harm from the “inherent risks” of the shop. *It is not the character of the danger which must change, but rather the likelihood of harm.*

The problem is highlighted by the case continually cited by the Board as a clear statement of the objective test. In *Redwing Carriers, Inc.*,²⁴⁷ seven truckers of a common carrier refused to cross a picket line. The alleged abnormal danger was the risk of injury in crossing the line. A number of the drivers had been threatened and one was handled roughly after calling the carrier for instructions. A subsequent state court injunction directed against some of the picketers was predicated on violent acts committed on the picket line. The threats, however, were insufficient to convince the Board that abnormally dangerous conditions existed.²⁴⁸

247. 130 N.L.R.B. 1208 (1961).

248. *Id.* at 1211. The Board seems to have given weight to the fact that between the employees' refusal and the end of the strike, the carrier hauled 1800 loads in or out of the struck plant. *Id.* at 1211. As the

The detailed findings of the trial examiner demonstrate the extent to which the employees bore the brunt of the emotion involved in the strike and, perhaps, the inability of law enforcement officers to provide protection.²⁴⁹ The trial examiner found that the refusal to cross the picket line was protected. Although the threat to safety and health was only "sporadic and uncertain," not continuous as in *Knight Morley*, the trial examiner held that the subjective good faith of the drivers was sufficient to bring them within section 502. Rejecting the subjective test, the Board stated that the "actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'"²⁵⁰

Even under an "objective" test, there clearly was a risk of harm above that faced by truck drivers normally, or perhaps even when crossing picket lines. The "sporadic" character of the threats does not decrease the danger but, as any guerrilla knows, merely increases the terror. The Board, however, seemed to treat the norm as a strike situation in which some disorder is not unusual.²⁵¹ Although a clear determination would have required further elucidation, the Board provided none.²⁵²

The poignancy of the *Redwing* situation is further increased by the fact that the truckers were not bound by a collective bargaining agreement, and therefore were not hindered by a no-strike clause. Thus, technically, the broad protections afforded by section 7, not those of section 502, were at issue.²⁵³ The Board held that employees who refuse to perform their jobs engage in unprotected activity. It has since been established, however, that

trial examiner stated in *Fruin-Colton*, however, surely "Section 502 of the Act does not require that someone be killed or seriously injured before conditions of work can be regarded as abnormally dangerous." 139 N.L.R.B. at 905. The subsequent work without injury could be "pure happen-stance."

249. Although police did escort trucks through the picket lines, trucks had previously been stopped by large groups of strikers. One driver was stopped by pickets and informed that it would be "healthy" if he turned around. Sometime after the employees refused to cross the picket line, "substantial" damage was done to the employer's equipment by nails and thrown objects. Threats continued, other drivers were assaulted, and at least one driver was shot. 130 N.L.R.B. at 1210-11.

250. *Id.* at 1209.

251. *See* *Republic Steel Corp. v. NLRB*, 107 F.2d 472, 479 (3d Cir. 1939).

252. *See* 130 N.L.R.B. at 1211.

253. The trial examiner held the actions of the employees to be concerted activities in the sense that the employees were seeking conditions of employment that would not require them to cross picket lines in the face of violence. *Id.* at 1215.

employees may refuse to cross a picket line under section 7, unless restricted by a no-strike clause, since this is activity for "mutual aid or protection."²⁵⁴

B. ANALYSIS OF THE STANDARD: THE DETERRENCE FUNCTION

As noted by one trial examiner, the objective test of the NLRB "places a heavy burden on employees, who must act without the benefit of medical advice and whose choice places either their jobs or their health in jeopardy."²⁵⁵ To paraphrase the appellate court in *Gateway*, no enlightened society should require such a choice. Moreover, there is no reason to interpret section 502 in this way, despite the Supreme Court's acceptance of the "objective" approach in *Gateway*. Since there is no legislative history relevant to section 502, the proper interpretation of the section must be based upon sound policy as well as correct grammar.

The objective test penalizes employees who cannot subsequently convince a tribunal that conditions were objectively dangerous, even if they succeed in establishing a good faith belief in such abnormal danger and a causal relationship between the belief and the walkout. The result is to penalize employees for a lack of knowledge about industrial disease and safety which they cannot realistically be expected to possess. Moreover, unless they have the resources to consult with industrial hygienists, there is little chance that such evidence will be provided, unless it is provided by company witnesses. In any event, experts can only base their conclusions on the situation they believe to have existed at the time of the alleged hazardous condition, and this will be primarily provided by employees and their supervisors. The testimony of employees and employer representatives will no doubt conflict. Even if the trier of fact believes the employees' version of events, and the expert has indicated that such a situation was abnormally dangerous, there would be little reason not to have simply relied on the employees' evidence in the first place. The inquiry proceeds in an air of unreality—the walkout has already occurred and the employees have already placed their jobs on the line. There is little policy justification for determining the job status of employees on the basis

254. *NLRB v. Union Carbide Corp.*, 440 F.2d 54 (4th Cir.), cert. denied, 404 U.S. 826 (1971). The court held, ironically, that the protection does not apply to employees who refuse to cross a picket line because of fear rather than solidarity.

255. *Curtis Mathes Mfg. Co.*, 145 N.L.R.B. 473, 482 n.6 (1963).

of information not known to them—and not realistically available—at the critical time.

To the extent that the law affects the behavior of employees, the “objective” approach will encourage them to choose wages and job security over safety and health. The facts in the cases demonstrate that many employees already make that choice,²⁵⁶ but there is no reason why the law should encourage it.

There is little evidence that application of the “subjective” test, a test more in keeping with the language of section 502, would result in economic disturbance sufficient to overbalance the health and safety interests of employees. Employees do not lightly strike and risk loss of pay, discharge, or discipline.²⁵⁷ Despite the arguments raised in favor of the more stringent “objective” test, the factual correctness of the employees’ perceptions does not guarantee their good faith or totally avoid the risk of a pretextual walkout. The objective test does, however, operate to penalize employees who act in good faith but who are “objectively” wrong about the safety hazard. Moreover, there is no clear relationship between the economic cost of the walkout to the employer and the choice between the subjective and objective tests. Similarly, the choice of tests has no necessary relationship to the importance of the particular work to the overall production process.

The arguments in support of the objective test stress the chaos and anarchy that would result if employees could choose when to work. Implicit in this fear is the assumption that employees do indeed face job dangers but are not capable of discerning *when* they face these dangers. This assumption denigrates the integrity of workers and implies class-based notions about workers and their proper status. Although these notions are not expressed, they are consistent with and implicit in the arguments made.

Another objection to a “subjective” approach is based on alleged administrative problems. The *Gateway* Court stated that if no “objective evidence” is required, courts face a wholly speculative inquiry into the motives of workers.²⁵⁸ Of course, no test would exclude objective evidence, and even under the “subjec-

256. I am aware of a situation in a steel plant where particular jobs were avoided for years because of perceived hazards, only to become the source of competitive struggle when an arbitration settlement determined that bonuses should attach to those jobs.

257. See Atleson, *supra* note 242.

258. 414 U.S. at 386.

tive" test, good faith would be evidenced by the situation at the time of the walkout. Like other sections of the NLRA, notably sections 8(a) (3) and 8(a) (5),²⁵⁹ states of mind are shown by the circumstances existing at the critical time. Indeed, the analogy indicates that such inquiries are neither "wholly speculative" nor novel. The fear that courts would have to accept the "naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard"²⁶⁰ assumes somehow that the suggested test depends upon "naked" assertions.

The reasons for such hyperbole are not fully explained but seem to flow from a feeling that industrial relations cannot otherwise be conducted efficiently. Evidence to support this notion is apparently not required. The disdain for employees who might make "naked assertions" that their life or health is in danger is clear. Surely it will be difficult to prove good faith on the part of strikers when it is supported *only* by "naked assertions" or "attitudes, fancies, and whim." The subjective test, however, requires more than mere whims or fancies.

It is not at all clear that the more stringent test is required by the "public policy favoring arbitration and peaceful resolution of labor disputes."²⁶¹ Arbitration is not necessarily inconsistent with the right to strike. Some agreements expressly preserve the right to strike over certain types of disputes, and section 502 itself permits strikes in certain circumstances. Moreover, arbitration is not necessarily the most appropriate forum for safety disputes. The burden of seeking "peaceful resolution of labor disputes" when employees face a safety or health hazard should not be placed upon the employee. Employees cannot reasonably be expected to blithely accept the danger and file a grievance in every case.²⁶²

The point which needs to be stressed is that employees can be expected to balk when they believe in good faith that safety hazards exist, regardless of which legal test is recognized. The only reason to punish objectively unfounded reasonable behavior is to protect the orderly flow of production by making employees

259. 29 U.S.C. §§ 158(a) (3), (a) (5) (1970).

260. *Gateway Coal Co. v. United Mine Workers*, 466 F.2d 1157, 1162 (3d Cir. 1972) (Rosenn, J., dissenting), cited in 414 U.S. at 386 n.16.

261. 414 U.S. at 386.

262. Employees often do not see the grievance process as a beneficial method of dispute resolution. The process is often long, and employees may perceive that management will somehow retaliate. See, e.g., R. SCOTT, *MUSCLE AND BLOOD* 164-66 (1974).

think seriously before walking out. This aim is hardly sufficient to support the objective test. In an earlier article I noted that wildcat strikes are rarely whimsical events; employees do not lightly decide to strike, even with union authorization.²⁶³ The flow of production is adequately protected from whimsical strikes by the requirement of good faith and the need to show that the walkout did result from the perception of abnormal hazards.

Although the objective test may in theory deter even protected walkouts, the actual behavior of employees may not be affected by either knowledge or concern for applicable rules of law. It is difficult to believe that the objective test will necessarily deter walkouts when employees reasonably fear threats to their safety or health. The lack of deterrent effect is even more obvious in safety disputes, whether the walkout is authorized by the union or not, than it is in nonsafety wildcat situations.²⁶⁴ Thus, the objective test cannot be expected to encourage walkouts *only* when conditions are *in fact* abnormally dangerous. This is especially true because expert advice will rarely be available at the critical moment.

The problems of threats to health are considerably greater than those of physical safety hazards; there may be long latency periods for health impairments, and existing causes may be hard to identify. For example, the effects of working with mercury, uranium, or vinyl chloride may not appear for many years, and current findings may represent only the tip of the iceberg. One implication is that workers will tend to walk out only when the threat to them is very clear—thus, section 502 cases will primarily represent only those situations where health and safety threats are immediately perceivable. Even a broad reading of section 502, then, would only protect a portion of those employees facing real hazards.

The burden placed on employees by the objective test should be viewed in light of the paucity of information and studies concerning workplace safety and health. In determining whether a situation is abnormally dangerous, to what body of knowledge can an employee quickly turn? Is a noise level of 100 decibels abnormally dangerous? What about 70 parts per million of carbon monoxide? Privately set standards exist for only a handful of chemicals and substances, and federal action under OSHA has

263. Atleson, *supra* note 242.

264. *Id.* at 809.

been painfully slow. Furthermore, the privately set standards are often regarded as arbitrary, obsolete, or based on inadequate scientific inquiry.²⁶⁵ Since both private and public standards are "consensus" standards, they generally represent political compromises rather than scientifically set safety guidelines.²⁶⁶

A recent study by Doctors John Peters and Richard Monson of the Harvard School of Public Health points out the hazards. In a study of two plastics plants they found that the number of cancer deaths over a 26-year span was 50 percent higher than could be expected from a comparable group of American males.²⁶⁷ The incidence of liver cancer was found to be ten times higher than that expected in the general population.²⁶⁸ The reported incidence of cancer deaths of workers in the plastics industry has soared in recent years, and the current findings suggest that studies of other industries could uncover similar horrors. The latency period of exposure to vinyl chloride could extend well beyond 20 years, and thus its full cancer-causing potential may not be known for several years.

Although there is a relatively well defined basis for industrial safety, the study of industrial health is in its infancy, and the extent and incidence of occupational disease is not known. Although some industrial substances are known to be carcinogenic, it is not known how many workers die each year from cancer resulting from long exposure to particular substances. Even the number of hazardous substances in use is unknown.²⁶⁹ The National Institute for Occupational Safety and Health (NIOSH) estimates that there are 15,000 hazardous substances in use, but this is based on an admittedly partial list. In addition, hundreds of new substances are annually introduced into work environments although little, if anything, is known about their potential effects. There is, furthermore, the enormous problem of determining the effect of exposure over many years, especially when the effects of these substances are combined with each other or with other environmental influences.²⁷⁰ All these difficulties of detection and proof indicate that an objective standard cannot fairly be applied to a situation in which an employee is faced with a dangerous condition.

265. See WALLICK, *supra* note 9.

266. See note 54 *supra* and accompanying text.

267. AFL-CIO News, July 6, 1974, at 8.

268. *Id.*

269. MALLINO, *supra* note 14, at 25.

270. *Id.*

C. SAFETY AND HEALTH STANDARDS AND THE OBJECTIVE TEST:
THE ROLE OF OSHA

If the objective test is considered to be the proper standard under section 502, then existing state and federal safety and health regulations should be used to define "abnormally dangerous conditions for work."²⁷¹ The passage of the Occupational Safety and Health Act of 1970²⁷² should result in standards whose violations would provide the objective evidence required to invoke section 502. Although the Act does not create private remedies for work stoppages, the Supreme Court in *Mastro Plastics* furnished an analogy for permitting safety violations to trigger section 502 walkouts. The Court noted that when employees are faced with an employer's illegal conduct, the rejection of self-help measures in favor of the unfair labor practice procedures of the NLRB would "relegate the employees to filing charges under a procedure too slow to be effective."²⁷³ Moreover, the rejection would penalize "one party to a contract for conduct induced solely by the unlawful conduct of the other, thus giving advantage to the wrongdoer."²⁷⁴ The Court, therefore, held that strikes over the unfair labor practices of the employer were protected, despite the existence of a no-strike clause and the remedial procedures of the NLRA. The contractual no-strike clause was held to cover only the economic disputes between the parties, most of which would be subject to the grievance system. The quoted passage refers to strikes during the section 8(d) no-strike period, but it demonstrates a disposition to construe no-strike promises narrowly when strikes occur over critical employee interests.²⁷⁵ The interest in safety and health, protected explicitly in section 502, parallels the concern expressed in *Mastro* in enforcing the NLRA. Serious unfair labor practices or

271. The General Counsel of the NLRB has ruled that violations of the Federal Coal Mine Health and Safety Act will be considered as objective evidence of abnormally dangerous conditions. NLRB, REPORT OF THE GENERAL COUNSEL (June 29, 1972).

272. Pub. L. No. 91-596, 84 Stat. 1590 (codified in various sections of titles 5, 15, 18, 29, 42, and 49, U.S.C.). For an excellent summary of the Act, upon which I have heavily relied, see G. GINSBURG, CASES AND MATERIALS ON FEDERAL LABOR STANDARDS 303 (1973). See also BUREAU OF NATIONAL AFFAIRS, THE JOB SAFETY AND HEALTH ACT OF 1970 (1971).

273. NLRB v. *Mastro Plastics*, 350 U.S. 270, 286-87 (1956).

274. *Id.* at 287.

275. The Board has narrowed *Mastro* to apply only to strikes over "serious" unfair labor practices, an interpretation which serves to undercut the *Mastro* rationale. *Arlans' Dep't Store of Mich., Inc.*, 133 N.L.R.B. 802, 808 (1961). For a recent definition of "serious" violations, see NLRB, QUARTERLY REPORT OF THE GENERAL COUNSEL (June 29, 1972).

abnormally dangerous working conditions should permit conduct otherwise within the literal scope of a no-strike clause.

The need to recognize safety walkouts is even greater than the Court's expressed need to defer to strikes over unfair labor practices. Safety strikes generally involve the need to respond quickly; remedial procedures are usually inadequate. It could well be argued that the remedial procedures of the NLRA are adequately suited, and indeed designed, to remedy violations of the Act which trigger employee walkouts. Safety violations, on the other hand, are not prohibited by the NLRA, and other federal avenues are usually too slow to provide effective alternatives to self-help.

The Occupational Safety and Health Act will not immediately provide sufficient guidance for the rational application of an objective test. The Department of Labor is charged under OSHA with assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions."²⁷⁶ The Act sets out the procedures by which safety and health standards are to be created and enforced, including provisions for inspections. Administration of the Act is primarily the responsibility of the Secretary of Labor and includes the promulgation of safety and health standards,²⁷⁷ the establishment of record keeping requirements,²⁷⁸ the collection and publication of statistics,²⁷⁹ and the conduct of inspections.²⁸⁰ The standards typically require the maintenance of specified conditions or the use of certain methods of operation or procedure.²⁸¹ The Secretary of Health, Education, and Welfare is responsible for all research and related activity in developing the new standards, testing new processes, and establishing standards for all toxic substances.²⁸² This responsibility is delegated to NIOSH, whose director is appointed by the Secretary.²⁸³ Administrative decisions on contested citations and penalties are made by the Occupational Safety and Health Review Commission (OSHRC), an independent commission of three members appointed by the President

276. OSHA § 2(b), 29 U.S.C. § 651(b) (1970).

277. *Id.* § 6, 29 U.S.C. § 655 (1970). See generally Morey, *Mandatory Occupational Health and Safety Standards—Some Legal Problems*, 38 L. & CONTEMP. PROB. 584, 590 (1974).

278. OSHA § 8(e), 29 U.S.C. § 657(e) (1970).

279. *Id.* § 8(g), 29 U.S.C. § 657(g) (1970).

280. *Id.* § 8, 29 U.S.C. § 657 (1970).

281. See, e.g., 29 C.F.R. §§ 1910.23(b)(1), .93(a) (1972).

282. OSHA § 20, 29 U.S.C. § 669 (1970). See Morey, *supra* note 277.

283. OSHA § 22, 29 U.S.C. § 671 (1970).

with the consent of the Senate.²⁸⁴

The general duty section of OSHA²⁸⁵ requires all employers to furnish a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm, and to comply with safety and health standards promulgated under the Act. The role of the general duty clause in defining "abnormally dangerous" working conditions is far from clear.²⁸⁶ Hazards which are likely to cause death or serious harm could be abnormal, but the range of abnormal hazards under section 502 is arguably narrower, since the section requires that a protected walkout be caused by greater risk than the norm for the particular employment. The greatest value of OSHA for purposes of section 502 will involve the actual standards promulgated; they can arguably be employed as definitions of conditions that are abnormally hazardous.

Three types of standards may be set by the Secretary of Labor.²⁸⁷ First, national consensus standards already promulgated by private safety organizations or used under the federal Walsh-Healey Act may be temporarily adopted without a hearing.²⁸⁸ Second, permanent standards are to be promulgated after formal proceedings, including hearings.²⁸⁹ Congress intended that these formal proceedings would also be used in the review, modification, or revocation of the temporary consensus standards. Third, emergency standards can be created to provide immediate protection until formal rulemaking procedures can be employed.²⁹⁰ The Secretary is required to promulgate a standard through normal administrative procedures no later than six months after publication of an emergency standard.²⁹¹

Although the Secretary of Labor must "promulgate the stand-

284. *Id.* § 12, 29 U.S.C. § 661 (1970). See Morey, *supra* note 277, at 595.

285. OSHA § 5(a), 29 U.S.C. § 654(a) (1970).

286. The general duty clause has stirred considerable controversy. See generally Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 38 L. & CONTEMP. PROB. 612, 615 (1974); Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988 (1973); Note, *The Occupational Safety and Health Act of 1970: State Plans and the General Duty Clause*, 34 OHIO ST. L.J. 599 (1973).

287. See J. CONNOR, *Standards, in OCCUPATIONAL SAFETY AND HEALTH ACT: TRENDS AND DEVELOPMENTS* 197 (P.L.I. ed. 1974).

288. OSHA § 6(a), 29 U.S.C. § 655(a) (1970). See Morey, *supra* note 277, at 586.

289. OSHA § 6(b), 29 U.S.C. § 655(b) (1970).

290. *Id.* § 6(c), 29 U.S.C. § 655(c) (1970).

291. *Id.* § 6(c) (3), 29 U.S.C. § 655(c) (3) (1970).

ard which assures the greatest protection of the safety or health of the affected employees,"²⁹² the role of individuals or groups of employees during the standard-setting proceedings is substantially limited.²⁹³ Employees may submit data or written comments, however, and such information may be submitted in order to initiate the proceedings.²⁹⁴ Employers seeking a variance from promulgated standards must notify their employees, post details, and make copies of the variance petition available. This information must inform employees of their right to contest the grant of a variance.²⁹⁵ In enforcement proceedings before the OSHRC, employees may participate to show that the Secretary, in issuing the citation challenged by the employer, gave the employer an unreasonably long time to abate the violations of a standard.²⁹⁶ Finally, employees, as persons "adversely affected or aggrieved" by a decision of the Commission, may appeal to the courts to modify or set aside the Commission's order.²⁹⁷

Although the Act makes no reference to any concerted activity by employees to secure enforcement of the Act,²⁹⁸ it does pro-

292. *Id.* § 6(a), 29 U.S.C. § 655(a) (1970). See MALLINO, *supra* note 14.

293. Moreover, the Act does not expressly provide for a damages remedy and none so far has been created. One court has observed that the purpose of OSHA is not to provide compensation for injuries to workers but "to reduce the number and severity of work related injuries and illnesses which, despite current efforts of employers and government, are resulting in ever-increasing human misery and economic loss." *Skidmore v. Travelers, Inc.*, 356 F. Supp. 670 (E.D. La.), *aff'd*, 483 F.2d 67 (5th Cir. 1973). Civil liability does not follow inevitably from the violation of a statutory duty expressly made enforceable in some other manner. See, e.g., *Breitweiser v. KMS Industries, Inc.*, 467 F.2d 1391 (5th Cir. 1972) (child labor provisions held not to provide a civil remedy for damages). See also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 402 (1971) (Harlan, J., concurring).

294. OSHA § 6(b) (1), 29 U.S.C. § 655(b) (1) (1970).

295. *Id.* § 6(b) (6) (B), 29 U.S.C. § 655(b) (6) (B) (1970).

296. *Id.* § 10(c), 29 U.S.C. § 659(c) (1970).

297. *Id.* § 11(a), 29 U.S.C. § 660(a) (1970).

298. A recent court of appeals decision suggests that federal safety statutes may provide some protection for employees exercising self-help. In *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), an employee's refusal to perform allegedly unsafe work was held to be protected under section 110(b) (1) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 820(b) (1) (1970). The section protects an employee from discrimination if he has notified the "Secretary or his authorized representative" of an alleged danger. The Court held that the employee's action was based on his perception that work conditions were unsafe, a perception sharpened by his prior complaints. The employee, however, had not in fact notified the Secretary of Labor, and other sections of the Act suggest that the "Secretary or his authorized representative" may have a narrow meaning. 500 F.2d at 785 (Robb,

vide some role for employees in the administrative process. If inspections occur, for instance, the employees' representative may accompany the inspection team²⁹⁹ and may notify the inspector of any violation before or during the inspection.³⁰⁰ If the inspector should fail to issue a citation on the basis of a written request, the employee or his representative may ask the Department of Labor for an informal review to learn the reason.

Employees may also initiate complaints and request inspections without first contacting their employer or representative.³⁰¹ This is a critically important provision because the federal inspection efforts are likely to be minimal, at least for the near future.³⁰² The request to inspect for a violation of a safety or health standard need not name the employees involved, although the employer must be provided with detailed reasons for the request. Upon receipt of the request, the Secretary must respond by determining whether reasonable grounds exist to believe there is a violation.³⁰³ Although rejections must be in writing, there is no clear right to appeal a rejection, which is not strictly "an order of the Commission" under section 11(a).³⁰⁴ Even if the refusal is appealable, the chance of reversal would no doubt be slim and the problem of delay serious.

If an inspection reveals an imminent danger, defined as a "danger . . . which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this [Act],"³⁰⁵ the Secretary is em-

J., dissenting). *But see* 115 CONG. REC. 27948 (1969) (remarks of Senator Kennedy). The protection of OSHA seems limited to one who has filed a complaint or instituted a proceeding "under or related to" the Act. OSHA § 11(c)(1), 29 U.S.C. § 660(c)(1) (1970). *See* G. GINSBURG, *supra* note 272, at 318. Nevertheless, the court's broad protection of an employee's refusal to obey a work order after filing formal complaints is of considerable importance. It is often difficult to prove why an employee has been fired, but the previous filing of safety complaints may increase the probability that the discharge will be found to have been discriminatory. The future application of the decision is of importance because any discouragement of employees in the use of the federal safety and health acts makes the scope of section 502 more critical.

299. OSHA § 8(e), 29 U.S.C. § 657(e) (1970).

300. *Id.* § 8(f)(2), 29 U.S.C. § 657(f)(2) (1970).

301. *Id.* § 8(f)(1), 29 U.S.C. § 657(f)(1) (1970).

302. *See* text accompanying notes 59-60 *supra*.

303. NADER, *supra* note 9, at 187.

304. An appropriate parallel to this situation may be the wide discretion of the NLRB General Counsel to issue charges of unfair labor practices. *But see id.* at 187.

305. OSHA § 13(a), 29 U.S.C. § 662(a) (1970).

powered to seek an injunction restraining the condition pending the outcome of statutory enforcement procedures. When an inspector finds that an imminently hazardous situation exists, the Act requires notification to the "affected employees and employers" of his intention to recommend injunctive action.³⁰⁶ Notification occurs by posting a citation before the inspector leaves the premises.³⁰⁷ Such notification would seem to be relevant "objective" evidence in a section 502 hearing. Under section 13(d), should the Secretary "arbitrarily or capriciously" fail to seek this relief, any employees who may be injured by reason of such failure may petition for a writ of mandamus to compel the Secretary to seek such an order.³⁰⁸ The process is cumbersome, since the employees' action is to force the Secretary to initiate a subsequent federal injunctive action. In an "imminent harm" situation, it is unrealistic to expect employees to rely solely on multistep litigation. OSHA's procedures make clear that the Act cannot be a meaningful substitute for employee self-help. Moreover, the experience thus far suggests that OSHA will not provide sufficient guidance to assist employees faced with an objective test under section 502. Thus, further doubt is cast upon the efficacy of the objective test.

It is foreseeable that new agencies will find it difficult to achieve results.³⁰⁹ The agencies involved in administering OSHA, moreover, have too little resources for the monumental task assigned them.³¹⁰ The small number of inspections and other actions of the Department of Labor, however, do not indicate vigorous enforcement.³¹¹ For instance, few permanent standards have been created. Since 1972, NIOSH has recommended exposure standards for fifteen dangerous substances and conditions, including carbon monoxide, arsenic, sulfur dioxide, and ultraviolet radiation, each affecting from 300,000 to 2,000,000 workers. Except for vinyl chloride, carcinogens, and asbestos, the Depart-

306. *Id.* § 13(c), 29 U.S.C. § 662(c) (1970).

307. Moran, *A Critique of the Occupational Safety and Health Act of 1970*, 67 Nw. U.L. Rev. 200 (1972).

308. OSHA § 13(d), 29 U.S.C. § 662(d) (1970).

309. See NADER, *supra* note 9, at 197-210.

310. See text accompanying notes 59-60 *supra*.

311. For instance, certain consensus standards existing under various federal laws could have been made immediately applicable under section 4(b)(2), 29 U.S.C. § 653(b)(2) (1970). The Department of Labor ignored this provision and instituted new consensus standards four months after the effective date of the Act. See MALLINO, *supra* note 14, at 9. Even some of those standards were not made immediately effective. NADER, *supra* note 9, at 201-02.

ment of Labor has failed to act on these recommendations.³¹² The goal for the future is a mere 15 to 20 more standards each year—a rate at which the Department would not deal with already existing hazards for decades, much less identify the numerous potentially dangerous new chemicals and substances continually being introduced.³¹³

Furthermore, the vast majority of all OSHA standards are concerned with safety rather than health.³¹⁴ Most health standards are merely “threshold limit values” (TLVs). The TLVs do not “define relationships between exposure and disease, nor do they provide relative indices of hazard or toxicity. They are simply levels above which exposure is considered hazardous.”³¹⁵ There are TLVs for only 450 substances and agents in OSHA’s general industry standards, despite the thousands of such agents in industrial use.³¹⁶

Criticism of the agencies administering OSHA is mitigated, however, by the magnitude of their task and insufficiency of their resources, a common attribute of social programs. The development and enforcement of standards is time-consuming and requires enormous resources of money and personnel.³¹⁷

Given the difficulty of determining when “abnormally dangerous” conditions exist, and the Hobson’s choice employees must make when faced with unsafe working conditions, violations of promulgated OSHA standards should at least be evidence of abnormally dangerous conditions, if not conclusively presumptive. Other federal laws, such as mine safety laws, should be used for the same purpose. As *Mastro Plastics* demonstrates, pri-

312. OCAW Union News, Sept. 1974, at 10.

313. Sixteen thousand potentially dangerous substances are now in use; six hundred such chemicals are introduced each year.

314. See MALLINO, *supra* note 248, at 10-11.

315. *Id.* at 11.

316. See text accompanying note 21 *supra*. The agencies administering OSHA have also been criticized for an alleged indifference to hazards in agriculture. Farmworker groups have sued the Occupational Safety and Health Administration for its failure to issue standards protecting workers against unsafe equipment and unsanitary working conditions. When the agency was directed by a district court to issue an emergency standard protecting farmworkers against pesticide poisoning, it contested the order and won, leaving pesticide protection to the Environmental Protection Agency, which has inadequate staff and power to enforce such a standard. See, e.g., MIGRANT LEGAL ACTION PROGRAM, MONTHLY REPORT, Oct. 1974, at 3.

317. Marcus Key, director of NIOSH, estimated that development of a comprehensive criteria document would cost approximately \$200,000 to \$300,000 and require a year or more to complete. See MALLINO, *supra* note 14, at 27.

vate enforcement of federal standards is not inconsistent with administrative enforcement procedures, even those procedures designed to enforce the same standards.³¹⁸ The time consumed in invoking the often complex provisions of OSHA encourages the private enforcement of these provisions. Indeed, the need for employee action when faced with safety and health dangers may well be greater than the need for response to "serious" unfair labor practices.

In sum, the enactment of OSHA is not likely to eliminate either the motivation or the need for employee self-help. Moreover, the progress of OSHA enforcement raises further doubt about the wisdom and fairness of an objective test under section 502. If a strictly subjective good faith test should nevertheless prove unacceptable, a middle position could be adopted in which the relevant interests could be more fairly balanced in light of the lack of information about health and safety threats. Part VI of this Article is devoted to the description of such a compromise position.

VI. A MIDDLE POSITION: THE STANDARD OF REASONABLENESS

A subjective good faith standard requires proof that employees honestly perceived abnormally hazardous working conditions. Any test relying upon a particular state of mind requires factual support from which inferences can be drawn. Employees would normally introduce evidence tending to show that hazards existed in order to demonstrate that their apprehensions were in "good faith." This evidence would also tend to show that conditions were in fact dangerous. Factual information, then, would be part of the employees' case under either an objective or a subjective test. Under a subjective test, such evidence would weaken the objection that stoppages were based upon "mere whim." Moreover, the evidence would be required to demonstrate that the employees had a good faith belief that the danger was *abnormally* dangerous, for this is what section 502 clearly requires.

318. Safety walkouts are arguably consistent with the statements of congressional purpose in OSHA. A purpose of the Act is to "assure so far as possible . . . safe and healthful working conditions . . . by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment." OSHA § 2(b) (1), 29 U.S.C. § 651(b) (1) (1970). A rival bill, introduced by Representative Daniels, would have protected the right to strike *with pay* in face of hazardous conditions. The provision was deleted in committee.

Should the subjective test not be acceptable, another standard could be devised to balance the competing interests more fairly than an objective standard. If honesty is not sufficient, and more objectivity is required, then the employees' action should be tested by a standard of reasonableness. Honesty or good faith at the time of the walkout would not alone be sufficient, yet the employees could not be penalized if their reactions were reasonable at the time, even though those reactions are subsequently found to have been provoked by conditions not abnormally dangerous in fact.³¹⁹ Application of the test focuses on the employees' perceptions and behavior and the physical environment at the critical time, rather than on an *ex post facto* search for objectively established abnormality. The suggested standard cannot be said to permit strikes at the whim or fancy of employees. It considers not only employees' perceptions but also the reasonableness of their conduct, which depends in large part on evidence showing the condition of the work environment.

The strongest argument for this test is that it best recognizes the situations in which employees can be expected to use self-help. It is simply unfair to punish reasonable conduct based upon a good faith perception of danger unless the opposing interests are over-powering. Admittedly, the test is similar to the recommended "subjective" test, since under the subjective test the reasonableness of employees' behavior would be relevant to their "good faith" belief.

A reasonableness standard has been applied by arbitrators when employees have refused to perform work in the face of perceived safety threats. The normal rule that employees must obey work orders is modified in those cases "where obedience would involve an unusual health hazard or similar sacrifice."³²⁰ Most arbitrators have not required an employee to "correctly" determine the health hazard; it is sufficient that he has an honest and reasonable belief.³²¹ Arbitrators generally have required an

319. See *Marble Prods. v. Local 155, United Stone & Allied Prods. Workers*, 335 F.2d 468, 472 (5th Cir. 1964), where the court implies that section 502 encompasses a reasonableness test. See also *Banyard v. NLRB*, 505 F.2d 342, 348 (D.C. Cir. 1974).

320. *Ford Motor Co.*, 3 Lab. Arb. 779, 782 (1944) (Shulman, Arbitrator). See also *Minnesota Mining & Mfg. Co.*, 59 Lab. Arb. 375, 378 (1972) (Silver, Arbitrator). But see *Bethlehem Steel Corp.*, 53 Lab. Arb. 1338 (1970) (Seward, Arbitrator); *North Am. Rockwell*, 53 Lab. Arb. 955 (1969) (Larkin, Arbitrator).

321. See, e.g., *F.M.C. Corp.*, 45 Lab. Arb. 293 (1965) (McCoy, Arbitrator); *American Radiator & Standard Sanitary Corp.*, 41 Lab. Arb. 755 (1963) (Stouffer, Arbitrator); *New York Shipbldg. Corp.*, 39 Lab. Arb. 1186 (1963) (Crawford, Arbitrator); *Union Carbide Plastics Co.*, 34 Lab.

employee to demonstrate a "reasonable basis for his belief";³²² if the employee's appraisal is reasonable, it is irrelevant whether in fact it is later determined that no hazard existed.³²³ Moreover, arbitrators have not required the danger to be abnormal—only some danger or discomfort has been required.³²⁴ None of these cases, however, have involved a walkout of more than a few employees, and in each case the employees involved were all directly confronted with the safety hazard.

Arbitral decisions suggest that the proposed interpretation of section 502 would not result in massive economic disruption, nor would it cripple arbitration systems or undercut the federal policy encouraging their use. The actual standards used in arbitration, the forum usually chosen for discipline cases,³²⁵ reflect a test more liberal than that adopted by decisionmakers under section 502.

Whether section 502 will be construed to protect economic pressure or, as seems likely, only defensive measures, the objective test does not result in a fair allocation of the dangers of industry. The test furnishes no significant support to legitimate employer interests or the integrity of grievance systems that could not be supplied by the competing tests discussed in this Article. The most logical reading of section 502 and the foreseeable employee response to health and safety threats support the subjective good faith test or, at a minimum, a test focusing on the reasonableness of employee perceptions at the time critical decisions must be made. When employees are faced with honest perceptions of danger, no enlightened society should make them act at their peril.

Arb. 504 (1960) (Luskin, Arbitrator).

322. Laclede Gas Co., 39 Lab. Arb. 833, 839 (1962) (Bothwell, Arbitrator).

323. A.M. Castle & Co., 41 Lab. Arb. 666, 670 (1963) (Sembower, Arbitrator).

324. See Celotex Corp., 52 Lab. Arb. 1187 (1969) (Cayton, Arbitrator); Berger Steel Co., 46 Lab. Arb. 1131 (1966) (Goldberg, Arbitrator); Gaffers & Sattler Corp., 44 Lab. Arb. 919 (1965) (Roberts, Arbitrator).

325. Most disciplinary cases are grieved. Access to the NLRB may even be barred by the Board's deference policy. Since Collyer Insulated Wire, 192 N.L.R.B. 837 (1971), in which the NLRB first deferred to the arbitration procedure, the Board has expanded its deference to arbitral processes by deferring in disciplinary cases. See, e.g., National Tea, 198 N.L.R.B. 62 (1972); National Radio, 198 N.L.R.B. 1 (1972).

Moreover, should the employee receive an adverse decision in arbitration, the NLRB may defer to the award. Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). For a criticism of this doctrine, see Atleson, *Disciplinary Discharges, Arbitration, and NLRB Deference*, 20 BUFFALO L. REV. 355 (1971).

