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UNSAFE WORKING CONDITIONS:  
EMPLOYEE RIGHTS UNDER THE LABOR MANAGEMENT  
RELATIONS ACT AND THE OCCUPATIONAL SAFETY &  
HEALTH ACT

*Nicholas A. Ashford\* and Judith I. Katz\*\**

I. Introduction

Occupational health and safety have long been an issue in the law governing labor-management relations. One of the clearest examples is the employee's right to refuse hazardous work, which is embodied in § 7 and § 502 of the Labor Management Relations Act (LMR Act).<sup>1</sup> The exercise of this limited right to employee self-help, the health and safety activities of the private sector and the state agencies proved insufficient to deal adequately with mounting occupational injury and disease.<sup>2</sup> The congressional response to this inadequacy was most emphatically articulated in the Federal Coal Mine Health and Safety Act of 1969<sup>3</sup> and the Occupational Safety & Health Act (OSH Act) of 1970.<sup>4</sup> These acts were not merely safety codes, but rather extensive legislation intended to alter employer and employee rights and obligations regarding broad health and safety issues. Indeed, the OSH Act has been called the "most revolutionary piece of labor legislation since the National Labor Relations Act."<sup>5</sup>

Recent decisions under both the LMR Act and the OSH Act have left the nature of the right to refuse hazardous work and the arbitration of health and safety disputes in a confusing state of affairs. Not only do certain critical issues under each act remain unresolved, but also the relationship between the two acts remains unclear. Under the LMR Act, union and non-union employees enjoy a different degree of protection in their right to refuse hazardous work, variation depending upon certain features of the collective bargaining agreement. The protection of the right appears different again under the OSH Act. At the root of this confusion are the different policies and practices of the NLRB and the Occupational Safety and Health Administration (OSHA).

The developing and uncertain nature of the law in this area is altering union behavior in the collective bargaining area beyond the mere incorporation of federal health and safety obligations into the contract.<sup>6</sup> Employees are resorting

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1 29 U.S.C. §§ 157, 143 (1970).

2 See N. ASHFORD, *CRISIS IN THE WORKPLACE: OCCUPATIONAL DISEASE AND INJURY* (1976) [hereinafter cited as N. ASHFORD]; J. McATEER, *COAL MINE HEALTH AND SAFETY: THE CASE OF WEST VIRGINIA* (1973).

3 30 U.S.C. §§ 801-960 (1970).

4 29 U.S.C. §§ 651-78 (1970).

5 White & Carey, *OSHA Comes of Age: The Law of Work Place Environment*, 1973 BUSINESS LAW. 1309.

6 See Bureau of Labor Statistics, U.S. Department of Labor, *Major Collective Bargaining Agreements: Safety and Health Provisions* (Bulletin No. 1425-16, 1976).

to private actions in tort against their employers for situations not covered by the shield of workers' compensation.<sup>7</sup> The uncertain and occasionally inconsistent legal signals given to employees and unions may actually be defeating the stated national policy favoring the arbitration of health and safety disputes articulated by the Supreme Court.<sup>8</sup> The purpose of this article is to review the present state of the law affecting the right to refuse hazardous work under the LMR Act and the OSH Act and to identify the unresolved issues which stand in the way of a coordinated policy aimed at the improvement of working conditions.

## II. Health and Safety Protection Under the LMR Act

### A. Refusal of Hazardous Work as a § 7 Protected Concerted Activity

The LMR Act guarantees that: "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>9</sup> Concerted activities are protected by § 8(a)(1) of the Act, which forbids employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]."<sup>10</sup> Hence, discharge of employees or other adverse action by a company against employees constitutes an unfair labor practice if it is in response to protected § 7 rights.

In *NLRB v. Washington Aluminum Co.*,<sup>11</sup> the Supreme Court recognized that a walkoff by employees for unsafe working conditions should be afforded full § 7 protection. Seven of eight non-union machine shop employees left the job in protest when the furnace broke in 11° weather and the company failed to supply adequate heat. The Court upheld the Board ruling that the company's discharge of the employees was a violation of § 8(a)(1) despite the company's argument that the machinists violated a company rule forbidding employees to leave their work without the foreman's permission. It is noteworthy that the Court placed special emphasis on the unorganized status of these employees in affirming their work stoppage: "They had no bargaining representative, and in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could."<sup>12</sup> It is precisely this philosophy through which unorganized workers have traditionally been encouraged to obtain improved working conditions.<sup>13</sup>

In order for a refusal to accept hazardous work to qualify as concerted

7 Miller, *The Occupational Safety & Health Act of 1970 and the Law of Tort*, 38 LAW & CONTEMP. PROB. 612 (1974).

8 See, e.g., *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974).

9 29 U.S.C. § 157 (1970) states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)].

10 29 U.S.C. § 158(a)(1) (1970).

11 370 U.S. 9 (1962).

12 *Id.* at 14.

13 This was true until the passage of the OSH Act in 1970, which covers both organized and unorganized employees.

activity protected by § 7, it must meet several essential requirements which include a requirement that the refusal constitute a labor dispute under § 2(9) of the LMR Act.<sup>14</sup> As the Supreme Court noted in *Washington Aluminum*, it has long been settled that "the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not."<sup>15</sup> Although the leaving of a job may be objectively "unnecessary and unwise," the objective determination of that fact cannot be used to establish whether a safety controversy exists. Thus it appears that neither the Board nor the courts need give scrutiny to the actual substance of the § 7 safety walkoff nor to whether the conditions which the employees protest are, in fact, unsafe. The Board's decision concerning § 7, affirmed by the Fourth Circuit, speaks directly to this point:

[T]he issue here is not the objective measure of safety conditions, it is whether these employees left their jobs because they thought conditions were unsafe. They could not have been penalized for so doing just because, other employees tolerated such conditions or because by some external standard, they were too safety conscious.<sup>16</sup>

This is in sharp contrast to specific standards of safety and types of evidence required under § 502 of the LMR Act and § 11(c) of the OSH Act.<sup>17</sup>

While non-union employees have successfully used their § 7 rights over unsafe working conditions,<sup>18</sup> employees represented by unions have also availed themselves of § 7 protection regarding health and safety,<sup>19</sup> often with the support

14 29 U.S.C. § 152(9) (1970) defines "labor dispute" to include any controversy concerning terms, tenure, or conditions of employment. In *Shelly & Anderson Furniture Co., Inc. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), the Ninth Circuit described the elements of § 7 protected concerted activity:

(1) there must be a work-related complaint or grievance [§ 2(9) labor dispute]; (2) the concerted activity must further some group interest; (3) a specific remedy or result must be sought through such activity; and (4) the activity should not be unlawful or otherwise improper.

*Id.* at 1202-03, citing 18B BUSINESS ORGANIZATIONS, Kheel, *Labor Law*, § 10.02(3) (1973). Accord *NLRB v. Leslie Metal Arts Co.*, 509 F.2d 811, 813 (6th Cir. 1975).

15 370 U.S. at 16. The Court also cites *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

The wisdom or unwisdom of the men, their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute.

*Id.* at 344.

16 213 N.L.R.B. 818, 87 L.R.R.M. 1269 (1974), enforced by, *Union Boiler Co. v. NLRB*, 530 F.2d 970, 90 L.R.R.M. 3057 (4th Cir. 1975). Employees cleaning a silo walked off the job because of concerns over bad weather and poor visibility. Although the employees belonged to a union, the union was not involved in the work stoppage.

17 See text accompanying notes 24-39, *infra*.

18 See, e.g., *NLRB v. KDI Precision Products, Inc.*, 436 F.2d 385 (6th Cir. 1971) (sit-out over excessive heat); *Oklahoma Allied Telephone Co.*, 210 N.L.R.B. 916, 86 L.R.R.M. 1393 (1974) (complaint over heat and paint fumes after air-conditioning system ceased functioning).

19 See, e.g., *NLRB v. Belfry Coal Corp.*, 331 F.2d 738 (6th Cir. 1964) (per curiam), enforcing 139 N.L.R.B. 1058 (1962) (two miners refused to work in area that had been "dangered off" by state mine inspector); *G.W. Murphy Industries, Inc.*, 183 N.L.R.B. 996 (1970) (walkoff over excessive smoke and heat in plant); *Associated Divers & Contractors, Inc.*, 180 N.L.R.B. 319 (1969) (union steward led work stoppage aboard barge over unsanitary conditions).

or sanction of the union.<sup>20</sup> Where a collective bargaining agreement may contain a no-strike clause, union-sanctioned walkoffs over health and safety are generally restricted under § 7.<sup>21</sup> Walkoffs by a minority of employees in derogation of the union and in conflict with the union's exclusive representation would not be protected by § 7.<sup>22</sup> Where health and safety have been excluded from a no-strike provision, § 7 is fully available and individual employees should be free to walk off the job when concerned over unsafe conditions so long as doing so is for the mutual benefit of other employees as well.<sup>23</sup>

### B. Section 502 and the Right to Strike over "Abnormally Dangerous Conditions"

In addition to the concerted activities protected under § 7, § 502 of the Taft-Hartley Act explicitly protects work stoppages by employees who refuse work because of abnormally dangerous conditions from being considered a "strike."<sup>24</sup> There are two major tests pertinent to coverage under § 502: what constitutes "good faith" and what hazards come within the scope of "abnormally dangerous conditions."

The courts have let the "good faith" test die a slow and subtle death. The case most cited as authority for the subjective test of good faith is *NLRB v. Knight Morley Corp.*<sup>25</sup> In that case, the improper repair of an exhaust fan in a buffing department created an increased accumulation of dust and heat, causing buffers to walk off the job. The testimony from the buffers as to the physical conditions in the buffing room was held to be "competent" by the appeals court. Laymen may testify as to the physical conditions which they have observed.<sup>26</sup>

The central focus of the court's opinion in *Knight Morley* lay not in the existence of good faith but the competency of the evidence to prove "abnormally dangerous conditions." Although the court alluded to the good faith of the employees in walking out, its decision is premised upon the existence of the

20 See, e.g., *Western Contracting Corp. v. NLRB*, 322 F.2d 893 (10th Cir. 1963). Nine of eleven drivers stopped work in an attempt to get heaters installed in their trucks and were subsequently discharged. The union notified the company that it had not called the strike although it was in full sympathy with the employees' action. In finding a company violation of § 8(a)(1), the court affirmed the Board holding that the work stoppage was not a "wildcat" strike, both because the union supported the strike and because a majority of the drivers affirmed the walkout soon after its inception.

21 It would seem that the only protection offered is defined by § 502. See Atleson, *Threats to Health and Safety: Employee Self-Help Under the NLRA*, 59 MINN. L. REV. 647, 660 (1975) [hereinafter cited as Atleson].

22 *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963).

23 See *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967). But see *NLRB v. C & I Air Conditioning, Inc.*, 486 F.2d 977 (9th Cir. 1973). See also *Shelly & Anderson Furniture Co., Inc. v. NLRB*, 497 F.2d at 1202-03 for other elements of "concerted activities" *supra* note 14.

24 29 U.S.C. § 143 (1970) states in pertinent part:

nor shall 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 be deemed a strike under this chapter.

29 U.S.C. § 142(2) (1970) states that: "The term 'strike' includes any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees." A § 502 claim will be dismissed for failure to state a claim for which relief can be granted if no strike is involved. *Kaelin v. B. F. Goodrich Chemical Co.*, 88 L.R.R.M. 2682 (Ky. Cir. Ct. 1974).

25 251 F.2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958).

26 *Id.* at 758.

evidence presented. It would seem that where such abnormally dangerous conditions exist, good faith must implicitly be present.<sup>27</sup>

The subjective good faith test which appeared to emerge in *Knight Morley*, however, received its deathblow in the NLRB ruling in *Redwing Carriers*, in which the Board stated:

It is necessary first to clarify the meaning of the term "abnormally dangerous conditions" as used in Section 502. We are of the opinion that the term contemplates, and is intended to insure, an objective, as opposed to a subjective, test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered "abnormally dangerous."<sup>28</sup>

This test has been utilized in all cases since *Redwing Carriers* where § 502 has been raised to defend activity which otherwise would be unprotected by a collective bargaining no-strike clause.<sup>29</sup> It finally received Supreme Court approval in *Gateway Coal v. UMW*.<sup>30</sup>

Using the objective test, courts have refined the definition of abnormally dangerous conditions. They have found to be abnormally dangerous, situations in which the risk of danger has increased over that considered to be normal for the specific job assignment. Where temporary exhaust system breakdowns occurred creating "highly unpleasant" working conditions, the Board refused to provide § 502 protection to employees who left the job, because the conditions were caused by periodic shutdowns,<sup>31</sup> and hence a "normal" part of the job. In *Anaconda Aluminum* the Board applied a similar approach to an inherently dangerous job:

Absent the emergence of new factors or circumstances which change the character of the danger, work which is recognized and accepted by employees as inherently dangerous does not become "abnormally dangerous" merely because employee patience with prevailing conditions wears thin or their forbearance ceases.<sup>32</sup>

27 See Atleson, *supra* note 21, at 687-99 for discussion of *Knight-Morley* and subsequent cases under the *Redwing* Doctrine. It is interesting to note that the Supreme Court cited *Knight and Morley* as authority for the requirement of objective evidence in *Gateway Coal*.

28 130 N.L.R.B. 1208, 1209, 47 L.R.R.M. 1470 (1961).

29 Stop and 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).

30 414 U.S. 368, 385-87 (1974).

31 Curtis Mathes Mfg. Co., 145 N.L.R.B. 473 (1963), states that: "There seems to be little dispute as to the nature of the conditions in the mill while the suction system was off . . . the high dust content in the air impaired visibility, made breathing more difficult, caused sore throats, etc." *Id.* at 474. The Board also makes it a point in illustrating that conditions were not abnormally dangerous to state that "no employees from the sanding area, where the dust was thickest, walked out." This evidence could not have been used under a § 7 concerted activities test as stated in *Union Boiler*. See text accompanying note 16, *supra*.

32 197 N.L.R.B. 336, 344 (1972), citing NLRB v. Fruin-Colnon Constr. Co., 330 F.2d 885 (8th Cir. 1964) (emphasis added) (employees widening a shaft to meet tunnel several hundred feet below). See also, Combustion Engineering, 224 N.L.R.B. 76, 93 L.R.R.M. 1049 (1976) (violence by other employees which erupted in a work area marked "danger" was covered under § 502). Cf. Philadelphia Marine Trade Association v. NLRB, 330 F.2d 492 (3d Cir. 1964), enforcing 138 N.L.R.B. 737 (1962), *cert. denied*, 379 U.S. 833 (1964) (unloading cargo by use of pallets rather than slings held abnormally dangerous); Pence Constr. Co. v. Int'l Union of Operating Engrs., 484 F.2d 398 (5th Cir. 1973) (firing of safety protagonist not proof of unsafety).

So it can be concluded that the task of proving the existence of abnormally dangerous conditions in order to come under § 502 protection is by no means easy; and it is particularly difficult in inherently dangerous jobs. The burden of the objective test means that employees risk penalties if, in walking off the job, their judgment as to the extent of the hazard and the increase in the risk prove inconsistent with an objectively determined standard.

Finally it would seem that because § 502 authorizes the quitting of work by "an employee or employees" it is arguably an individual right; moreover, the section does not mention a labor union.<sup>33</sup> Hence the right would extend only to those employees actually faced with the abnormally dangerous conditions, and a safety issue could not be used as justification for a union walkout unless everyone were threatened by the hazard.<sup>34</sup> However, this question has never been answered.

The relationship between § 7 and § 502 remains unclear in many respects. They could be read as establishing separate rights, without coterminous application. On the other hand, § 502 defines the scope of the concerted activities protected by § 7 in the context of a no-strike clause in the collective bargaining contract. Looking at the types of activities protected, it is clear that § 7 is broader than § 502 since the latter applies only to abnormally dangerous conditions while § 7 does not depend on a determination concerning the nature or extent of the hazard. Thus, when employees wish to quit work because of unsafe (but perhaps less than abnormally dangerous) conditions, the preference of § 7 protection over that of § 502 is obvious. Section 7 protection would probably be chosen over § 502 protection where a collective bargaining agreement had a clause reserving the right to strike, since the more limited § 502 protection is not necessary because strikes are not forbidden. After *Boys Markets Inc. v. Retail Clerks Local 770*,<sup>35</sup> the policy favoring arbitration where an express no-strike clause exists was extended such that an agreement to arbitrate gave rise to an implied promise not to strike. This severely restricted the scope of § 7 concerted activity in general. What remained unresolved was the extent to which § 502 kept the § 7 protection open for abnormally dangerous conditions,<sup>36</sup> thus making employer reprisal against the protected walkoff an unfair labor practice. This issue was addressed in *Gateway Coal*<sup>37</sup> where a requirement that health and safety disputes be arbitrated does not necessarily extinguish a § 502 right to strike, even where an express or implied no-strike clause exists.<sup>38</sup> However, broad § 7 con-

33 *Clark Engineering & Constr. Co. v. United Brotherhood of Carpenters and Joiners*, 510 F.2d 1075, 1079 (1975). In support of § 502 being an individual right, Atleson argues that it should be interpreted to protect even an unauthorized walkout. See Atleson, *supra* note 21, at 660.

34 Ferris, *Resolving Safety Disputes: Work or Walk*, 26 LAB. L.J. 695, 702 (1975).

35 398 U.S. 235 (1970). See text accompanying notes 71-79, *infra*.

36 Where a statutory § 502 walkoff is outside the scope of the collective bargaining agreement, it can serve as the foundation of a § 7 concerted activity in order to press an unfair labor practice charge under § 8(a)(1). Section 8(a)(1) applies only to "rights guaranteed in section 7." It can be argued that in order to have a § 8 unfair labor practice charge available, § 502 must be a form of concerted activity since § 8(a)(1) only covers § 7 rights. However, § 502 need not meet all the requirements of a concerted activity, e.g., an individual for his or her own purpose may engage in a § 502 walkoff but not in "concerted activity."

37 414 U.S. at 376.

38 See Atleson, *supra* note 21, at 682-99 for discussion of scope and availability of § 502.

certed activities in the area of health and safety do not appear to be available where no-strike clauses, express or implied, are present.<sup>39</sup>

There may be circumstances where a health and safety dispute involves an unfair labor practice and at the same time falls within the scope of the contract, to be resolved by the arbitration process. Under the doctrine enunciated in *Collyer Insulated Wire*, the NLRB will defer to arbitration all disputes both arising out of the collective bargaining agreement<sup>40</sup> and certain disputes which are not specifically mentioned in the contract.<sup>41</sup> This policy of pre-arbitral deferral paralleled the policy of post-arbitral deferral announced much earlier in *Spielberg Manufacturing Co.*,<sup>42</sup> where the NLRB held that it would delay resolution of the unfair labor practice until the issues were resolved by the arbitration process already under way. The *Collyer* doctrine was narrowed considerably in the recent NLRB decision in *General American Transportation Corporation*. The Board held that it will no longer defer to arbitration in cases where it is independently alleged by the employee that an unfair labor practice was committed by an employer in violation of §§ 8(a)(3) and 8(a)(1) of the LMR Act.<sup>43</sup>

An arbitrator is sometimes in a better position than the courts to understand and weigh the concerns of both labor and management. The relative informality of the arbitration proceeding and the arbitrator's better familiarity with the workplace have sometimes provided employees with a more favorable forum for the protection of their rights and interests than the courts. Many unions favor arbitration because they retain a lingering distrust of courts which predates the passage of the Norris-LaGuardia Act. There is also a recognition by labor and management that court costs and crowded dockets do not contribute to an effective judicial approach to dispute resolution. However, health and safety matters often require a high degree of expertise, beyond that which can be reasonably expected from arbitrators. In § 502 cases, arbitrators most frequently use the

39 It has been argued that it is the union which agrees not to strike under a no-strike clause, and that unauthorized walkouts should not come under its scope because the section is aimed at protecting employees and not unions. *Id.* at 660.

40 *Collyer Insulated Wire*, 192 N.L.R.B. 837, 843 (1971), citing *Boys Markets Inc. v. Retail Clerks Union, Local 770*, 398 U.S. at 252, that arbitration has become "the central institution in the administration of collective bargaining." See Isaacson & Zifchak, *Agency Deferral to Private Arbitration of Employment Disputes*, 73 COLUM. L. REV. 383 (1973) for analysis of the *Collyer* doctrine, See also *Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974).

41 See *Great Coastal Express, Inc.*, 196 N.L.R.B. 871 (1972). The arbitration process must be agreed to by all parties, must be "fair" and "regular" and the outcome not repugnant to the LMR Act policy. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

42 29 U.S.C. § 173(d) (1970).

43 *General American Transportation Corporation*, 228 NLRB No. 102, 94 L.R.R.M. 1483 (1977); 29 U.S.C. §§ 158(a)(3) and (1). In this case there was uncertainty in the union's position regarding deferral. The employee and the NLRB General Counsel were unwilling to defer to arbitration. The Board overruled *National Radio, Inc.*, 198 N.L.R.B. 150 (1972). The two-vote majority opinion opposed the *Collyer* deferral policy in the broadest context. The concurring opinion of Chairperson Murphy would limit deferral only to cases where the dispute is between the union and the employer and where there is no alleged interference with individual employees' § 7 rights. In a companion case, *Roy Robinson Chevrolet*, 94 L.R.R.M. 1474 (1977), Chairperson Murphy concurred with the dissent in *General American*. Their majority opinion distinguished *Roy Robinson* because no independent unfair labor practice charge was alleged except that arising from violation of the contract. The employee did not appear unwilling to have the issue arbitrated. The willingness of an employee to go to arbitration would seem to be a crucial requirement, narrowing the *Spielberg* post-arbitral policy as well as the *Collyer* pre-arbitral policy.



objective test of *Redwing Carriers*.<sup>44</sup> Because the objective requirement creates an extremely difficult situation for workers who must decide on the spot whether to perform hazardous work and because arbitrators apply much the same standard as the NLRB and the courts, it is likely that unions may seek contracts which explicitly exclude the determination of danger on the job from arbitration and obtain instead the right to make such determinations internal to the union.<sup>45</sup> Unions may also seek a more protective contractual right to refuse hazardous work.

### C. Gateway Coal and the Arbitrability of Health and Safety Disputes

The special status afforded safety by § 502 of the LMR Act was clarified and limited by the Supreme Court in its recent decision in *Gateway Coal*.<sup>46</sup> The Court interpreted the right to refuse hazardous work in the light of prior cases favoring arbitration as the preferred means of settling labor disputes<sup>47</sup> and the increased willingness of the courts to allow an injunction to compel arbitration or to enjoin work stoppages pending the outcome of arbitration.<sup>48</sup> The Court established that safety disputes are presumed to be subject matter for compulsory arbitration unless the collective bargaining contract explicitly exempts those disputes from arbitration.<sup>49</sup> As a result the Court sustained the district court injunction compelling arbitration and to enjoining the work stoppage over the safety issue.<sup>50</sup> In order to understand the potentially far-reaching implications of *Gateway Coal*, it is necessary to examine briefly the history of labor injunctions prior to that case which clearly reflects a policy favoring arbitration of labor-management disputes. Several commentators<sup>51</sup> have provided extensive analysis of the relevant cases leading up to *Gateway Coal*.

44 According to a recent survey of 19 arbitrators and 200 arbitration awards, a majority of arbitrators will not use the subjective belief or reasonable subjective belief tests, but rather follow established Board criteria, upheld in *Gateway Coal*. Summa, *Criteria for Health and Safety Arbitration*, 26 LAB. L.J. 368 (1975). See also A. COX & D. BOX, LABOR LAW 519 (7th ed. 1969).

45 In a recent survey of 1,724 major collective bargaining agreements covering 7.9 million workers conducted by the Bureau of Labor Statistics, it was found that collective bargaining agreements often explicitly give rights to the union or employees in the event hazardous conditions develop or are believed to exist. Under 371 agreements, employees may refuse hazardous work or be relieved from a job. The union may remove employees from a job deemed unsafe in 42 agreements. Approximately 2.4 million employees are covered by these provisions. Bureau of Labor Statistics, U.S. Department of Labor, *Major Collective Bargaining Agreements: Safety and Health Provisions* 19-23 (Bulletin No. 1425-16, 1976). This document offers numerous sample clauses used by unions to illustrate various approaches to deal with work under unsafe conditions.

46 414 U.S. 368 (1974).

47 *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) [hereinafter cited as *Steelworkers Trilogy*]. But see discussion accompanying notes 40-43 for possible limitations on deferral to arbitration where an employee who files an unfair labor practice charge is unwilling to defer to arbitration.

48 *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

49 414 U.S. at 378.

50 *Id.* at 387.

51 N. ASHFORD, *supra* note 2, at 185-207; Atleson, *supra* note 21, at 665-75; Tobin, *OSHA, Section 301 and the NLRB: Conflicts of Jurisdiction and Rights*, 23 AM. U.L. REV. 837, 841-45 (1974) [hereinafter cited as Tobin].

## 1. The Labor Injunction and Policy Favoring Arbitration

In *Textile Workers Union v. Lincoln Mills*,<sup>52</sup> the Supreme Court ruled that § 301(a) of the LMR Act<sup>53</sup> provided for the granting of specific performance of collective bargaining provisions requiring arbitration of labor disputes when it stated "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."<sup>54</sup> The union thus succeeded through the courts in forcing the employer to arbitrate issues which were clearly covered by both an agreement to arbitrate and the subject matter of an express no-strike provision. Section 301(a) was interpreted as an expression of federal policy that industrial peace is best served through judicial enforcement of agreements to arbitrate disputes which occur during the life of a collective bargaining contract. The court did not consider judicial orders to arbitrate to be included in the limitations on equitable remedies available in the courts as stated by § 4 of the Norris-LaGuardia Act.<sup>55</sup>

The *Steelworkers Trilogy* cases further extended the *Lincoln Mills* doctrine that public policy favors resolutions of labor disputes through the arbitration process.<sup>56</sup> The court's role is not to consider the merits of the case, but to defer consideration of the matter to the arbitrator, if the following minimal conditions are met: (1) a labor contract exists; (2) the contract contains a binding arbitration clause; and (3) there is an allegation that a provision of the contract has been violated. In other words, an order to arbitrate a particular grievance is not to be denied unless it is clear that the arbitration clause does not cover the asserted dispute. Any doubts that arise should be resolved in favor of coverage.<sup>57</sup> This is the origin of the famous "presumption of arbitrability." As a result, arbitration awards will be upheld by the courts unless it can be shown that the arbitrator clearly overstepped the bounds of the contract in reaching his decision.<sup>58</sup>

52 353 U.S. 448 (1957).

53 Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1970).

54 353 U.S. at 455.

55 The labor injunction was widely used in the years prior to 1932 to forestall the spread of unionization and to restrain labor organizations and their members from engaging economic self-help activity, even when nonviolent. In keeping with increasing public sentiment that such activity on the part of labor organizations was legitimate and should not ordinarily be subject to judicial interference, Congress enacted the Norris-LaGuardia Act in 1932. This Act greatly reduced the power of the federal judiciary to issue injunctions in labor disputes. Section 4 of the Act states that

[n]o court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute.

29 U.S.C. § 104 (1970).

56 *Steelworkers Trilogy*, *supra* note 47.

57 *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (one of *Steelworkers Trilogy* cases).

58 A similar policy had been adopted by the NLRB. In *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955) the Board announced it would give deference to an arbitrator's award and would not reconsider the merits of a dispute when "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is

*Teamsters Local 174 v. Lucas Flour Co.*<sup>59</sup> presented a different situation from *Lincoln Mills* in three important ways. First, while the union struck over an issue which was arbitrable according to their collective bargaining agreement, the agreement did not contain an express no-strike clause. Secondly, the employer brought an action for damages resulting from a business loss. He did not bring a suit to enjoin a strike. Thirdly, the action was brought in a state court. In a case decided a few months earlier,<sup>60</sup> the Supreme Court stated it had decided that "in enacting § 301, Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules."<sup>61</sup> The Court found that a no-strike clause was to be implied as a result of the agreement to submit disputes to final and binding arbitration. Damages were awarded as a result of that strike which was in violation of the contract.<sup>62</sup> The Court urged a limitation, however, that a no-strike agreement is not to be implied beyond the areas exclusively covered by compulsory terminal arbitration.<sup>63</sup> It should be noted that a possible conflict of § 301 of the LMR Act and § 4 of Norris-LaGuardia was not an issue in *Lucas Flour* since the employer did not seek to enjoin the strike.<sup>64</sup>

However, the Court did reach that issue less than four months later when it decided in *Sinclair Refining Co. v. Atkinson*,<sup>65</sup> that the Norris-LaGuardia Act prevents federal courts from enjoining a work stoppage in violation of an express no-strike provision of a collective bargaining agreement, even though that agreement contains binding arbitration provisions enforceable under § 301(a) of the LMR Act. *Sinclair* resulted in a lack of symmetry in the federal law. The federal courts could still compel arbitration by granting injunctive relief under § 301(a) of the LMR Act in cases where the collective bargaining contract contained a compulsory arbitration clause,<sup>66</sup> but could not enjoin a work stoppage in violation of an express no-strike clause, the *quid pro quo* of the agreement to arbitrate.<sup>67</sup> This lack of symmetry need not have been particularly serious in itself if it were not for the fact that the anti-injunction provision of § 4 of the Norris-LaGuardia Act spoke only to federal courts. While the Supreme Court had declared in 1962 that federal labor law took precedence over state law,<sup>68</sup> it was not clear whether state courts could continue to award injunctions against work stoppages under state law. In *Avco Corp. v. Aero Lodge 735*,<sup>69</sup> the Supreme Court decided that § 301(a) suits initially brought in state courts are removable to federal courts but expressly left open the questions of whether state courts are bound by the federal anti-injunction policy and whether, after removal

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not clearly repugnant to the purposes and policies of the Act." *Id.* at 1082. *But see* discussion accompanying notes 40-43 for possible limitations on both *Spielberg* post-arbitral deferral policy and the *Collyer* pre-arbitral deferral policy.

59 369 U.S. 95 (1962).

60 *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

61 369 U.S. at 104.

62 *Id.* at 104-06.

63 *Id.* at 106.

64 398 U.S. at 243.

65 370 U.S. 195 (1962).

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

67 *Id.* at 455.

68 *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

69 390 U.S. 557 (1968).

to federal court, the federal court is obligated to dissolve injunctive relief granted by the state.<sup>70</sup> The question was decided by the Supreme Court in *Boys Markets*<sup>71</sup> where it reversed the court of appeals' denial of injunctive relief granted by the state court in a case where both compulsory arbitration and an express no-strike clause were part of the collective bargaining agreement. The Supreme Court overruled *Sinclair* stating, "[t]he principal practical effect of *Avco* and *Sinclair* taken together is nothing less than to oust state courts of jurisdiction in § 301(a) suits where injunctive relief is sought for breach of a no-strike obligation."<sup>72</sup> "[T]he congressional purpose embodied in § 301(a) was to supplement, and not to encroach upon, the pre-existing jurisdiction of the state courts."<sup>73</sup> In *Boys Markets*, the Supreme Court reasoned that a no-strike obligation on the part of the union, expressed or implied, is the *quid pro quo* for the employer's agreement to submit disputes arising during the life of the contract to binding arbitration.<sup>74</sup> The incentive for the employer to enter such an agreement would be greatly diminished if the union could not be forced (via injunction if necessary) to live up to its part of the bargain, *i.e.*, not to strike.<sup>75</sup> To this end, injunctive relief under § 301(a) was held to be necessary for carrying out the national labor policy favoring arbitration as a means of promoting industrial peace.<sup>76</sup> In allowing an injunction to issue under § 301(a), the Court found that suits for money damages under § 301(a) did not always adequately protect employers from the imminent and irreparable harm of a work stoppage.<sup>77</sup> In rejecting Justice Black's dissenting opinion that § 301(a) was not intended to clear the way for judicial obliteration of the Norris-LaGuardia Act under the soft euphemism of "accommodation," the majority of the Court held that § 4 of Norris-LaGuardia did not preclude issuance of injunctions against strikes in breach of a collective bargaining agreement. The Court reasoned that although the central objective of Norris-LaGuardia Act was to prevent judicial interference with the growth and legitimate economic self-help activities of labor organizations, congressional intent in subsequent legislation (the LMR Act) was to promote the peaceful settlement of industrial disputes through arbitration. Congress, by not enacting amendments to Norris-LaGuardia Act, was held to have left it to the courts to accommodate the old law to the new policy.<sup>78</sup> While the decision suggests that an implied no-strike clause, in conjunction with an agreement to arbitrate, would justify an injunction against a work stoppage, the Supreme Court did not face that situation until *Gateway Coal*.<sup>79</sup>

70 398 U.S. at 244.

71 *Id.* at 235.

72 *Id.* at 244-45.

73 *Id.* at 245.

74 *Id.* at 248.

75 *Id.* at 248.

76 *Id.* at 253.

77 *Id.* at 248.

78 N. ASHFORD, *supra* note 2, at 194.

79 In *Lucas Flour* an agreement to arbitrate gave rise to an implied no-strike obligation for which § 301(a) damages and not enjoinder of the strike were sought. As if to invite a distinction, the Supreme Court cites *Lucas Flour* in footnote 16 immediately following its "quid pro quo" policy statement. 398 U.S. at 248. The Court goes on to say, "Our holding in the present case is a narrow one. . . . Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance." *Id.* at 253-54.

## 2. *Gateway Coal*

In *Gateway Coal*, an injunction compelling both arbitration and enjoining a work stoppage was granted against the union in a case involving a safety dispute. In so ruling, the Supreme Court extended the presumption of arbitrability enunciated in the *Steelworkers Trilogy* to cover safety issues.<sup>80</sup> On April 18, 1973, workers of the United Mine Workers Local No. 6330, in Greene County, Pennsylvania, voted not to work unless Gateway Coal suspended three foremen who had allegedly falsified records of air flows in the mine. The company acquiesced to this demand and the miners returned to work. Subsequently, criminal prosecutions were initiated against the three foremen and an investigation was undertaken by the Pennsylvania Department of Environmental Resources pursuant to possible decertification proceedings.<sup>81</sup> While criminal charges were still pending, the Pennsylvania Department of Environmental Resources notified Gateway Coal on May 29, 1973, that the foremen could be reinstated. On June 1, 1973, the foremen resumed work and miners on all shifts struck to protest the alleged safety hazard created by the foremen's presence in the mine. On June 8, 1973, the union refused a company offer to arbitrate the matter. Meanwhile, the foremen pleaded *nolo contendere* to criminal charges for falsification of records and paid fines of \$200 each.<sup>82</sup>

The union's refusal either to return to work or to submit the dispute to arbitration prompted Gateway Coal to seek an injunction against the strike in district court under the provisions of § 301(a) of the LMR Act. The district court ordered arbitration and issued a preliminary injunction against the work stoppage based upon the finding that the broad arbitration clause of the collective-bargaining contract did not exclude arbitration of safety disputes;<sup>83</sup> in other words, despite the absence of an explicit no-strike clause, the court recognized an implied no-strike clause. Significantly, the court made the grant of injunctive relief contingent upon the company's suspension of the foremen pending arbitration of the dispute.<sup>84</sup>

The Third Circuit then overturned the injunction, reversing the district court's decision. The Court relied upon § 502 of the LMR Act in finding that the usual federal policy favoring arbitration of labor disputes need not extend to disputes over hazardous conditions. In the words of the appellate court:

If employees believe that correctable circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgement to that of an

80 414 U.S. at 379.

81 *Id.* at 370-72.

82 *Id.* at 372.

83 The agreement covered disputes "about matters not specifically mentioned in this agreement" and "any local trouble of any kind aris[ing] at the mine." *Id.* at 375. See Atleson, *supra* note 21, at 677-81, for a discussion of the arguments in *Gateway Coal* supporting the contractual exclusion of safety disputes from arbitrable subject matter and possibly a contractual right to strike contained in a clause of the contract which allowed the mine safety committee to require the employer to remove employees from a work area. As the Supreme Court pointed out, however, that clause was not invoked by the union. 414 U.S. at 383. Cf. Jones & Laughlin Steel Corp. v. UMW, 519 F.2d 1155, 3 O.S.H.C. 1373 (3d Cir. 1975) discussed in note 101, *infra* and in text accompanying note 219, *infra*.

84 414 U.S. at 373.

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 employees to stake theirs on his judgement.<sup>85</sup>

On this basis, the appellate court concluded that the union had no contractual duty to submit the controversy to arbitration, and hence no injunction could issue even under the traditional considerations of equity set forth in *Boys Markets*.<sup>86</sup>

The company appealed this ruling. By granting *certiorari*, the Supreme Court addressed three questions. First, did the collective bargaining agreement impose upon the parties a compulsory duty to submit safety disputes to arbitration? If so, did that duty to arbitrate imply a no-strike obligation on the union, supporting issuance of a *Boys Markets* injunction? Finally, did the circumstances of the case satisfy the traditional equity criteria concerning the availability of injunctive relief?<sup>87</sup>

Addressing the first issue, the Court found that the facts of the case and the union's contractual obligation to arbitrate "any local trouble of any kind aris[ing] at the mine" on its face required submission of the safety dispute to arbitration.<sup>88</sup> Further, the Supreme Court disagreed with the appellate court's argument that public policy favoring arbitration did not extend to safety disputes.<sup>89</sup> Relying on legislative history, the Supreme Court noted:

On its face, [Section 502 of the LMR Act] appears to bear more directly on the scope of the no-strike obligation than on the arbitrability of safety disputes. Indeed, there is nothing in the legislative history to suggest that § 502 was intended as a limit on arbitration.<sup>90</sup>

Accordingly, the Supreme Court held that the dispute in *Gateway Coal* was covered by the arbitration clause in the parties' collective bargaining agreement, thereby extending to safety disputes the "presumption of arbitrability" set forth in the *Steelworkers Trilogy*.<sup>91</sup>

As to whether a *Boys Markets* injunction could issue, the Court found that "the agreement to arbitrate and the duty not to strike should be construed as having coterminous application."<sup>92</sup> While the Supreme Court agreed with the finding of the appellate court that "a refusal to work because of good faith apprehension of physical danger is protected activity and not enjoined, even where the employees have subscribed to a comprehensive no-strike clause in their labor contract,"<sup>93</sup> it concluded that the court of appeals erred in applying the principle to *Gateway*.<sup>94</sup> The Supreme Court relied upon the principle established in *Redwing Carriers* that employees' good-faith belief that an "abnormally

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85 466 F.2d 1157, 1160 (3d Cir. 1972).

86 414 U.S. at 373.

87 *Id.* at 374.

88 *Id.* at 376.

89 *Id.*

90 *Id.* at 377 n. 8.

91 *Id.* at 379-80.

92 *Id.* at 382.

93 *Id.* at 385.

94 *Id.* at 387.

dangerous condition" exists is not proof enough.<sup>95</sup> The Court agreed with the dissenting opinion of the appeals court that a union seeking to justify a contractually prohibited work stoppage under § 502 must present "ascertainable, objective evidence supporting its conclusion that any abnormally dangerous condition for work exists."<sup>96</sup> In any event, the Supreme Court noted that the district court had resolved this issue by expressly conditioning injunctive relief on the suspension of the foremen pending the outcome of arbitration, thereby removing the alleged "abnormally dangerous condition."<sup>97</sup>

To the question of whether the circumstances of the case satisfy traditional equity considerations, the Supreme Court responded:

[I]t is also evident that injunctive relief was appropriate in the present case under the equitable principles set forth in *Boys Markets* . . . The District Court found that the union's continued breach of its no-strike obligation would cause irreparable harm to the petitioner. It eliminated any safety issue by suspending the two foremen pending a final arbitral decision. In these circumstances, we cannot say that the District Court abused its discretion.<sup>98</sup>

One can interpret *Gateway Coal* as merely establishing the presumption of arbitrability for safety disputes and extending the *quid pro quo* of the agreement to arbitrate to both express and implied promises not to strike. However, the decision has created a new uncertainty in this area of labor law.

#### D. *The Right to Refuse Hazardous Work after Gateway Coal*

In *Gateway Coal* the "presumption of arbitrability" was extended to safety disputes so that, absent explicit contractual exclusion of safety matters from arbitration, a union can be compelled to arbitrate the issue. The availability of a limited right to strike over safety afforded employees by § 502 does not by itself remove the safety dispute from arbitrability.<sup>99</sup> In *Gateway Coal*, the Supreme Court was careful to say that:

[A]n arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain *analytically distinct*. Ultimately, each depends on the intent of the contracting parties. It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitra-

95 *Id.* at 385-86.

96 *Id.* at 386-87.

97 *Id.* at 387.

98 *Id.* at 387-88.

99 In *Gateway Coal*, the Supreme Court affirmed the protection afforded by § 502 against § 301 reprisals, even though the burden of meeting the objective evidence test regarding "abnormally dangerous conditions" was not satisfied in that case. The Court stated:

This section provides a limited exception to an express or implied no-strike obligation. The Court of Appeals held that "a refusal to work because of good faith apprehension of physical danger is protected activity and not enjoined, even where the employees have subscribed to a comprehensive no-strike clause in their labor contract." 466 F.2d at 1160. We agree with the main thrust of this statement—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 Markets* injunction.

*Id.* at 385 (1973).

tion provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in *Boys Markets*.<sup>100</sup>

Thus, contractually reserving the right to strike over safety may afford more protection against an employer's attempt to force employees back to work than reliance on the statutory protection afforded by § 502 in "abnormally dangerous conditions." This may be the case both because the contractual right may explicitly extend the right to quit to other than "abnormally dangerous conditions" and because it renders § 502 irrelevant to the issue of whether or not a strike has occurred since it may be contracted that a work stoppage for safety is not a strike. If a work stoppage for safety is not a strike, it does not violate the collective bargaining agreement. Therefore, employer retaliation in the form of an injunction may be prevented,<sup>101</sup> or employer discriminatory practices may be the basis for an unfair labor practice charge by the NLRB,<sup>102</sup> both without going first to arbitration. The irony of the latter situation, however, is that if the quitting of work occurs over a safety matter which itself qualified as a labor dispute for arbitration purposes,<sup>103</sup> the NLRB may not wish to decide a highly technical safety question, but instead delay consideration of the alleged unfair labor practice until the arbitrator has made factual determinations necessary for the settlement of the arbitrable dispute and germane to the reasonableness of the work stoppage.<sup>104</sup> While arguably foreclosed by *Gateway Coal*, this delay could conceivably be accompanied by a temporary restraining order enjoining the work stoppage until the factual determinations are made by the arbitrator. Alternatively, the work stoppage could be permitted, but in the event the arbitrator decides against the employees, a suit against the union for damages under § 301 of the LMR Act could succeed unless either the collective bargaining agreement explicitly limited the unions' liability in this situation or through their equitable jurisdiction, courts determine § 301 damages against the union to be

100 *Id.* at 382 (emphasis added).

101 In *Jones & Laughlin Steel Corp. v. UMW*, 519 F.2d 1115, 3 O.S.H.C. 1373 (3d Cir. 1975), a district court injunction against a work stoppage was dissolved by the appellate court because the parties had contracted that the mine safety committee be the determinant of whether employees should be removed from an "imminent danger" situation. The Third Circuit stated that "[t]he subject matter of this case is not a 'strike' in its broad connotation but only the removal of employees from a limited portion of the mine while work continued elsewhere." *Id.* at 1158, 3 O.S.H.C. at 1375. "The [district] court is not required to determine the correctness of the [mine safety committee's] recommendations." *Id.* The appeals court distinguished *Gateway Coal* in that:

1. There was objective evidence of the alleged imminently dangerous condition rather than the merely subjective reactions to a co-employee's safety consciousness.
2. The union did not rely upon § 502 of the Labor Management Relations Act.
3. The union asserted contractual authority for the action of the Safety Committee in closing down portions of the mine, a point specifically not decided by the *Gateway* court.

*Id.* at 1157, 3 O.S.H.C. 1374.

102 Under these conditions it may not be necessary for the employee to establish "abnormally dangerous conditions," and union employees may be afforded the apparently greater protection afforded non-union employees qualifying for § 7 protected concerted activities concerning safety matters. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

103 414 U.S. 368 (1973).

104 Note, however, that if an individual employee who files an unfair labor practice charge is unwilling to have the issue go to arbitration, this situation may be avoided for that employee, even if the union wishes or is obligated to arbitrate. See discussion in text accompanying notes 40-43 for limitations of deferral policies.



unavailable so long as the employees' claim was not unreasonable.<sup>105</sup> It is clear that while an agreement to arbitrate and an agreement permitting or prohibiting a right to strike are "analytically distinct," the resulting judicial consequences are not.

If, as in *Gateway Coal*, a court orders both arbitration of a safety dispute and an immediate correction by the employer of the situation giving rise to the alleged unsafe condition, then it may be argued that the work stoppage is no longer necessary. *Gateway Coal* raises the question of whether an employer seeking an injunction of a work stoppage over health and safety might be required to arbitrate and to eliminate the alleged hazard pending arbitration as the *quid pro quo* for the union agreeing not to cease work, since the Supreme Court upheld the district court's injunction to do that. However, if the parties have already taken steps to arbitrate, can it be further argued that an employer's promise to correct an unsafe condition is the *quid pro quo* for the agreement not to cease work? Given the jurisdiction over health and safety by the Federal Coal Mine Health and Safety Act<sup>106</sup> and the OSH Act,<sup>107</sup> can the courts act in the context of an injunction proceeding to require employers to abate alleged hazards in return for employees returning to their jobs?<sup>108</sup> If the courts can fashion a remedy to abate a hazard in this way, should a union not also be able to obtain an injunction under § 301 of the LMR Act to force an employer to abate the hazard?<sup>109</sup> Unions, of course, can contract for an employer's abatement of the alleged hazard as the *quid pro quo* for an agreement not to stop work pending the outcome of arbitration.

Irony lies in the possibility that unions may find it more in their interest to

105 Generally, individual union members are not liable in a § 301 damage action, although the union is liable. However, if individual employees strike and the union does not acknowledge or support the strike, the individuals can be held personally liable. See *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962).

106 30 U.S.C. §§ 801-960 (1970).

107 29 U.S.C. §§ 651-78 (1970).

108 Note, however, that it can be argued that health and safety legislation pre-empts the determination of whether an employer has created a hazard by violation of federal standards, and hence whether he must abate it. If this is the case, then *Gateway Coal* may be limited to the proposition that only some kinds of hazards may be ordered abated, such as the removal of unacceptable supervisors. This "hazard" is more closely related to administrative practices than to technical safety issues and, if not preempted by the OSH Act, would be enjoined on equitable grounds. Note also Justice Douglas' dissent in *Gateway Coal* that:

A close reading of [the Federal Coal Mine Health and Safety] Act convinces me that it must displace all agreements to arbitrate safety conditions . . . When it comes to health, safety of life, or determination of environmental conditions within the mines, Congress has pre-empted the field. An arbiter is no part of the paraphernalia described in the Act. An arbiter seeks a compromise, an adjustment, an accommodation. There is no mandate in arbitration to apply a specific law. Those named in the present Act who construe, apply, and formulate the law are the Secretary and the courts.

...

Moreover, arbitration awards might compromise administration of the 1969 Act. Rulings of arbiters might not jibe with rulings of the Secretary. Rulings of the arbiters might even color claims for compensation or damages by negating the very basis of liability either in workmen's compensation Acts or in state lawsuits for damages.

414 U.S. at 394. See also discussion on health and safety protection under the OSH Act in the text accompanying notes 111-16 and 175-93, *infra*.

109 See N. ASHFORD, *supra* note 2, at 197. See also Blumrosen, Ackerman, Kligerman, VanSchaick, & Sheehy, *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions* 64 CALIF. L. REV. 702 (1976), for a discussion of the use of injunctive relief in the state courts to mandate the correcting of unsafe conditions.

both exclude safety disputes from arbitration (as some unions have done) and to either (1) reserve the right to strike over health and safety issues, thus acquiring more protection against employer retaliation than § 502 provides, or (2) not agree to an express no-strike clause,<sup>110</sup> thus obtaining the greater protection afforded safety walkouts under § 7. Thus, the "public policy favoring arbitration" of safety disputes may be defeated by the very decision which articulated its desirability—*Gateway Coal*.

### III. Health and Safety Protection Under the OSH Act

#### A. *Employee Rights and Responsibilities Under the OSH Act*

The OSH Act places on employees one responsibility and gives them a number of rights.<sup>111</sup> The basic duty of an employee is to comply with occupational health and safety standards and all OSHA rules, regulations and orders which are applicable to his or her own action and conduct.<sup>112</sup> Employees have a general right to a safe and healthful workplace resulting from their employer's general duty to maintain a workplace "free from recognized hazards" likely to cause serious harm.<sup>113</sup> Specific rights guaranteed employees include the right to be kept informed by the employer of OSHA standards under the Act.<sup>114</sup> Employees have the right to observe any monitoring of the work environment by the employer and have access to records of such monitoring and records of their exposure to toxic substances or harmful physical agents.<sup>115</sup> They have the right to accompany an OSHA inspector on his tour of the workplace and consult freely with him regarding health and safety matters,<sup>116</sup> to request an OSHA inspection

<sup>110</sup> See, e.g., the United Auto Workers contract with Allis-Chalmers Manufacturing Company provides:

It is not a violation of this provision for an employee to refrain from performing work assigned to him which would expose such employee to a significant hazard which seriously threatens his health or safety. If such a hazard exists and it is not corrected by the company, the union shall have a right to strike as provided below as an alternate to arbitration following process of a grievance protesting the hazard through the steps of the grievance procedure short of arbitration.

The International Brotherhood of Service Station Operations has obtained the following provision in its contract with the Area Independent Service Station Operators of California:

Where it has been determined that health or safety hazards may exist, the union may call and authorize a strike or closure of the station, including such stations where the company may raise as a defense that they are complying with local ordinances or other regulatory authorities. If such conditions are not satisfactory to the union, then the union shall be empowered to do whatever is necessary to protect the safety of its members or eliminate the source of the problem.

Bureau of Labor Statistics, U.S. Department of Labor, *Major Collective Bargaining Agreements: Safety and Health Provisions* (Bulletin No. 1425-16, 1976).

As discussed by the Supreme Court in *Gateway Coal*, "[t]he Court of Appeals majority feared that an arbitrator might be too grudging in his appreciation of the workers' interest in their own safety." 414 U.S. at 379. The absence of a no-strike clause in combination with an agreement *not* to arbitrate an issue renders § 301 unavailable to enjoin the work stoppage or recover damages since there is no *quid pro quo*. Cf. *Boys Markets*, 398 U.S. at 253-54.

<sup>111</sup> OSH Act § 2(b)(2), 29 U.S.C. § 651(2) (1970), states that it is congressional policy that "employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions."

<sup>112</sup> OSH Act § 5(b), 29 U.S.C. § 654(b) (1970).

<sup>113</sup> OSH Act § 5(a), 29 U.S.C. § 654(a) (1970) (popularly called the "general duty" clause).

<sup>114</sup> OSH Act § 8(c)(1), 29 U.S.C. § 657(c)(1) (1970).

<sup>115</sup> OSH Act § 8(c)(3), 29 U.S.C. § 657(c)(3) (1970).

<sup>116</sup> OSH Act § 8(e), 29 U.S.C. § 657(e) (1970) (popularly called the "walkaround" right).

where they believe a violation or imminent hazard exists and to have their names withheld as the requesting parties.<sup>117</sup> If an employer receives a citation for the violation of an OSHA standard, an employee may contest as unreasonable the time period allotted to the employer to correct the violation.<sup>118</sup> The vehicle by which these rights are explicitly protected is § 11(c) which states in part:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceedings under or related to this chapter or has testified or is about to testify in any such proceeding or because of the *exercise* by such employee on behalf of himself or others of *any right* afforded by this chapter.<sup>119</sup>

Persons prohibited from discriminating are defined under the OSH Act to include not only corporations and other business associations but also any third party employer who may discriminate against employees of another employer, labor unions, and employment agencies.<sup>120</sup> While the Act does not define employees to be protected, they have been interpreted to include applicants for employment, former employees<sup>121</sup> and supervisors.<sup>122</sup> Public employees on the federal, state and local levels are excluded from direct coverage under the Act.<sup>123</sup> Employee representatives (unions) are excluded from exercising rights under § 11(c)<sup>124</sup> although they share all other employee rights under the act with individual employees.

An employee's participation in protected activities need not be the sole consideration behind discharge or other discriminatory action by the employer. If the discrimination would not have taken place "but for" the employee pro-

117 OSH Act § 8(f)(1), 29 U.S.C. § 657(f)(1) (1970).

118 OSH Act § 10(c), 29 U.S.C. § 659(c) (1970).

119 OSH Act § 11(c)(1), 29 U.S.C. § 660(c)(1) (1970) (emphasis added). The method by which this anti-discrimination provision is effectuated is stated in OSH Act § 11(c)(2), 29 U.S.C. § 660(c)(2) (1970):

Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

120 OSH Act § 3(4), 29 U.S.C. § 652(4) (1970), as interpreted by 29 C.F.R. § 1977.4 (1976).

121 29 C.F.R. § 1977.5(b) (1976).

122 Hayden Electric Services, Inc., 9 O.S.A.H.R.C. 466, 2 O.S.H.C. 3069 (1974). See Mangus Firearms, 16 O.S.A.H.R.C. 550, 3 O.S.H.C. 1214 (1975) ("silent partner" who performs employee tasks as substitute for principal owner); Kensington Electric Products Co., Inc., 4 O.S.A.H.R.C. 211, 1 O.S.H.C. 3095 (1973) (corporation president and stockholder-plant superintendent with direction over plant operations).

123 See 29 C.F.R. § 1977.5(c) (1976), which interprets in combination OSH Act § 3(5), (6), 29 U.S.C. § 652(5), (6) (1970). Although § 19 provides for federal agencies to establish "effective and comprehensive" occupational health and safety programs, an anti-discrimination mechanism is conspicuously missing from the statutory requirements of the federal program. 29 U.S.C. § 668 (1970).

124 Dunlop v. McConway & Torley Corp., No. 75-594 (W.D. Pa. 1975) (motion to intervene denied).

tected activity or the activity is a substantial reason for the discrimination, then § 11(c) has been violated.<sup>125</sup> An example of the court's willingness to find the protected activity as the motivation behind the discriminatory action is *Dunlop v. Trumbull Asphalt Co.*<sup>126</sup> where an employee was found to have been discharged for participation in the filing of an OSHA complaint, and not for a two-day absence which followed. However, in order for a discriminatory motivation to exist, it must be proven that an employer knows that the employee had engaged in protected activities prior to his discharge. If the Secretary is unable to carry this burden on behalf of an employee, the action will not stand.<sup>127</sup>

Complaints under or related to the Act include those addressed to other federal, state, or local agencies with occupational health and safety functions as well as good faith complaints made to employers. The range of complaints "related to" the Act is commensurate with the Act's broad remedial purposes.<sup>128</sup> An employee who filed a health and safety complaint with Legal Services, Inc. and retained counsel to assist in pressing his complaint was recently found to have taken "the first step in his exercise of his right to 'safe and healthful working conditions,' a right which was expressly established by the Act."<sup>129</sup>

Procedurally, an employee has thirty days after the alleged violation occurs to file a discrimination complaint with the Secretary of Labor. Complaints filed after that time will usually be considered stale. However, where "strongly extenuating circumstances" exist, the thirty-day filing period *may* be tolled in order to allow the Secretary to process the complaint.<sup>130</sup> Circumstances sufficient to warrant the tolling of the filing period would be where the violation is of a continuing nature or where the employer has misled the employee as to the grounds for his adverse actions.<sup>131</sup> Once a complaint is filed, the Secretary must notify the employee of his determination of whether § 11(c) has been violated.<sup>132</sup> During that period, the Secretary usually investigates the claim in order to make an appropriate determination but the performance and/or extent of this investigation is discretionary.<sup>133</sup>

125 29 C.F.R. § 1977.6(b) (1976).

126 No. 75-1025 (E.D. Mo. 1976), citing *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975) (a discharge case under the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1970), a section similar in language and purpose to § 11(c) of the OSH Act).

127 See, e.g., *Brennan v. Daniel Construction Co. of Florida*, No. 74-723 (M.D. Fla. 1976). Thus if an employee requests his name be withheld from his employer against whom he has filed an OSHA complaint, he may find it difficult to prove a subsequent discriminatory discharge unless he can prove the employer knew or suspected that he filed the complaint.

128 29 C.F.R. § 1977.9 (1976).

129 *Dunlop v. Hanover Shoe Farms, Inc.*, No. 75-1243, 4 O.S.H.C. 1241 (M.D. Pa. 1976).

130 29 C.F.R. § 1977.15(d)(3) (1976).

131 See, e.g., *Usery v. Northern Tank Line, Inc.*, No. CV-76-41-BLG (D. Mont. 1976) (seasonal employee with seniority who waited 90 days after normal hiring season was over before filing complaint should have known that he would not be hired for the season prior to his filing complaint).

132 OSH Act, § 11(c)(3), 29 U.S.C. § 660(c)(3) (1970). As indicated in 29 C.F.R. § 1977.16 (1976), there may be instances where a determination cannot be made within the statutory period. This is due to an increase in complaints submitted to OSHA regional offices. The number of complaints received annually increased from 700 in fiscal year 1975 to 1,600 in fiscal year 1976, and OSHA projects between 2,000 and 3,000 for fiscal year 1977. This has created an increased workload and a backlog of 800 complaints pending investigation. Morton Corn, Assistant Secretary of Labor, *Memorandum for Members of the National Advisory Committee on Occupational Safety and Health*, 1 (Nov. 16, 1976).

133 See note 129, *supra*.

B. *Is the Refusal to Work Under Unsafe Conditions Protected by § 11(c)?*

The question arises as to what other rights "afforded by the Act" come within the scope of § 11(c) protection. OSHA regulations interpreting § 11(c) state that "certain other rights exist by necessary implication."<sup>134</sup> While acknowledging that OSHA generally creates no right to walk off the job because of potentially unsafe conditions at the workplace, the Secretary of Labor interprets § 11(c) to contain an implied right to refuse a hazardous work assignment in limited circumstances: where the employee would reasonably believe there is a real danger of death or serious injury, where there is insufficient time to eliminate the danger through the normal administrative process, and where the employer has failed to correct the condition after an employee request to do so.<sup>135</sup>

The Secretary's interpretation of this implied right has been reviewed by several district courts and with one exception the courts do not support his construction. In *Usery v. Babcock & Wilcox Co.*<sup>136</sup> the court upheld the regulation as consistent with the legislative history of the OSH Act, particularly when read in the context of congressional floor debate. The court analyzed congressional concern over an original provision in the bill which "would allow [some] employees to absent themselves from a dangerous situation without loss of pay"<sup>137</sup> to have been misinterpreted as sanctioning "strike with pay." The subsequent deletion of the provision was interpreted by the court to be a rejection of the collective strike-with-pay concept rather than a rejection of the individual right to refuse hazardous work: "There is a vast amount of difference between shutting down an entire plant and allowing a few employees to refuse a particular work assignment."<sup>138</sup> The second ground upon which the court in *Babcock & Wilcox* upheld the regulation is a combination of practical necessity and policy considerations under the OSH Act. Because statutory enforcement proceedings take time, the court argued there must be some mechanism available to afford relief to employees prior to implementation of enforcement proceedings. To do less for employees during that interim period would not be consistent with the policy of

134 29 C.F.R. § 1977.12(a) (1973).

135 29 C.F.R. § 1977.12(b) (1) states in part:

[R]eview of the Act and examination of the legislative history disclose that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. . . .

However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

136 No. 4-72290, 4 O.S.H.C. 1857 (E.D. Mich. 1976).

137 116 CONG. REC. 38, 369, 377-78 (1970).

138 *Id.* at 1859.

the Act "in encouraging the reporting and correcting of safety violations."<sup>139</sup>

Five other district court cases have held that § 11(c) does not include an implied right to walk off a job which an employee believes to be hazardous. In *Usery v. Whirlpool Corp.*,<sup>140</sup> several maintenance employees refused to repeat a cleaning procedure which had resulted in the death of another employee two weeks earlier and which had not been fully corrected. Although the court found that the threat of death or serious bodily harm was real (under the language of the OSHA interpretive regulation), it concluded that Congress expressly rejected allowing employees to walk off the job with pay and intended § 13 of the Act to provide the best method for dealing with imminent danger situations.<sup>141</sup> Both *Dunlop v. Daniel Construction Co., Inc.*<sup>142</sup> and *Brennan v. Diamond International Corp.*<sup>143</sup> support this view. In addition, these two cases held that the employee right to request an inspection for an alleged imminent danger found in § 8(f),<sup>144</sup> along with § 13, constitutes the scope of congressional intent to create an exclusive imminent danger remedy. Under this line of cases the OSHA regulation would be invalid.<sup>145</sup>

The Secretary of Labor has appealed the district court rulings in *Whirlpool* and *Daniel*.<sup>146</sup> In its *Daniel* brief,<sup>147</sup> the Secretary argues that OSHA § 11(c) provision should be interpreted consistent with analogous anti-discrimination provisions in other remedial labor legislation.<sup>148</sup> Where statutory language has a

139 *Id.* at 1860. Because the case was heard upon the defendant employer's unsuccessful motion for summary judgment, the merits of whether the employee's action came within the scope of the implied § 11(c) protection were not reached.

140 416 F. Supp. 30 (N.D. Ohio 1976).

141 29 U.S.C. § 662 (1970), states in pertinent part:

(a) The United States district courts shall have jurisdiction upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists 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. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and *prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists*, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger . . . (d). If the Secretary arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employees, might bring an action against the Secretary . . . for a writ of mandamus. . . .

*Id.* (emphasis added).

142 No. C-75-26-N, 4 O.S.H.C. 1125 (N.D. Geo. 1975).

143 No. C-1-75-43, 5 O.S.H.C. 1049 (S.D. Ohio, 1976). *Accord* *Brennan v. Empire-Detroit Steel Div., Detroit Steel Corp.*, No. C-1-74-345 (S.D. Ohio, 1976); *Aders v. Kennecott Copper Corp.*, No. 76-292-M (D. N. Mex. 1976).

144 29 U.S.C. § 657(f)(1) (1970).

145 *See* *Tobin*, *supra* note 51, at 857-59. He argues that the Secretary's interpretation is contrary to Congress' intent in the OSH Act because the inclusion of § 502 in the LMR Act (which sets out the extent of the employee right to refuse hazardous work) would be at variance with what the OSHA § 11(c) regulations allow.

146 6 OCCUPATIONAL SAFETY & HEALTH REP. 61, 107 (1976) [hereinafter cited as OSHR].

147 Brief for Appellant at 10-11, *Usery v. Daniel Constr. Co.*, C-75-26-N, 4 O.S.H.C. 1125.

148 *See, e.g.*, 29 U.S.C. § 157(a)(3) (1970) (National Labor Relations Act): "It shall be an unfair labor practice for any employer . . . by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization"; 29 U.S.C. § 157(a)(4) (1970) (National Labor Relations Act): "It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act"; 29 U.S.C. § 215(a)(3) (1970) (Fair Labor Standards Act) "[I]t shall be unlawful for any person . . . to discharge or in any manner discriminate against any employee because [he] filed any complaint . . . instituted . . .

counterpart in other legislation dealing with the same subject matter, courts should not diverge from traditional interpretation unless Congress is found to have intended a radical break.<sup>149</sup> This argument is persuasive in light of the Hobson's choice described by the court in *Babcock & Wilcox*—accepting a work assignment and risking death or serious injury or refusing to do so and being discharged, suspended or docked.<sup>150</sup> Because the central purpose of the OSH Act is protection of employee health and safety, inclusion of an implied right to refuse hazardous work under limited circumstance comports with its remedial purpose. A similar conclusion was reached in *Phillips v. Board of Mine Operations Appeals*<sup>151</sup> regarding the Federal Coal Mine Health and Safety Act in which the court upheld the informal procedure used by a miner who complained about hazardous working conditions to the foreman and safety committee rather than the federal enforcement agency. The court looked to the overall remedial purpose of the statute and practicalities existing at the mine:

The existence of this procedure . . . was a practical recognition that the bare words of the Safety Act, unless implemented by some procedure at the mine to bridge the gap between the (enforcement agency) . . . and the coal miner himself . . . would be completely ineffective in achieving mine safety.<sup>152</sup>

In addition to those arguments made above, the Secretary's *Whirlpool* brief makes arguments regarding legislative history similar to those used by the district court in *Babcock & Wilcox*.<sup>153</sup> The view presented is that rather than reject any right in individual employees to refuse a hazardous work assignment, Congress never treated the issue at all. Rather, congressional rejection of the "strike-with-pay" provision was part of a regulatory scheme concerned with potentially harmful toxic substances, not with hazards of an immediately fatal or harmful nature. Significant re-emphasis on the narrow protection of the interpretive regulation was made, with the contention that no unrestricted unilateral right to strike or shut down a plant is intended.

It remains unsettled whether the limited circumstances to which § 11(c) appears to address itself as interpreted by the regulations and *Babcock & Wilcox* will be upheld by higher courts. If they are not, it seems apparent that § 13 imminent hazard provision will fail to adequately deal with the dilemma faced by employees who must make immediate judgements about staying on a life or limb threatening job or leaving, to suffer the consequences of possible employer reprisals.

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or testified . . . in any proceeding . . ."; 30 U.S.C. § 820(b)(1): (1970) (Coal Mine and Safety Act); "No person shall discharge or in any . . . way discriminate . . . against any miner [because he] . . . notified the [agency] . . . of any alleged violation or danger . . . filed, instituted or . . . testified . . . in any proceeding . . ."

149 *TWA v. CAB*, 336 U.S. 601, 604-06 (1949), *as cited in*, Reply Brief for Appellant at 9, *Usery v. Daniel Constr. Co.*, C-75-26-N, 4 O.S.H.C. 1125.

150 *Usery v. Babcock & Wilcox Co.*, 4 O.S.H.C. at 1860.

151 500 F.2d 776 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938. *See* *NLRB v. Scrivener*, 405 U.S. 117 (1972), construing LRM Act's anti-discrimination clause broadly to prevent Board channels of information from being dried up and to effectuate congressional intent that employee be free of discrimination at all stages of NLRB investigation.

152 500 F.2d at 779.

153 Brief for Appellant at 27-32, 38, *Marshall v. Whirlpool*, Nos. 76-2143, 2261. *Cf.* *Tobin*, *supra* note 51, at 851-53, for argument that the OSH Act creates no implied right to stop work.

### C. OSHA Deferral to Arbitration

Another issue in controversy over the use of § 11(c) is whether OSHA should defer any action in the district court pending arbitration or other proceedings dealing with the same issue. Although the regulations assert the Secretary's independent jurisdiction to pursue § 11(c) complaints, there is clear recognition of "the national policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements."<sup>154</sup> The Secretary of Labor may defer to other forums where the factual issues and rights asserted in other proceedings are "substantially the same" as § 11(c) rights and the proceedings "are not likely to violate" those rights.<sup>155</sup> The regulations utilize a deferral standard similar to that stated by the NLRB in *Spielberg Mfg. Co.*,<sup>156</sup> that the deferral is permitted where the proceedings are fair, regular, and free of procedural infirmities, and that the outcome of the proceedings not be repugnant to the purpose and policy of the OSH Act.<sup>157</sup>

Two recent district court cases have addressed whether the Secretary should defer to arbitration. In *Brennan v. Alan Wood Steel Co.*,<sup>158</sup> the court observed first, that the regulations state that deferral "may be in order," and hence discretionary, and second, that since the policy favoring arbitration as stated in § 203(d) of the LMR Act<sup>159</sup> has no counterpart in the OSH Act, mandatory deferral to arbitration is not required of OSHA. However, in *Brennan v. Pascoe Steel Corp.*,<sup>160</sup> the court held in favor of deferral by arguing that congressional intent in enacting the OSH Act was not to contravene effective labor-management dispute resolution.

In *Alan Wood*, an employee who had refused to work on a crane and was discharged filed both a grievance under § 502 which went to arbitration and a § 11(c) complaint alleging discrimination. The arbitrator concluded that the job did not involve an "abnormal safety or health hazard."<sup>161</sup> However, a § 11(c) walkoff is predicated on a reasonable conclusion that there is a "real danger of death or serious injury,"<sup>162</sup> a standard not yet sufficiently interpreted by the courts. Because this standard may be different from the § 502 objective test requirement,<sup>163</sup> the Secretary acted properly in refusing to defer to the arbitrator's conclusion, based on the different "rights" and "factual issues" presented by the § 11(c) complaint.

Whether OSHA deferral under the OSH Act should be treated the same

154 29 C.F.R. § 1977.18(a) (1976).

155 29 C.F.R. § 1977.18(b) (1976).

156 112 N.L.R.B. at 1082. Note, however, recent limitations on deferral by the NLRB in cases where individual employee rights are involved, similar to those covered by § 11(c) of the OSH Act. See notes 40-43, *supra*.

157 29 C.F.R. § 1977.18(c) (1976).

158 No. 74-1810, 3 O.S.H.C. 1654 (E.D. Pa. 1975).

159 29 U.S.C. § 173(d) (1970), provides in pertinent part:

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

160 No. 74-73-COL (D. Md. 1975).

161 3 O.S.H.C. at 1654.

162 29 C.F.R. § 1977.12(b)(2) (1976).

163 See text accompanying notes 215-35, *infra*, for a discussion of the types of OSHA standards and violations of them which are appropriate evidence for § 502 and § 11(c) coverage.



as NLRB or court deferral under the LMR Act in order to further the policy of arbitration is open to question. While it can be argued that such a question is made moot by the discretionary language of the interpreting regulation, the underlying issue is the extent to which the policies and procedures under § 11(c) of the OSH Act are in concert or conflict with those of the LMR Act.<sup>164</sup>

#### D. NLRB Deferral to OSHA

A policy to avoid duplication and potentially conflicting results in health and safety matters was established in April 1975 by OSHA and the NLRB in a memorandum of understanding. The memorandum states that:

Although there may be some safety and health activities which may be protected solely under the OSH Act, it appears that many employee safety activities may be protected under both Acts. However, since an employee's right to engage in safety and health activity is specifically protected by the OSH Act and is only generally included in the broader right to engage in concerted activities under the NLRA, it is appropriate that enforcement actions to protect such safety and health activities should primarily be taken under the OSH Act rather than the NLRA.<sup>165</sup>

By this agreement, where an unfair labor practice charge has been filed with the NLRB and a § 11(c) complaint has been filed with OSHA "as to the same factual matters," the NLRB will defer to the OSHA § 11(c) process. Where a charge has been filed only with the NLRB, the Board will notify the employee of his or her rights under OSHA and defer if the employee subsequently files a § 11(c) complaint. Under the agreement, the NLRB will process the charge only if the employee fails to go to OSHA or withdraws an OSHA complaint.

This policy of deferral seems sound when applied to most employee complaints involving the existence of unsafe conditions save the limited walkoff exception argued to be implied by § 11(c). But NLRB deferral of unfair labor practice charges brought by non-union employees will unnecessarily limit the scope of their protection. It ought to be noted in the first instance that the implied right of § 11(c) is a very limited one, requiring that there be a prior attempt to get the condition abated, as well as insufficient time to go through the normal administrative channels, and a reasonable belief of real danger of serious injury or death.<sup>166</sup> In contrast, a refusal of hazardous work by a non-union employee would be a § 7 concerted activity without any of these limitations.<sup>167</sup> The same would be true for a union employee who could avail himself of the full § 7 protection as a result of appropriate contractual exclusions. Deferral under such circumstances would not, to quote from the memorandum of understanding,

164 Cf. Tobin, *supra* note 51, at 839-40. Note, however, that deferral policy under the LMR Act and the OSH Act may come more into line as a result of recent decisions limiting NLRB deferral regarding individual employee § 7 rights. See notes 40-43 *supra*.

165 5 OSHR 126 (1975).

166 29 C.F.R. § 1977.12(b)(2) (1976). See notes 119, 134-35, *supra* and accompanying text.

167 29 U.S.C. § 157 (1970). See notes 9-16, *supra* and accompanying text.

"insure that employee rights in the area of safety and health will be protected."<sup>168</sup> This is particularly true for the three quarters of the U.S. work force that is unorganized.<sup>169</sup>

As for unionized employees with no-strike provisions in their contracts, *Gateway Coal* has left unanswered the exact conditions under which they may walk off the job under § 502 while the legality of the work stoppage is arbitrated.<sup>170</sup> A charge of unfair labor practices based on a lockout, discharge or other interference with the exercise of § 502 rights could be deferred by the NLRB to arbitration rather than to OSHA. Because the scope of § 502 protection requires an objective determination of abnormal danger, instead of the "real danger" as judged by reasonable belief required under § 11(c),<sup>171</sup> it would be proper for the NLRB to retain independent review of a § 502 charge.<sup>172</sup> It would seem that the as yet undetermined outcomes of the appeals in *Whirlpool* and *Daniel* on the § 11(c) implied right to stop work in hazardous circumstances are an additional reason for the NLRB not to defer to OSHA.

#### IV. The Impact of Health and Safety Legislation on Arbitration and the Right to Refuse Hazardous Work

##### A. *Violations of Federal Health and Safety Standards as Evidence of Danger under §§ 502 and 11(c)*

##### 1. OSH Act Changes the Norm for Workplace Safety

When Congress enacted the Federal Coal Mine Health & Safety Act in 1969,<sup>173</sup> and the OSH Act in 1970, it recognized a new set of national policies aimed at reducing illness and injury in the workplaces of the United States by providing "safe and healthful working conditions" for "every man and woman in the Nation."<sup>174</sup> These goals are a combination of both health policy and labor policy and it is the unique recognition of the close relationship of health and work that sets the OSH Act apart from the other statutes aimed at the promotion of industrial peace.

The requirement that employers have both a general duty to provide a safe workplace and a specific duty to comply with standards promulgated under the

168 See note 164, *supra*.

169 Of the 84.7 million people in the workforce during 1975, approximately 21.6 million were members of AFL-CIO affiliated unions. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *Statistical Abstract of the U.S.* 365, 384 (9th Ed. 1976).

170 See text accompanying notes 99-109, *supra* and accompanying text.

171 See text accompanying notes 215-34, *supra*, for a discussion of the different standards of proof required for § 502 and § 11(c) and how OSHA evidence can be applied.

172 Under the memorandum of understanding the NLRB will defer to OSHA where the facts are the same as those involved in the OSHA review, however, as stated in the OSHA regulations, OSHA deferral is permitted only where both facts and rights are substantially the same. See text accompanying notes 40-43, 155, *supra*. However, with the issue of the validity of the OSHA § 11(c) regulations yet to be determined on appeal, OSHA may attempt to encourage a petitioner to file actions with both OSHA and the NLRB.

173 Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801-960 (1970) and Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. §§ 721-40 (1970).

174 29 U.S.C. § 651(b) (1970).

Act<sup>175</sup> establishes a new norm for judging the safety of the workplace. Thus, the general duty<sup>176</sup> coupled with the OSHA standards<sup>177</sup> becomes the minimum level of safety established by law, the departure from which can be penalized by citations<sup>178</sup> and fines.<sup>179</sup> Many OSHA standards promulgated as "consensus standards" were previously industry guidelines<sup>180</sup> and are presently being reevaluated in order to determine if they are optimal.<sup>181</sup> The norm as established by newly promulgated health standards seems to be in favor of greater safety than those prior standards that were established by "industry consensus."<sup>182</sup>

While it is clear that the permanent OSHA standards which have passed judicial scrutiny do create a readily discernible norm for safety, however, it is less clear what norms are established by the general duty clause. The potential of the employer's general duty lies in the imposition of a general responsibility on the employer to take affirmative action in improving workplace conditions. The existence of OSHA standards, and the continuing process by which they are developed, places employers on notice that they will be held responsible for an awareness of the growing evidence regarding hazards in the workplace, and that there is an obligation to use this knowledge to reduce illness and injury.<sup>183</sup> So, for example, where employees exhibit the same abnormal symptoms, the employer may have a duty to investigate.

It appears that the general duty clause as currently interpreted has not been used to establish as strict a view of safety as would be consistent with the specific duties established by standards. The reason for this situation lies in the interpretation of "recognized hazards" set forth in the general duty clause.<sup>184</sup>

175 29 U.S.C. § 654(a) (1970) states that "[an employer] (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; [and] (2) shall comply with occupational safety and health standards promulgated under this Chapter."

176 OSH Act § 5(a)(1), 29 U.S.C. § 654(a)(1) (1970). See generally Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988 (1973).

177 OSH Act § 6(b), 29 U.S.C. § 655(b) (1970).

178 OSH Act § 9, 29 U.S.C. § 658 (1970).

179 OSH Act § 17(a), 29 U.S.C. § 666(a) (1970).

180 Approximately 450 Threshold Limit Values (TLV's) were promulgated as OSHA "consensus standard" under the authority of § 6(a), 29 U.S.C. § 655(a) (1970). New permanent standards could also be promulgated through formal rulemaking. See 29 C.F.R. § 1910.1000 (1976); note 11, *infra*.

181 See N. ASHFORD, *supra* note 2, at 247-48.

182 5 OSHR 960 (1975). OSHA has promulgated only 17 permanent health standards for the control of toxic and hazardous substances: asbestos, 14 carcinogens, vinyl chloride, and coke oven emissions. 29 C.F.R. § 1910.1001-1017, 1029 (1976). The TLV for asbestos was 5 fib/cc as compared to the OSHA standard of 2 fib/cc. For vinyl chloride, the TLV was 50 parts per million (ppm) and the OSHA standard, 1 ppm.

183 OSH Act § 2(b)(1), 29 U.S.C. § 651(b)(1) (1970) encourages employment efforts to "reduce the number of occupational safety and health hazards" in workplaces.

184 The OSHA *Field Operations Manual* states:

[a] hazard is "recognized" if it is a condition that is (a) of common knowledge or general recognition in the particular industry in which it occurs, and (b) detectable (1) by means of the senses (sight, smell, touch and hearing) or (2) is of such wide general recognition as a hazard in the industry that even if it is not detectable by means of the senses, there are generally known and accepted tests for its existence which should make its presence known to the employer.

Safety and Health Reporter Reference File Occupation 77:3101-3102 (1977) [hereinafter cited as *Field Operations Manual*].

In *American Smelting and Refining Co.*,<sup>185</sup> the Occupational Safety and Health Review Commission<sup>186</sup> found that:

[S]erious hazards that are not obvious and can be detected by instrumentation are within the scope of Section 5(a)(1) of the Occupational Safety and Health Act, which is not limited to "recognized hazards" of types that are detectable by basic human senses.<sup>187</sup>

The *National Realty and Constr. Co., Inc. v. OSAHRC* further refined the definition of the term:

An activity may be a "recognized hazard" even if the defendant employer is ignorant of the activity's existence or its potential for harm. . . . The standard would be the common knowledge of safety experts who are familiar with the circumstances of the industry or activity in question.<sup>188</sup>

The Review Commission has used the definition of "recognized hazard" as measured by industry experience and employer knowledge in determining whether individual employers have violated their general duty obligation.<sup>189</sup> When measured by industry experience, an employer can be cited where he reasonably should have known of the hazard.<sup>190</sup> The industry experience measure has been justly criticized when it does not establish an acceptable standard of conduct consistent with the policy behind the general duty clause:

Industry practices will not always establish an acceptable standard of conduct under the general duty clause. An employer may be held to a higher standard of conduct than that accepted within his industry if his industry fails to take reasonable precautions against hazards . . . Clearly, this possibility of holding an employer to a higher standard of care than that observed within his industry must be applied where, as here, the employer's industry chooses to ignore an obvious hazard that can be easily corrected.<sup>191</sup>

If an obvious hazard will not be considered as "recognized" because it is not industry practice to do so, then the result is to allow each industry to be the judge

185 4 O.S.A.H.R.C. 445, 1 O.S.H.C. 1256 (1973), *affirmed*, 501 F.2d 504 (8th Cir. 1974).

186 The Occupational Safety and Health Review Commission was established under the OSH Act as an independent quasi-judicial review board. The Commission rules upon all challenged enforcement actions of OSHA. If an employer who has been issued a citation or penalty by OSHA fails to lodge a challenge within 15 days, then that failure automatically constitutes a decision of the Review Commission to uphold the citation or penalty. Such a decision by default is not subject to review by any court or agency. If, on the other hand, an employer challenges the agency's decision, the case is heard by an administrative law judge. His report to the Commission becomes the final order of the Review Commission unless one of the Commission members calls for the report to be reviewed by the full Commission. Having gone through this procedure, the employer may then seek review of the Commission's decision in the courts. OSHA may also seek review of the Commission's decisions. Employees have limited right of Commission review on the "reasonableness" of the abatement period. OSH Act §§ 10-12, 29 U.S.C. §§ 659-661 (1970).

187 1 O.S.H.C. at 1256.

188 489 F.2d 1257, 1265 n.32 (D.C. Cir. 1973), *citing* 116 CONG. REC. 38377 (1970). *See* Brennan v. OSAHRC, 494 F.2d 460 (8th Cir. 1974).

189 *See, e.g.*, Southern Railway Co., 3 O.S.H.C. 1657 (1975); Cormier Well Service, 4 O.S.H.C. 1085 (1976); Penrod Drilling Co., 4 O.S.H.C. 1654 (1976).

190 *See* Cormier Well Service 4 O.S.H.C. at 1087.

191 Penrod Drilling Co., 4 O.S.H.C. at 1658-59 (Cleary, dissenting).

of its own safety. This is, in effect, "a delegation of legislative authority to the industry which is in itself of questionable legality. This merely serves to preserve the status quo within an industry."<sup>192</sup> The use of the industry experience test to define a recognized hazard under the general duty clause establishes a norm for health and safety conditions that is not as strict as a norm established by a specific standard to cover the hazard. Hence, when evaluating the adequacy of evidence of a violation of OSHA obligations for the purposes of § 502 and § 11(c), the general duty obligation does not appear as useful as specific OSHA standards since the level of safety it establishes is predicated on what is already considered normal for any given industry, regardless of how patently hazardous that may be. This is especially distressing, inasmuch as most of the 13,000 toxic substances in commercial use today are not covered by specific OSHA standards, and therefore can only be covered by the general duty norm.<sup>193</sup>

## 2. OSHA Violations as Norms for Safety

There are six categories of OSHA violations of specific standards and the general duty clause, the citation of which could be used as evidence to prove the dangerousness of conditions under § 502 and § 11(c): serious, non-serious, *de minimus*, willful, repeated, and imminent hazard.<sup>194</sup> A serious violation exists where there is a "substantial probability that death or serious physical harm could result" from conditions in the workplace *unless* "the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."<sup>195</sup> The emphasis on the possible harm, *i.e.*, its "substantial probability," has been construed to mean *any* possibility of death or serious physical harm, no matter how unlikely it is that an event that could lead to harm may occur as a result of an OSHA violation.<sup>196</sup> If the harm that the regulation seeks to prevent is death or serious physical injury, then its violation is serious per se.<sup>197</sup>

The OSH Act does not state the elements of a "non-serious" violation but establishes a ceiling of \$1,000 for each violation "determined not to be of a serious nature."<sup>198</sup> This type of citation is issued in situations where an occupational illness or an accident resulting from a violation of the standard would probably not cause death or serious physical harm but which would have a direct or immediate relationship to employee health or safety.<sup>199</sup> Several violations of standards which individually would be considered "non-serious" could in combination constitute a "serious" violation.

Where a violation of a standard does not immediately or directly relate to employee health or safety, OSHA can issue a notice of *de minimus* violation in lieu of a citation.<sup>200</sup> Such violations are considered slight deviations and no

192 *Id.* at note 6.

193 N. ASHFORD, *supra* note 2, at 275.

194 *Field Operations Manual* at 77:3103-3106. There is, however, an increasing tendency to replace the term "non-serious" with "other than serious." See note 26, *supra*.

195 OSH Act § 17(k), 29 U.S.C. § 666(j) (1970).

196 *California Stevedore & Ballast Co. v. OSAHRC*, 517 F.2d 986 (9th Cir. 1975). *Accord Shaw Construction, Inc v. OSAHRC*, 534 F.2d 1183 (5th Cir. 1976).

197 517 F.2d at 987.

198 OSH Act § 17(c), 29 U.S.C. § 666(c) (1970).

199 *Field Operations Manual* at 77:3105.

200 OSH Act § 9(a), 29 U.S.C. § 658(a) (1970).

abatement by the employer is required.<sup>201</sup>

As with "non-serious," the OSH Act does not define a "willful" violation, except by amount of penalty.<sup>202</sup> OSHA has interpreted "willful" to mean action taken intentionally and knowingly for which an employer either recognizes he is in violation of the Act or, being aware of a hazardous condition, makes no reasonable attempt to eliminate it.<sup>203</sup> No showing of malicious intent is necessary. This construction has been adopted by the First and Fourth Circuits, the Fourth Circuit on the foundation that Congress did not intend to restrict OSHA in applying strong sanctions by requiring bad intent for a "willful" violation.<sup>204</sup> However, the Third Circuit holds that "obstinate refusal to comply" and "deliberate flaunting of the Act" are required.<sup>205</sup>

Violation of any standard may be cited as "repeated" where, upon re-inspection by OSHA, another violation of a previously cited standard or general duty clause is found.<sup>206</sup> The Third Circuit interprets "repeated" to mean the recurrence of the violation more than twice in a manner which flaunts the Act.<sup>207</sup> The court disagreed with OSHA and the Occupational Safety and Health Review Commission that "repeated" meant more than once and that a second violation would come within the meaning.<sup>208</sup> The requirement that a "repeated" violation must flaunt the Act is probably derived from its statutory context which is seen as similar to that of "willful."<sup>209</sup>

Section 13(a) of the OSH Act defines an imminent danger as

any conditions or practices in any place of employment which are such that a danger exists 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.<sup>210</sup>

For a health hazard to constitute an imminent danger an OSHA inspector must conclude that toxic substances or health hazards are present and that exposure to them will cause "irreversible harm to such a degree as to shorten life or cause reduction in physical or mental efficiency even though the resulting irreversible harm may not manifest itself immediately."<sup>211</sup> The power to require

201 *Field Operations Manual* at 77:3106.

202 OSH Act § 17(a), 29 U.S.C. § 666(a) (1970).

203 *Field Operations Manual* at 77:3106.

204 *Intercounty Construction Co. v. OSAHRC*, 522 F.2d 777 (4th Cir. 1975); *F. X. Messina Constr. Corp. v. OSAHRC*, 505 F.2d 701 (1st Cir. 1974) (*per curiam*).

205 *Frank Irey, Jr., Inc. v. OSAHRC*, 519 F.2d 1200 (3rd Cir. 1974). Holding based in part on view that penalties for "willful" violation are 10 times greater than for "serious" violations, indicating Congress intended a more flagrant type of conduct than for a "serious" violation.

206 *Field Operations Manual* at 77:3316. As with a "willful" violation, a "repeated" violation is followed by a maximum penalty 10 times greater than a "serious" violation. OSH Act § 17(a), 29 U.S.C. § 666(a) (1970). See note 205, *supra*.

207 *Bethlehem Steel Corp. v. OSAHRC*, 540 F.2d 157 (3rd Cir. 1976).

208 *Id.* at 162.

209 See notes 33-34, *supra*.

210 29 U.S.C. § 662(a) (1970). Note the similarity between the elements required under § 13 and those required under § 11(c). See notes 135 and 140, *supra*.

211 *Compliance Field Manual* at 77:3301. Where epidemiology can clearly demonstrate an increase in the amount of a disease over that in the general population or where numerous employees are found to be suffering the same abnormal symptoms, the imminent danger could be found to exist.

abatement of the hazard lies with the Secretary of Labor, who must obtain an injunction against the process or operation causing the imminent danger.<sup>212</sup> Neither affected employees nor a labor union may intervene as co-plaintiffs in proceedings under § 13.<sup>213</sup> Their only recourse is to bring an action against the Secretary for arbitrary and capricious failure to seek an injunction.<sup>214</sup>

While these categories of OSHA violation may be clear for inspection purposes, their relationship to "abnormally dangerous conditions" and other statutory or contractual descriptions of hazards is largely unsettled. However, it is likely that as more attention is given to health and safety rights in collective bargaining agreements, this set of violations will become increasingly useful to make fine distinctions regarding degrees of protection afforded employees.

### 3. The Use of OSHA Violations to Establish the Right to Refuse Hazardous Work

While § 4(b)(4) of the OSH Act states that the Act does not enlarge, diminish or affect in any other manner the common law or statutory rights and obligations of employers and employees,<sup>215</sup> OSHA violations have still been allowed as evidence in private tort actions by employees against their employers.<sup>216</sup> For example, OSHA violations have been successfully used to establish negligence per se.<sup>217</sup> OSHA records are apparently available for tort actions and other civil cases.<sup>218</sup>

In *Jones & Laughlin Steel Corp. v. UMW*,<sup>219</sup> a case distinguishing *Gateway Coal*, evidence of a violation of federal health and safety standards established the reasonableness of a mine safety committee's determination that "imminent danger" ("abnormally dangerous conditions") existed. While the violations themselves did not indicate "imminent danger," that determination was contractually delegated to the mine safety committee. This case serves as a vivid reminder that health and safety violations may be used not only to establish objective evidence of a degree of danger, but also may be used to establish "sufficiency of the evidence."

So it is fair to conclude that a number of actions involving the right to refuse hazardous work can be brought in various forums under different legislative provisions. In the remainder of this section we discuss the role of OSHA viola-

212 OSH Act § 13(a), 29 U.S.C. § 662(a) (1970).

213 *Hodgson v. Greenfield & Associates*, No. 37596, (E.D. Mich. 1972).

214 OSH Act § 13(d), 29 U.S.C. § 662(d) (1970).

215 OSH Act § 4(b)(4), 29 U.S.C. § 653 (b)(4) (1970).

216 See N. ASHFORD, *supra* note 2, at 173-75; Miller, *supra* note 7.

217 *Arthur v. Flota Mercante Gran Centro Americana, S.A.* 487 F.2d 561, (5th Cir. 1973).

218 In the recently adopted *Federal Rules of Evidence for United States Courts and Magistrates* Rule 803 on Hearsay Exceptions provides: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information of other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8) (emphasis added).

219 519 F.2d 1155, 3 O.S.H.C. 1373 (3d Cir. 1975). See discussion in note 101 and accompanying text, *supra*.

tions as evidence in the offensive use of statutory rights, *i.e.*, in actions brought by the NLRB or OSHA on behalf of the employees.

Also discussed is a § 301 action by a union for reinstatement or damages due its members resulting from the violation by the employer of a contractually protected right to refuse hazardous work. Lastly, we address the role of OSHA violations as a defensive tactic to be used by unions in an attempt to frustrate employers from obtaining an injunction against a work stoppage or from recovering damages as a result of an allegedly illegal strike. In the next section, there is a discussion of the use of OSHA violations in actions by employees or unions seeking to force the cessation of employer practices which violate a statutory or contractual right to a safe and healthful workplace.

Employees, on whose behalf the NLRB is pressing unfair labor practice charges for violation of full LMR Act § 7 rights, need not rely on the evidence of OSHA violations to be successful although that evidence might help establish the required good faith.<sup>220</sup> An employee, on whose behalf OSHA is charging the employer with discriminatory action under § 11(c) of the OSH Act, might very well avail himself of the determination that OSHA previously or concurrently cited the employer for a serious violation or worse.<sup>221</sup> Since the only requirement is that the employee's conclusion that he is in danger of death or serious bodily harm be reasonable, it can be argued that even a "non-serious" or "other than serious" violation would provide sufficient evidence for the employee's conclusion.<sup>222</sup>

Employees, on whose behalf the NLRB is pressing a § 502 unfair labor practice charge, appear to be in a most unsettled position as regards the use of OSHA violations. An objective determination of abnormally dangerous conditions is the requirement enunciated in *Gateway Coal*.<sup>223</sup> If the NLRB, and not a contractually designated body,<sup>224</sup> is to make that determination, it would seem that a federal safety standard violation characterized as an "imminent danger" would meet the requirement of "abnormally dangerous."<sup>225</sup> Whether a "serious" violation would satisfy the requirement remains unsettled. Further, it could be argued that if "abnormally dangerous" means more dangerous than usual in the industry, then perhaps only "serious" and "unusual" dangers would be included, leaving "serious" but "usual" hazards out of the protection of § 502.<sup>226</sup> A recent decision of the D.C. Circuit may have blurred the usual/unusual distinction to establish abnormally dangerous conditions.<sup>227</sup> A question which

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

221 This assumes, of course, that the § 11(c) regulations remain valid after appellate review of *Whirlpool* and *Daniels*. See note 146, *supra*.

222 *Cf. Jones & Laughlin Steel Corp.*, *supra*, notes 101 and 219.

223 414 U.S. 368 (1974).

224 *See Jones & Laughlin Steel Corp.*, *supra*, notes 101 and 219.

225 *Id.*

226 *See text accompanying notes 31-32, supra.*

227 In *Banyard*, the D.C. Circuit declared improper the NLRB's deference to an arbitrator's decision that an employee be ordered to continue an unsafe and illegal work practice (which had been followed in the past) as dispositive of the issue of whether an unfair labor practice had occurred as a result of an employee being dismissed for refusing unsafe work. The court of appeals reiterated the dissenting opinion in the court below that "[n]o contract provision or arbitration award can permit an employee to violate state [safety] laws or to create safety hazards for themselves or others."

In the companion case *Ferguson*, the employee sought to establish an unfair labor practice



remains unsettled is whether the federal health and safety legislation has changed what is considered to be abnormally dangerous because the *norm* is no longer defined by industry practice but rather by the goals of safety as articulated in the new legislation.<sup>228</sup> OSHA's retention of industry practice to define the standard for a general duty violation would seem to argue against this, but there has been severe criticism of this position as being inconsistent with the OSH Act.<sup>229</sup> Hopefully the OSHA requirements will change eventually what is, in fact, usual industry practice.

Even if the abnormally dangerous requirement remains unsettled, it is not unlikely that in practice the various tribunals considering the issue will relax the standards for the kind of evidence that must be presented to establish abnormally dangerous conditions. Certainly arbitrators have this discretion. One commentator has suggested a middle ground for the standard—"a reasonable basis for belief."<sup>230</sup> This is akin to the OSHA standard articulated in the § 11(c) regulations.<sup>231</sup>

If the right to refuse hazardous work has been incorporated into a collective bargaining agreement and employees are dismissed or otherwise discriminated against by the employer as a result of their exercising the right, the unions can bring an action for reinstatement and back pay on behalf of the employees under the damage provisions of § 301 of the LMR Act. In this case the proper exercise of the right to refuse hazardous work would be decided by reference to the contract language. If the issue goes to arbitration, the recent trends in other forums may, of course, be influential but not dispositive. While arbitrators tend to follow the other forums,<sup>232</sup> they may also give heavier weight to new health and labor policies and norms articulated in the new federal health and safety legislation.

Evidence of actual violations or working conditions which would violate federal health and safety standards are not the only factors enlarging the evidentiary basis for supporting a right to refuse hazardous work. Record-keeping and environmental and medical monitoring requirements placed on the employer also help establish documentary evidence which might be relied upon by employees or unions to establish objective proof of hazards or a "reasonable basis for belief." Thus it is not surprising that some employers resist union attempts to monitor the workplace<sup>233</sup> or prefer to withhold records of environmental or medical monitoring.<sup>234</sup>

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regarding his dismissal for exercising his § 502 and § 7 right to refuse to work in abnormally dangerous conditions." The court ordered the NLRB to consider the alleged unfair labor practice. The unsafe work practice though *usual* was *illegal*. Whether this decision represents a real erosion of the usual/unusual distinction for the purpose of being abnormal[ly dangerous] remains to be seen. 505 F.2d 342 (D.C. Cir. 1974).

228 See Justice Douglas' dissent in *Gateway Coal*, *supra* note 108.

229 See *Penrod Drilling Co.*, O.S.A.H.R.C. No. 5991, 4 O.S.H.C. 1654, 1658-1659 (Cleary, J., dissenting).

230 Atleson, *supra* note 21, at 711-13.

231 See note 135, *supra*.

232 See Summa, *supra* note 44.

233 N. ASHFORD, *supra* note 2, at 494.

234 *Id.* at 336.

### B. *Injunctive Enforcement of the Right to a Safe and Healthful Workplace*

In spite of the existence of statutory and contractual rights to refuse hazardous work, employees may still be subject to "the horns of a dilemma which forces them to risk either their jobs or their health."<sup>235</sup> Alternative actions seeking injunctions to compel the employer to correct health or safety hazards may be more successful in some instances. The *Whirlpool* and *Daniels* cases hold invalid the OSHA § 11(c) regulations defining a limited safety walkoff right. Instead they suggest the employee use § 13(d) of the OSH Act<sup>236</sup> to compel the Secretary of Labor to seek an injunction against the employer, forcing him to correct a health or safety hazard likely to cause death or serious physical harm. This two-step relief offered under § 13 may not come fast enough if the employee is required to remain on the job while the Secretary goes about his business. Nor is this relief available for all degrees of hazard.

A major question arising out of *Gateway Coal* and *Boys Markets* is whether unions can also obtain an injunction to force employers to cease dangerous practices pending arbitration. Is a right to a safe and healthful workplace the *quid pro quo* for an agreement to arbitrate—or for an agreement not to strike over health and safety?<sup>237</sup> Can unions obtain an injunction against the employer under § 301? It is significant in this regard that in *Gateway Coal* the district court's grant to the company of injunctive relief was conditioned upon the suspension of the foremen. Of course, the union's claim for injunctive relief would have to be based upon the usual equity criterion of "irreparable damage," and the harm the union would suffer if the injunction were denied would have to be judged to exceed that which the employer would suffer if the injunction were granted. Nevertheless, it is precisely in cases involving disputes over hazardous conditions that unions may stand the best chance of obtaining injunctive relief on equity grounds. In such cases, a union's claim that the employer was in violation of OSH Act standards may prove to be a significant factor in the court's decision to grant injunctive relief, particularly in cases where such OSHA Act standards have been explicitly incorporated into the collective bargaining agreement. Just what kind of OSHA violations would suffice remains untested and is an open question.

Finally, it has been argued persuasively that employees might bring actions to enjoin unsafe working conditions in state courts under traditional principles of equity.<sup>238</sup>

In considering this issue, [the first problem addressed was] whether OSHA contains explicit or implicit statutory language allowing a worker to maintain an action for injunctive relief. Concluding that the Act does not provide for such relief, [it is likely] that an injunction based on the state law duty of the employer to provide a reasonably safe place to work fits comfortably within existing principles of equity. Such equitable relief is precluded by neither the existence and use of administrative remedies available

235 *Id.* at 192.

236 29 U.S.C. § 662(d) (1970). *See* note 140, *supra*.

237 *See* discussion in text accompanying notes 105-109, *supra*.

238 *See* Blumrosen, *supra* note 109, *supra*.

under OSHA nor the existence of a collective bargaining agreement. Rather, in appropriate cases, equitable relief is available to simultaneously protect workers' rights and spur administrative action in implementing the principles of OSHA.<sup>239</sup>

It is beyond the purpose of this article to expand on the likelihood of states awarding such injunctions and under what degrees of hazard. However, one complicating factor is the fact that over twenty states have their own occupational health and safety plans which pre-empt federal OSHA.<sup>240</sup> Whether the state acts permit or restrict injunctions to correct health or safety hazards needs to be determined on a case-by-case basis.

## V. Conclusion

The right to refuse hazardous work enjoys different protection in different forums and under different legislative provisions for both organized and unorganized employees. Both the extension of the presumption of arbitrability to health and safety issues and agency deferral to arbitration, designed to further the national policy favoring arbitration of labor disputes, may not in fact lead to the reduction of industrial strife in the immediate future. The implied no-strike clause which is the *quid pro quo* for the agreement to arbitrate safety disputes may have so compromised a union employee's right to refuse hazardous work that the union may either (1) seek contractual exclusion of health and safety from arbitration and/or from a no-strike clause, (2) find alternative mechanisms for settling these issues such as resolution through joint management-labor safety committees, (3) contractually reserve the right of the affected employees to refuse hazardous work, or (4) contractually agree to return to work as the *quid pro quo* for the employer removing the hazardous conditions.

These alternatives have different consequences for protection of the right to refuse hazardous work. Further complicating the situation for organized workers is the recent development whereby individual employees may insist on Board resolution of an unfair labor practice which violates their § 7 rights, while unfair labor practices in violation of the contract filed by unions will continue to be deferred to arbitration by the NLRB as the preferred policy. Employees may find themselves in the unfortunate position of being in an adversary relationship with their employer and in conflict with their own union's strategy. Ironically, the unorganized employee may actually have more protection regarding a refusal to perform hazardous work; however, he or she may be unaware of such a right.

The scope and coverage of §§ 7 and 502 of the LMR Act and § 11(c) of the OSH Act create a tangled web through which employees who refuse hazardous work assignments must carefully work through. For non-union employees and union employees whose collective bargaining agreements specifically exclude health and safety from a no-strike clause, § 7 protection for the concerted activity of a work stoppage over unsafe conditions is available. Scrutiny need not be given to the nature or extent of the hazard over which a § 7 safety walkout is

239 *Id.* at 707.

240 N. ASHFORD, *supra* note 2, at 208-33.

concerned. The subjective belief of employees that the conditions are unsafe is all that is needed. Section 502, a statutory removal of certain walkoffs from being considered a strike, applies to union employees. It is an individual right and arguably is not a basis for a union walkout unless everyone who stops work is threatened by the unsafe conditions. The standard for proving § 502 "abnormally dangerous conditions" is an objective test rather than the subjective good faith test used in the exercise of § 7 rights.

As a result of *Gateway Coal*, the availability of the right to strike over safety afforded by § 502 does not by itself remove the safety dispute from arbitrability. Extension of the "presumption of arbitrability" to health and safety issues may mean that dangerous conditions can continue while the arbitration process proceeds. Employees who claim § 502 protection have to be correct in their belief that conditions are "abnormally dangerous" in order to be protected under the LMR Act against employer reprisals. Solutions to this dilemma are for the union to contract for limited liability if the employee is proven wrong as to the extent of the danger, to specifically exclude health and safety from arbitration, to reserve the right to strike over health and safety issues (even in less than "abnormally dangerous" conditions), or to obtain an agreement that during arbitration the employer will remove the alleged hazard or allow the workers to perform other work. An individual employee may refuse to perform the hazardous work and, if discriminated against, file an unfair labor practice charge with the NLRB requesting that it not be deferred to arbitration. Where unions have not taken creative steps to protect their members from facing a Hobson's choice, an individual employee's filing of an unfair labor practice charge may press union leadership into more aggressive postures on health and safety issues as well.

Protection against discrimination for refusing hazardous work under § 11(c) of the OSH Act, while available to unorganized and organized employees alike, is restricted to situations in which there is a "real danger of death or serious injury," where there is insufficient time to eliminate the danger through the normal administrative process, and where the employer has failed to correct the condition after an employee request to do so. The validity of regulations interpreting this implied limited protection is currently undergoing court review. If the regulations are upheld as valid within the rubric of the OSH Act, it is possible that § 11(c) may afford union employees more protection under certain circumstances than § 502 because dangerous conditions needed not be abnormally so and because only a reasonable basis for belief on the part of the employee is required. On the other hand, if the norm for safety is no longer the *usual* industry practice, but rather what the OSH Act seeks to establish as the norm, *i.e.* compliance with health and safety standards and *desirable* industry practice, then § 502 of the LMR Act could evolve into a more protective avenue.

Aggressive seeking of injunctive relief in both federal and state courts compelling an employer to correct unsafe or unhealthful working conditions may be a consequence of a general diminution or uncertainty of the right to refuse hazardous work. *Gateway Coal* may well be interpreted as establishing the employer agreement to arbitrate *and* to eliminate the alleged hazard pending arbitration as the *quid pro quo* for the union agreement not to cease work. This

interpretation would allow equitable remedies to operate quickly both to reduce industrial strife and to avoid employees being forced to continue work under hazardous conditions.