NATIONAL LABOR POLICY AND THE CONFLICT BETWEEN SAFETY AND PRODUCTION†

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I. INTRODUCTION: ENJOINING STRIKES WHILE PROTECTING THE SAFETY OF THE WORKPLACE

For two decades the United States Supreme Court has encouraged management and labor to agree to settle all disputes by peaceful, binding arbitration, without resort to the stronger weapons of strikes and lockouts.[1] To strengthen this policy, the Court has not only allowed employers to receive damages[2] when employees strike over issues that should have been submitted to arbitration under the collective bargaining agreement. The Court also has enjoined such strikes.[3] Another national policy — increased safety in the workplace[4] — can conflict with the Court's policy of promoting arbitration and discouraging strikes. Under provisions of the Labor Management Relations Act[5] (LMRA), the Wagner Act,[6] the Mine Safety and Health Act[7] (MSHA), and the Occupational Safety and Health Act[8] (OSHA), Congress has prevented employers in a variety of circumstances from retaliating against employees who complain, outside the arbitration process about unsafe working conditions, or who stop working due to dangerous conditions. Each statutory provision could be construed to conflict with the policy of promoting arbitration and preventing work stoppages. The Supreme Court has avoided such a conflict, however, in both instances where it has considered a safety statute's applicability. The Court has construed section 502 of the LMRA to require ob-

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[1] *See, e.g.*, Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448, 455-56 (1957).

[2] *See, e.g.*, Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 97, 106 (1962).

[3] Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 253-55 (1970), *overruling*, Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962).

[4] *See, e.g.*, 29 U.S.C. § 651(b) (1976) (reciting the purposes of the Occupational Safety & Health Act).

[5] 29 U.S.C. § 143 (1976).

[6] 29 U.S.C. § 157 (1976).

[7] 30 U.S.C. §§ 801-962 (1976 & Supp. III 1979). When the Federal Mine Safety & Health Act was first enacted, its title was the Federal Coal Mine Health and Safety Act. 30 U.S.C. § 801 (Supp. III 1979). Many decisions refer to the Act by that original title. *See, e.g.*, Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 370-71 n.1 (1974). The name was changed as part of the 1977 amendments to the Act. 30 U.S.C. § 801 (Supp. III 1979). This article will refer to the Act by its present title, or as the MSHA.

[8] 29 U.S.C. § 660(c)(1) (1976).

jective evidence of unsafe conditions to justify an employee work stoppage,[9] and has ruled that section 7 of the Wagner Act does not protect an employee's refusal to work when a collective bargaining agreement exists and provides for arbitration.[10] Recent developments under OSHA, however, have increased the potential for conflict between the two policies. In 1973, the Secretary of Labor issued a regulation under OSHA, which, after stated qualifications, specifically authorizes an employee to refuse to work on the ground that a hazardous condition exists. Under the regulation, the employee is to suffer no adverse employment consequences from his actions,[11] even if reasonable but only sub-

[9] Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 386-87 (1974) (construing § 502 of the LMRA, 29 U.S.C. § 143 (1976)).

[10] National Labor Relations Board v. Washington Aluminum Co., 370 U.S. 9, 17 (1962) (construing § 7 of the Wagner Act, 29 U.S.C. § 157 (1976)).

The MSHA has not yet been construed to avoid a conflict between the two policies, but unlike OSHA, see text at notes 11-13 *infra*, the Supreme Court has not yet ruled on MSHA as a source of work refusal by reason of unsafe conditions. Lower court decisions, however, discussed in text at notes 128-42 *infra*, show a burgeoning conflict between the policies through construction of MSHA.

[11] 29 C.F.R. § 1977.12 (1973), 38 Fed. Reg. 2681, 2683 (Jan. 29, 1973), *corrected*, 38 Fed. Reg. 4577 (Feb. 16, 1973). The regulation in its present form is at 29 C.F.R. § 1977.12 (1980). Subsection (a) asserts that the Act's explicit provision of some rights necessarily implies the existence of others. *Id.* at § 1977.12(a). Subsection (b)(1) states the way in which imminent hazards generally will be handled. *Id.* at § 1977.12(b)(1). Subsection (b)(2) provides for the right to refuse imminently hazardous work, and the conditions that surround the right. *Id.* at § 1977.12(b)(2).

The regulation in full reads as follows:

> (a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise 'of any rights afforded by this Act.' Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.
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> (b)(1) On the other hand, review of the Act and examination of the legislative history discloses 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. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.
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> (2) However, occasions might arise when an employee is confronted

jective fears were the basis for the refusal to work.[12] In a recent decision upholding the Secretary's authority to promulgate this regulation,[13] the Supreme Court did not mention, and hence left unresolved, the question of whether the regulation would apply to a dispute about a safety condition deemed to be arbitrable. Thus, the Court has created the potential for a head-on conflict between the two national policies of preventing strikes and promoting safety in the workplace. On the one hand, the Court has limited the availability of strikes by ruling that the LMRA requires objective evidence of a health hazard to support a refusal to work. On the other hand, the Court has promoted the policy of safety in the workplace by upholding an OSHA regulation which allows safety concerns to excuse refusals to work if supported by reasonable, albeit subjective, evidence.

This article will address the question of whether the OSHA regulations should be interpreted broadly — first, to apply its subjective standard of danger to a refusal to work regardless of the arbitrability of the safety dispute, and second, to prohibit a union from waiving the employee's right to refuse dangerous work in a collective bargaining agreement. Before reaching those questions, however, it is necessary to review the development of the Court's arbitration/no-strike policy. It will also be helpful to show how the National Labor Relations Board, the courts, and the federal agencies charged with enforcing safety statutes have construed Congress' will. Finally, analysis of the legislative purpose of OSHA, when considered against the background first to be developed, will demonstrate that the Court's policy of minimizing work

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> 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.

Id. at § 1977.12.

[12] No court has actually held that the regulation protects an employee if he was reasonable, regardless of whether he was accurate. The regulation on its face, however, adopts a reasonable perception standard. 29 C.F.R. § 1977.12 (1980). But if that were enough, one would have thought that § 502 of the LMRA, by using the words "good faith" could be said to have adopted reasonableness on its face. 29 U.S.C. § 143 (1976). In any event, every court that has considered the regulation has assumed that it requires only a reasonable belief, and this article is based on that assumption. *See, e.g.*, Whirlpool Corp. v. Marshall, 445 U.S. 1, 21 (1980); Marshall v. Whirlpool Corp., 593 F.2d 715, 720 (6th Cir. 1979), *aff'd sub nom.* Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980); Marshall v. Daniel Constr. Co., Inc., 563 F.2d 707, 714-15 (5th Cir. 1977).

[13] Whirlpool Corp. v. Marshall, 445 U.S. 1, 22 (1980).

stoppages and the accompanying disruption of production by narrowing safety as a defense to such employee activities should not be extended to circumstances described in the OSHA regulation, regardless of the existence or content of a collective bargaining agreement. Instead, subjective evidence of a health hazard, as required by the OSHA regulation, should be held sufficient to justify an employee's refusal to work.

II. THE CONTROVERSY DELIMITED

A. *Enjoining Strikes*

For two decades the Supreme Court has steadily promoted a policy of requiring grievance arbitration in lieu of strikes or lockouts, whenever a collective bargaining agreement can be construed to support such a result. In *Textile Workers Union of America v. Lincoln Mills of Alabama*,[14] the Court laid a foundation for building a national policy of preventing strikes and lockouts. In *Lincoln Mills*, the Court held that section 301 of the Labor Management Relations Act[15] gave the federal courts authority to create a federal common law for the construction of collective bargaining agreements.[16] More specifically, the Court held that the plaintiff union was entitled to an order against the defendant employer compelling the latter to submit the union's grievances to arbitration, as provided for in the collective bargaining agreement.[17] In the Court's view, Congress wanted to encourage a collective bargaining process that resulted in agreements not to strike.[18] Furthermore, the Court stated, legislative history revealed that "the agreement to arbitrate grievance disputes was considered as *quid pro quo* of a no-strike agreement."[19] Thus, in order to avoid a strike, the Court ordered that the grievance be arbitrated in accordance with the terms of the collective bargaining agreement.

The Court subsequently strengthened the arbitration/no-strike policy that lay behind *Lincoln Mills*. In the *Steelworkers' Trilogy*,[20] the Court granted near finality to the awards of arbitrators, recognizing a narrow, indeed nearly nonexistent, power of the courts to review such awards.[21] The *Steelworkers' Trilogy* Court also adopted a presumption of arbitrability for labor disputes in cases where there is both a collective bargaining agreement and a broadly worded no-strike clause.[22] Noting that the purpose of labor arbitration is to

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[14] 353 U.S. 448 (1957).

[15] 29 U.S.C. § 185 (1976).

[16] 353 U.S. at 455-57.

[17] *Id.* at 449, 457-59.

[18] *Id.* at 453.

[19] *Id.* at 455.

[20] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navig. Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) [hereinafter cited and referred to as *Steelworkers Trilogy*].

[21] *Steelworkers Trilogy*, 363 U.S. at 567-68, 596.

[22] *Id.* at 582-83, 584-85.

prevent industrial strife,[23] the Court concluded that arbitration should be required in every collective bargaining agreement with an arbitration provision unless the agreement expressly provides otherwise.[24] Thus, the Court took the position that agreements to submit a particular grievance to arbitration rather than strike need not be express — they may be implied from broad arbitration provisions in the collective bargaining agreement.[25] Shortly thereafter the Court extended the rule of *Lincoln Mills* and its progeny to the state courts,[26] requiring them to follow federal law.[27] At the same time, the Court held that a strike violates a collective bargaining agreement if the strike is over an issue that the agreement commits to arbitration, regardless of the absence of a no-strike pledge.[28] The Court thus broadened its policy that an agreement to arbitrate effectively precludes the possibility of strikes to mean that a union's acceptance of arbitration implies an enforceable promise not to strike.

One more result, necessary for compulsory arbitration to avoid strikes,[29] came in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*.[30] In *Boys Markets*, the Court ruled that federal, not only state, courts could enjoin a strike conducted in violation of a no-strike clause.[31] The Court held that section 4 of the Norris-LaGuardia Act[32] (NLGA) did not preclude federal courts from enjoining such strikes.[33] Section 4 of the NLGA, the Court said, responded to a period of

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[23] *Id.* at 582.

[24] *Id.* at 582-83, 584-85.

[25] Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104-05 (1962).

[26] *Id.* at 101-02. In Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), the Court held that state courts have jurisdiction, concurrently with federal courts, to hear suits arising out of disputes over the construction of a collective bargaining agreement. 368 U.S. at 508-14.

[27] Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102 (1962).

[28] *Id.* at 104-05.

[29] The law through *Lincoln Mills*, *Steelworkers Trilogy*, *Charles Dowd Box Co.*, and *Lucas Flour* required all courts in the United States to order arbitration of an arbitrable grievance, and virtually required courts to enforce an arbitrator's award. Although these requirements would likely deter strikes over grievances, since employers suffer from a strike, the Court had not yet decided to prevent strikers forcefully.

Indeed, until 1970 an anomolous situation existed. State courts could, so far as federal law was concerned, enjoin strikers. Federal courts could not enjoin strikers because in Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962), the Court reaffirmed the position that § 4 of the Norris-LaGuardia Act, 29 U.S. § 104 (1976), prevented federal courts from issuing injunctions as a remedy for the employer in a suit that alleged that a strike breached the collective bargaining agreement. 370 U.S. at 199, 203, 215. Although the employer could sue in state court, the union could remove to federal court. Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560 (1968). A union would always be tempted to remove, to avoid an injunction. This situation created two problems. First, only one half of the arbitration/no-strike policy was enforceable. Second, an unnecessarily large percentage of these lawsuits would be litigatged in federal court. At some point the problems had to be solved, either by overruling *Sinclair*, or by extending the prohibitions on injunctions to state courts, as a matter of federal common law under *Lincoln Mills* and *Lucas Flour*. *See* Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 247 (1970).

[30] 398 U.S. 235 (1970), *overruling*, Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962).

[31] 398 U.S. at 238, 253-55.

[32] 29 U.S.C. § 104 (1976).

[33] 398 U.S. at 253.

history when labor unions were much less organized and powerful than they are today.[34] The Court concluded that the appropriate policy to pursue with modern unionized labor, which is powerful enough to compel employers to make collective bargaining agreements, was a policy that would encourage peaceful settlement of disputes arising out of such contracts and would curtail or eliminate the disruption of production and commerce.[35] For that reason, binding arbitration became the union's and society's tool to settle grievances while the injunction of a strike became the employer's and society's remedy for interruptions of production.

The only lapses in the Court's enforcement of no-strike clauses came in *Mastro Plastics Corp. v. National Labor Relations Board*,[36] and *Buffalo Forge Company v. United Steelworkers of America*.[37] In *Mastro Plastics*, a relatively early decision, the Court refused to enforce a no-strike clause on the ground that it applied only to disputes about normal, not extraordinary, events in the operations of the employer. Finding that the strike at issue resulted from an extraordinary event,[38] the Court refused to grant the employer an injunction, damages or an arbitration order.[39] *Mastro Plastics'* continued vitality is doubtful, however, because it preceded the Court's decisions in *Lincoln Mills*, the *Steelworkers' Trilogy*, and *Boys Markets*. Furthermore, *Mastro Plastics* was not a suit for breach of contract but rather an unfair labor practice proceeding that required construction of a provision of the National Labor Relations Act.[40] The case's applicability to claims disputing contractual rights is thus minimal because the latter arise under the federal common law announced in *Lincoln Mills*.

The other occasion in which the Court diverged from its policy of enforcing contractual no-strike clauses was *Buffalo Forge Company v. United Steelworkers of America*.[41] In *Buffalo Forge*, the Court refused to enjoin a sympathy strike by one group of employees who refused to cross the picket lines of another group of employees.[42] The contract invoked by the plaintiff in *Buffalo Forge* unequivocally provided that disputes about the application of the no-strike clause were to be submitted to arbitration.[43] The district court, however, had con-

[34] *Id.* at 250-51.

[35] *Id.* at 251-53.

[36] 350 U.S. 270 (1956).

[37] 428 U.S. 397 (1976).

[38] 350 U.S. at 281-84.

[39] *Id.* at 278-79, 284.

[40] In *Mastro Plastics* the union struck during the 60-day cooling-off period immediately prior to expiration of the existing contract. *Id.* at 274-75. *See* National Labor Relations Act (NLRA) § 8(d)(4), 29 U.S.C. § 158(d)(4) (1976). The strike was called, however, to protest the employer's alleged unfair labor practices, not to exert pressure during the critical period before negotiations. 350 U.S. at 273. The Court held that the no-strike clause in the collective bargaining agreement was not intended to apply to strikes over unfair labor practices, *id.* at 281-84, and also that the statutory proscription did not apply to unfair labor practice strikes. *Id.* at 286.

[41] 428 U.S. 397 (1976).

[42] *Id.* at 400-01, 403-04.

[43] *Id.* at 400. The arbitration/no-strike clause encompassed "differences . . . between the [employer] and any employee covered by this Agreement as to the meaning and application of the provisions of this Agreement, . . . [and] trouble of any kind . . . in the plant." *Id.*

cluded that neither the causes of the sympathy strike nor the issues underlying it were subject to the arbitration clause in the collective bargaining agreement.[44] The parties to the dispute had stipulated to the correctness of that finding.[45] The question before the Supreme Court, therefore, was whether an injunction, as opposed to damages, would be warranted if the sympathy strike violated a no-strike provision, but did not breach the arbitration provisions of the agreement.[46] The Court denied the injunction,[47] thus refusing to extend the power granted to the federal courts in *Boys Markets*. Under *Buffalo Forge*, then, a strike may not be enjoined pending arbitration of the propriety of the strike when the district or appellate court finds that neither the causes of nor the issue underlying the strike is subject to the arbitration provisions of the collective bargaining agreement.[48]

The foregoing discussion shows that in the past twenty years, the Supreme Court has developed an aggressive policy of favoring arbitration and minimizing strikes. The powers of arbitrators have been broadened and their rulings subject to very narrow judicial review. Employers have been allowed to seek injunctions in federal, as well as state, courts to prevent strikes over issues that are properly submittable to arbitration. In only one instance has the Court refused to grant an injunction against a strike arguably conducted in disregard of an agreement to arbitrate, and even this exception may include only strikes where the validity of the strike is subject to arbitration — not the issues underlying or causing it — and where the employees have agreed to submit to arbitration on that issue. Otherwise, the Court has adhered steadfastly to the notion that the disruption of production should be minimized while arbitration should be encouraged.

B. *Safety as a Justification for Refusal to Work*

The judicial policy of eliminating, within the limits imposed by contract, any disruption of production during the resolution of employer/employee disputes was destined to conflict with another social goal — promoting safety in the workplace. The full impact of the continuous production policy upon society's interest in safe working conditions has not yet been resolved, but some conflicts have emerged. Although four sources of law have been relied upon from time to time to justify a refusal to work based on unsafe conditions,[49] the impending conflict exists because of the Supreme Court's construction of sec-

[44] *Id.* at 402-03.

[45] *Id.* at 403.

[46] *Id.* at 404.

[47] *Id.*

[48] *Id.* at 406-09.

[49] Section 7 of the NLRA, 29 U.S.C. § 157 (1976), discussed in text at notes 120-27 *infra*; § 502 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 143 (1976), discussed in text at notes 54-81 *infra*; § 110(b) of the MSHA, 30 U.S.C. § 815(c)(1) (Supp. III 1979), discussed in text at notes 129-42 *infra*; § 11(c)(1) of OSHA, 29 U.S.C. § 660(c)(1) (1976), and the accompanying regulation, 29 C.F.R. § 1977.12 (1980), discussed in text at notes 82-119 *infra*.

tion 502 of the LMRA[50] and the Court's approval of the OSHA regulation.[51] Accordingly, this article will concentrate on section 502 and the OSHA regulation. The other two sources of employee-safety legislation, section 7 of the Wagner Act[52] and section 110(b) of the MSHA,[53] will be discussed to illustrate the depth of judicial concern about safety and to complete the picture of safety justifications for refusal to work. An analysis of section 7 of the Wagner Act and section 110(b) of the MSHA will also demonstrate that judicial and administrative constructions of these statutes support the thesis of this article — that subjective evidence of a health hazard should be sufficient, under the OSHA regulation, to justify an employee's refusal to work.

1. Section 502 of the Labor Management Relations Act and Refusals to Work

Section 502 of the LMRA[54] provides that the definition of strike in the act does not include the quitting of labor by one or more employees in good faith due to abnormally dangerous work conditions. The major effect of section 502 is to exempt from punitive employer treatment an employee who stops working in accordance with the statutory requirements.[55] Before 1973, the Labor Board and the few circuit courts of appeals that construed section 502 did not link construction of that provision with the Supreme Court's expansive role for arbitration and narrow role for strikes. While the courts and the Board dealt with issues of construction which could further or curb the Court's policies, the opinions do not suggest that the adjudicators were aware of that possible effect of their decisions. These decisions focused on two questions. First, the courts and the Board considered whether the words "good faith" in section 502 meant that the employee's belief that a condition was abnormally dangerous had to be only reasonable, or whether the employee's belief had to be objectively correct.[56] Second, the adjudicatory bodies also considered whether the

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[50] 29 U.S.C. § 143 (1976), *construed in* Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 385-87 (1974).

[51] 29 C.F.R. § 1977.12 (1980). *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 22 (1980).

[52] 29 U.S.C. § 157 (1976).

[53] 30 U.S.C. § 815(c)(1) (Supp. III 1979).

[54] 29 U.S.C. § 143 (1976). The statute says: "... 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."

[55] Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 385 (1974).

[56] Knight-Morley Corp., 116 N.L.R.B. 140 (1956), *enforced sub nom.* NLRB v. Knight-Morley Corp., 251 F.2d 753 (6th Cir. 1957), *cert. denied sub nom.* Knight-Morley Corp. v. NLRB, 357 U.S. 927 (1958), was the first significant case to construe § 502. In that case, the air blowers in the plant worked in reverse, scattering hot air and dust around the room and into workers' eyes, and creating a great deal of heat. 251 F.2d at 756. The employees left after working briefly under those conditions, and the employer refused to admit them to work the next day. *Id.* The collective bargaining agreement contained a general no-strike clause. *Id.* at 759. An expert witness testified that the conditions in the plant could cause a variety of serious physical difficulties. 16 N.L.R.B. at 142-43. The Board held that § 502 protected the walk-off. *Id.* at 145-47. The opinion, however, relied on both the expert witness' testimony that the conditions were hazardous, and the testimony of the employees that they thought the conditions were unsafe. *Id.*

phrase "abnormally dangerous" meant abnormally dangerous in an abstract sense, or abnormally dangerous for the particular job involved.[57] Thus the question of whether to use objective or subjective standards to construe safety statutes arose early in the application of those protections. The same question

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at 142-44. In a concurring opinion, Member Rogers wrote that only objective evidence of abnormally dangerous conditions, here the expert's testimony, could suffice to invoke § 502. *Id.* at 154-55. The employees' perceptions were not, he thought, relevant. *Id.* The opinion of the Sixth Circuit, enforcing the Board's orders, relied almost entirely on the objective evidence. 251 F.2d at 758-59.

Although Knight-Morley has sometimes been cited to show that § 502 requires only subjective evidence, it has been cited more often to support the theory that § 502 requires objective evidence. *Compare* J. Attleson, *Threats to Health and Safety: Employee Self-Help Under the NLRA*, 59 MINN. L. REV. 647, 686-88 (1975) [hereinafter cited as *Attleson*] *with* NLRB v. Fruin-Colnon Constr. Co., 330 F.2d 885, 892 (8th Cir. 1964) (discussed *infra* at note 57). *See Attleson*, *supra*, at nn.207-08.

In Redwing Carriers, Inc., 130 N.L.R.B. 1208 (1961), *enforced as modified sub nom.* Teamsters, Chauffeurs, & Helpers, Local Union No. 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964), a truckloader refused to cross a picket line of other employees, alleging fear of violence and harassment. A union represented the truckloaders, but there was neither a collective bargaining agreement nor a no-strike clause. *See* 130 N.L.R.B. 1208 (*compare* discussion of rights under § 7 of the Wagner Act at text at notes 120-27 *infra*). The Board ruled that conditions were not abnormally dangerous, because other truckloaders had performed the work without difficulty. 130 N.L.R.B. at 1210-11. The Board wrote, however, that for that reason it need not decide whether § 502 *could* protect the truckloaders. *Id.* at 1209. It is one thing to say that the absence of abnormally dangerous conditions means that § 502 does not apply; it is quite another to say that the absence of such conditions means that one need not decide whether § 502 applies. The Board may have been confused about the roles of objective and subjective evidence in § 502 cases. That the Board's opinion in *Redwing* reads much like the *Knight-Morley* concurrence strengthens that possibility, as does the absence of a concurring opinion by Member Rogers in *Redwing*. Furthermore, two years after *Redwing*, the Board ruled, in Curtis-Mathes Mfg. Co., 145 N.L.R.B. 473 (1963), that the employees' perception of danger lacked a sufficient foundation in objective fact. *Id.* at 475 n.4. Member Leedom, a member of the *Knight-Morley* majority, and perhaps its author (the Board's opinions do not ascribe authorship), concurred specially, saying that he would apply § 502 solely on the basis of the employees' perceptions. *Id. Redwing* and *Curtis-Mathes* thus suggest that the Board was moving toward an objective evidence definition for the statute's phrase "good faith because of abnormally dangerous conditions." *Accord* NLRB v. Fruin-Colnon Constr. Co., 330 F.2d 885, 892 (8th Cir. 1964) (requiring objective evidence, and reading the Sixth Circuit opinion in *Knight-Morley*, to require such evidence).

[57] In Fruin-Colnon Constr. Co., 139 N.L.R.B. 894 (1962), *enforcement denied sub nom.* NLRB v. Fruin-Colnon Constr. Co., 330 F.2d 885 (8th Cir. 1964), the job was to place dynamite charges in a mountain. 139 N.L.R.B. at 896. The employees left the job one day, claiming that it was extremely cold, and that the ladders they used were slippery from ice. *Id.* at 897-98. The Board held these conditions to be abnormally dangerous within the meaning of § 502, *id.* at 894, 904-05 (adopting findings of Trial Examination), but the court of appeals reversed. 330 F.2d at 891-92. The court said that the job was dangerous by nature, that the workers were paid an additional wage for that reason, and that there was insufficient evidence that conditions were abnormally dangerous given that the job was fairly dangerous in any event. 330 F.2d at 891.

The Board agreed with the Eighth Circuit's decision in *Fruin-Colnon* when the Board decided Anaconda Aluminum Co., 197 N.L.R.B. 336 (1972). The workers in *Anaconda* refused to pull pins on detonators, claiming that their proximity to and the frequency of explosion were dangerous. *Id.* at 341-42. The Board cited Redwing Carriers, Inc., 130 N.L.R.B. 1208 (1961), *enforced as modified sub nom.* Teamsters, Chauffeurs & Helpers, Locan Union No. 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964), and *Fruin-Colnon*, *supra* for the

has blossomed to create the potential conflict between OSHA and the arbitration/no-strike policy.[58]

While the early decisions concerning section 502 did not directly address the conflict between the policies of promoting arbitration and protecting worker safety, in 1973, in *Gateway Coal Company v. United Mine Workers*,[59] the Court of Appeals for the Third Circuit confronted the issue head-on, only to be reversed by the Supreme Court.[60] In *Gateway Coal*, the union told its men to stop working because of an alleged fear of unsafe conditions, based on the continued presence of foremen who had falsified air flow records.[61] The company offered to arbitrate, but the union refused.[62] The company then sought to enjoin the strike on the ground that the union had struck over an arbitrable issue.[63] The district court granted the injunction, but also suspended the foremen pending arbitration.[64] On appeal, the Third Circuit reversed.[65] The court recognized the importance of the national policy favoring arbitration[66] but concluded that the arbitration agreement involved in *Gateway Coal*, which did not contain express provisions regarding safety,[67] should not be construed to include safety complaints when balancing the policy of promoting arbitration against that of protecting worker safety.[68] The court of appeals read earlier decisions interpreting section 502 to establish that a "... good faith apprehension of physical danger is protected activity and not enjoinable, even where the employees have subscribed to a comprehensive no-strike clause in their labor contract."[69] Although the court did not offer any definition of the term "good faith," its reasoning suggests that the employees' perceptions of danger would suffice if reasonable, even if evidence did not prove those perceptions to be accurate.

The Supreme Court reversed the court of appeals[70] on a variety of grounds. First, the Court ruled that the arbitration clause in the workers' col-

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proposition that a condition is not abnormally dangerous unless the degree of danger is extraordinary for the work involved. 197 N.L.R.B. at 343-44.

After the decision in Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368 (1974), discussed in text at notes 59-81 *infra*, however, the NLRB General Counsel's office took the position that the term "serving violation" in OSHA is broader than the phrase "abnormally dangerous" in § 502. Economy Tank Line, [1978-79] NLRB DEC. (CCH) ¶ 20,223 at 33,389-90 (July 31, 1978). Although binding on virtually nobody, the position of the General Counsel's office suggests that OSHA may be held to provide more protection than § 502.

[58] See text at notes 11-14 *supra*.

[59] 466 F.2d 1157 (3d Cir. 1972), *rev'd*, 414 U.S. 368 (1974).

[60] 414 U.S. 368 (1974).

[61] *Id.* at 371.

[62] *Id.* at 372.

[63] *Id.*

[64] *Id.* at 372-73.

[65] 466 F.2d 1157, 1161 (3d Cir. 1972), *rev'd*, 414 U.S. 368 (1974).

[66] 466 F.2d at 1159.

[67] *Id.*

[68] *Id.* at 1160.

[69] *Id.*

[70] 414 U.S. 368, 388 (1974).

lective bargaining agreement encompassed disputes about safety.[71] In so concluding, the Court rejected the Third Circuit's reference to a public policy that militated against arbitration of safety disputes.[72] The Court reasoned that all of the policies favoring arbitration, such as avoiding industrial strife, were as applicable to safety disputes as to any other disagreements.[73] The Court found unpersuasive the court of appeals' contention that an arbitrator would be insensitive to the workers' interest in their safety.[74]

The Court also rejected the appeal's court's refusal to uphold an injunction of the employees' strike.[75] Relying upon the model it had created in earlier cases,[76] the Court reasoned that absent an explicit expression of an intention to negate a no-strike obligation, "the agreement to arbitrate and the duty not to strike should be construed as having coterminous application."[77] Thus, in *Gateway Coal*, a duty not to strike existed because, in the Court's view, safety disputes were proper subjects for arbitration under the contract.

Turning to the effect that section 502 of the LMRA had on the dispute, the Court ruled that the provision furnished only a narrow exception to the implied no-strike obligation in the workers' collective bargaining agreement.[78] The Court agreed with the court of appeals that section 502 provides a limited exception to an express or implied no-strike obligation, but ruled that the exception did not apply unless the employees presented objective evidence of an abnormally dangerous condition.[79] The Court weighed the desirability of arbitration against the policy of promoting safety in the workplace by stating: "Absent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be."[80] Thus, the Court in *Gateway Coal* held that where safety conditions are determined to be arbitrable under the employment contract, section 502 is not a defense for an employee who stops working unless the employee presents objective evidence of abnormally dangerous conditions. The Court did not consider, however, the rights and duties of an employee not subject to a collective bargaining agreement containing an arbitration clause.[81]

In summary, the Supreme Court decided in *Gateway Coal* that the judicially-created policy of favoring arbitration was as applicable to safety disputes as to any other labor disagreement. The Court also concluded that

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[71] *Id.* at 376-80.
[72] *Id.* at 376.
[73] *Id.* at 377-80.
[74] *Id.* at 379.
[75] *Id.* at 380-88.
[76] *Id.* at 380-82.
[77] *Id.* at 382.
[78] *Id.* at 385-87.
[79] *Id.* at 386-87.
[80] *Id.* at 386.
[81] For a discussion on this problem, see text at notes 120-27 *infra*.

where employees strike in violation of an agreement to arbitrate and there is an express or implied no-strike clause, the panoply of remedies available to employers, in particular injunctive relief, would also apply to safety disputes. Thus, the Court deemed the policy of preventing the disruption of production more important than an employee's honestly held fear of unsafe conditions to justify a refusal to work, where the safety defense was based on section 502.

2. The Occupational Safety and Health Act and Refusals to Work

OSHA prohibits any employer from discharging or discriminating against any employee who exercises "any right afforded by" the statute.[82] In 1973, the Secretary of Labor issued a regulation providing that among the rights that the statute protects is, after stated qualifications, the right of an employee to refuse work on the ground that a hazardous condition exists, and to suffer no adverse employment consequences from exercising that right.[83] Under this regulation, a reasonable, subjective belief — not objective evidence — of unsafe conditions triggers the employee's privilege to refuse work.[84] Thus, the employee's protection under the OSHA regulation is broader than protection under section 502, since the Supreme Court interpreted the latter to require objective evidence that danger existed.[85] Recently, in *Whirlpool Corp. v. Marshall*,[86] the Supreme Court upheld the Secretary's power to issue this regulation. The Court's opinion in *Whirlpool* does not directly address the relationship of the OSHA regulation to the policy of favoring arbitration and preventing strikes. Nevertheless, the Court's reasoning, as well as its endorsement of the regulation, accentuates the emerging conflict between the Court's policy of encouraging continued production and the congressional goal of promoting safety in the workplace.

In *Whirlpool*, an employer told employees who had refused to perform certain tasks because of dangerous conditions to leave work for the remainder of their shift.[87] The employer issued written reprimands that were subsequently placed in the employees' files.[88] The Secretary of Labor sued to expunge the records, and to recover pay for the lost time.[89] Although the employees might have used section 502 as a defense, none of the opinions rendered in the case suggests that they did so. The district court denied relief, holding that the Secretary's regulation was invalid because it was inconsistent with the Act.[90] The Court of Appeals for the Sixth Circuit reversed,[91] finding the regulation

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[82] 29 U.S.C. § 660(c)(1) (1976).

[83] 29 C.F.R. § 1977.12 (1980). See note 11 *supra* for text of the OSHA regulation.

[84] See note 12 *supra*.

[85] See discussion in text at notes 70-81 *supra*, especially at notes 79-80 *supra*.

[86] 445 U.S. 1 (1980).

[87] *Id.* at 7.

[88] *Id.*

[89] Usery v. Whirlpool Corp., 416 F. Supp. 30, 31 (N.D. Ohio 1976).

[90] *Id.* at 33.

[91] Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979), *aff'd sub nom.* Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980).

within the scope of OSHA,[92] and the Supreme Court affirmed the court of appeals.[93]

The Supreme Court first concluded that the regulation was reasonably related to the Act's fundamental purpose of protecting workers.[94] The Court emphasized that safety legislation is to be construed liberally in order to further congressional intent.[95] The Court then examined the employer's arguments that the regulation was inconsistent with the legislative history of OSHA.[96] First, the employer argued that Congress had specifically rejected the right given by the regulation.[97] One of the bills leading to the passage of OSHA would have entitled workers to leave work and continue to be paid if (1) the Department of Health, Education and Welfare determined that materials at the workplace were toxic, (2) sixty days elapsed after such determination, and (3) the employer failed either to correct the conditions, or to inform the employee of the hazard, and neglected to furnish the employee with personal protective equipment.[98] Ultimately this proposal, denounced by opponents as the strike with pay provision,[99] was dropped.[100] Nevertheless, the Court upheld the OSHA regulation, reasoning that it differed significantly from the strike with pay provision. The Court noted that "Congress rejected a provision that did not concern itself at all with conditions posing real and immediate threats of death or severe injury."[101] Yet the regulation, in the Court's view, is so qualified as to limit its application to such cases.[102] Additionally, the Court concluded that the opposition to the strike with pay provision arose from its imposition on employers of an unconditional obligation to continue to pay full compensation to the non-working employees, and not from the creation of a right to stop working.[103] The Court specifically did not decide whether the regulation granted a right to pay for the time not worked.[104]

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[92] 593 F.2d at 736. The court neither considered nor decided whether the regulation entitled the employer to pay for lost time, nor, if it did, whether the statute authorized such a portion of the regulation.

[93] Whirlpool Corp. v. Marshall, 445 U.S. 1, 22 (1980).

[94] *Id.* at 13.

[95] *Id.*

[96] *Id.* at 13-21.

[97] *Id.* at 16-17.

[98] *Id.* at 14-15 (discussing H.R. 16875, 91st Cong., 2d Sess., § 19(a)(5) (1970), *reprinted in* COMM. ON LABOR AND PUBLIC WELFARE, 92d Cong., 1st Sess., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1974, at 755-56 (1971)).

[99] 445 U.S. at 14.

[100] *Id.* at 16 (discussing S. 2193, 91st Cong., 2d Sess. (1970), *reprinted in* COMM. ON LABOR AND PUBLIC WELFARE, 92d Cong., 1st Sess., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 1-30 (1971)).

[101] 445 U.S. at 17.

[102] *Id.*

[103] *Id.* at 17-18.

[104] *Id.* at 19 n.31. The questions of whether an employee whose refusal to work is protected by the regulation should be paid for lost time is a complex one. Such an inquiry must focus on the basic issue of how broad is the relief provided by the regulation. A remedy which fails to treat the employees as though they had worked the whole time would require a detailed statement of the employer's rights and responsibilities. Decisions would have to be made about fringe

The *Whirlpool* Court then examined another portion of the legislative history which the employer claimed invalidated the OSHA regulation. Two bills, the Daniels and Williams Bills, originally had contained provisions that would have granted Labor Department officials the power to shut down temporarily all or part of an employer's plant.[105] The Court reasoned that the deletion of these provisions did not militate in favor of invalidating the regulation since the opposition to the provisions was directed at the broad authority they gave to federal officials to impair the operation of an employer's business.[106] While it was thus possible that the omitted provisions might shift the nature of the government's traditionally neutral role in labor-management relations,[107] the Court reasoned that the OSHA regulation did not raise such concerns because it accords no authority to government officials.[108] The Court explained:

> [The regulation] simply permits private employees of a private employer to avoid workplace conditions that they believe pose grave dangers to their own safety. The employees have no power under the regulation to order their employer to correct the hazardous condition or to clear the dangerous workplace of others. Moreover, any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith. The regulation, therefore, does not remotely resemble the legislation that Congress rejected.[109]

Thus, the Court effectively endorsed the right of an employee to stop working, based upon a reasonable belief of imminent danger, without suffering employer retribution.

The scope of the Court's decision is, as yet, unknown. Neither the Court's opinion nor those of the lower courts reveal whether the plant was unionized, whether a collective bargaining agreement governed employment or, if there was a collective bargaining agreement, whether it contained an agreement to arbitrate or a no-strike clause. Given that posture, the application of *Whirlpool* to future safety disputes remains uncertain. There are at least three ways in which the courts could interpret the OSHA regulation. First, courts could conclude that the right of an employee to stop working under the regulation applies only where the collective bargaining agreement does not contain an agreement to arbitrate.[110] Second, courts could conclude that the regulation applies in all situations, providing an exception to a no-strike obligation arising from an

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benefits, seniority, and all other incidents of employment related to time actually worked.

[105] *Id.* at 19 (discussing H.R. 16785, 91st Cong., 2d Sess., § 12(a) (1970) (the Daniels Bill) and S. 2193, 91st Cong., 2d Sess., § 11(b) (1970) (the Williams Bill)).

[106] 445 U.S. at 20-21.

[107] *Id.* at 21.

[108] *Id.*

[109] *Id.*

[110] See discussion in text at notes 154-56 *infra*.

agreement to arbitrate.[111] Finally, the regulation's applicability to a situation where a collective bargaining agreement contains an arbitration clause could be evaluated on a case-by-case basis to determine if particular trades of safety guarantees for economic benefit in a collective bargaining agreement violate the purposes and precepts behind OSHA.[112]

There is a dearth of authority addressing the scope of the OSHA regulation's application. In particular, sources have not addressed the need to reconcile *Gateway Coal*'s objective standard for justifying a refusal to work with the OSHA regulation's broader approach to the same question. A few tangentially-related items are suggestive, although scarcely conclusive.

First, two circuits have held that a court may refuse to enforce an arbitrator's award in favor of an employer when the employee later sues over the same grievance, asserting that either OSHA or MSHA protected his conduct.[113] The results and reasoning in these cases suggest that some courts were willing, even before the *Whirlpool* decision, to use the safety statutes to create a hole in the *Steelworkers' Trilogy* policy of enormous deferences to the jurisdiction of an arbitrator and the substance of his award. Second, even the Supreme Court, in *Gateway Coal*, has agreed that a general no-strike pledge is insufficient to waive the limited right to refuse work that section 502 provides.[114] Thus, there exists strong authority for the proposition that waiver of safety protections will not be inferred. Third, the agencies that administer the relevant statutes — the NLRB and the OSH Administration — have agreed that in cases where the jurisdictions of the two agencies overlap, the jurisdiction of the OSH Administration is primary.[115] This arrangement sug-

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[111] This interpretation would have the effect of virtually dispensing with the *Gateway Coal* objective evidence limitation because § 502 would apply only where OSHA, or a similarly construed statute, did not apply. See discussion in text at notes 150-82 *infra*.

[112] See discussion in text at notes 194-95 *infra*.

[113] Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772, 777, 783 (D.C. Cir. 1974) (arbitration board held itself without authority to apply federal mine safety act); N.L. Indus., [1980] OSHA DEC. (CCH) ¶ 24,354, at 29,689-90 (7th Cir. 1980). *Accord*, Brennan v. Alan Wood Steel Co., [1975-76] OSHA DEC. (CCH) ¶ 20,136, at 23,958-59 (E.D. Pa. 1975). In Marshall v. General Motors, 6 OSHC 1200 (BNA) (N.D. Ohio 1977), the court refused to inquire behind an arbitrator's award, but on the ground that the award was made by the consent of both parties and therefore operated as a waiver of the employee's right to bring suit under OSHA. *Id.* at 1201, 1203. The decision in Hanna Mining Co. v. United Steelworkers of America, 464 F.2d 565 (8th Cir. 1972), holding that a coal mine safety dispute was subject to arbitration, *id.* at 569, is not to the contrary because the *Hanna* opinion did not discuss implications of the safety act.

[114] 414 U.S. at 385.

[115] 29 C.F.R. § 1977.13 (1980). A nearly identical agreement exists between the NLRB and MSHA. 45 Fed. Reg. 6189 (Jan. 25, 1980); [1979-80 Transfer Binder] EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 11,886.

In addition, the Secretary of Labor was instructed to report to Congress regarding overlapping jurisdiction between the NLRB and the OSH Administration. 29 U.S.C. § 653(b)(3) (1976). In 1975 the Secretary seems to have reported that no legislation was required to work out interagency overlapping jurisdiction. [1974-75] EMPL. SAFETY & HEALTH GUIDE

gests that the protection offered by OSHA is paramount to that of the NLRA. Hence, the limitations placed on the NLRB in its administration of statutes such as section 502 of the LMRA might not bind the OSH Administration. Further support for the proposition that the administration of OSHA is to remain distinct from, and indeed, in some aspects, superior to that of the NLRA, can be found in a recent district court decision. In *Newport News Shipbuilding and Drydock Co. v. Marshall*, the court held that the OSH Administration should not defer to NLRB proceedings,[116] and that OSHA required the Secretary of Labor to bring suit on behalf of a complaining employee, promptly and without delaying the remedy.[117]

Although no one of these developments even approaches strong authority regarding the scope of applicability of the OSHA regulations, taken as a whole they suggest that the courts and the agencies may be inclined to give the regulation broad application — broader at least than the Court allowed for section 502 in *Gateway Coal*. They at least show that the policy the Court followed in *Gateway Coal* under section 502 may be modified in cases brought under the OSHA regulation. Since the Supreme Court endorsed one policy in *Gateway Coal* and an arguably different one in *Whirlpool*, some choice or accommodation will have to be made to reconcile the two positions. An examination of the ways in which section 7 of the Wagner Act[118] and section 110(b) of the MSHA[119] have been used to justify refusals to work for safety reasons will supply a useful background for a discussion of the choice or accommodation that must be made between *Gateway Coal* and the OSHA regulation. Cases decided under both of those sections shed light on the kind of accommodation that should be made between the Court's construction of section 502 in *Gateway Coal*, requiring objective proof that conditions were in fact unsafe, and the apparent meaning of the OSHA regulation, requiring only that the employee's subjective belief that conditions were unsafe was reasonable.

3. Section 7 of the Wagner Act and Refusal to Work for Safety Reasons

Section 7 of the Wagner Act[120] gives employees the right to engage in concerted activity for mutual aid and protection. Sections 8(a)(1)[121] and 8(a)(3)[122] enforce those rights. Before OSHA existed and, therefore, long before the

(CCH) ¶ 9789 (reporting draft report). 29 U.S.C. § 653(b)(1) (1976), however, excludes application of OSHA to employment conditions "with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce" safety and health standards. *Id.* Although this might mean that any overlap with § 502 must be resolved against OSHA jurisdiction, none of the agencies involved have taken that position.

[116] Newport News Shipbuilding and Drydock Co. v. Marshall, [1980] OSHA DEC. (CCH) ¶ 24,510 at 29,969 (E.D. Va. 1980).

[117] *Id.*

[118] 29 U.S.C. § 157 (1976).

[119] 30 U.S.C. § 815(c)(1) (Supp. III 1979).

[120] 29 U.S.C. § 157 (1976).

[121] 29 U.S.C. § 158(a)(1) (1976).

[122] 29 U.S.C. § 158(a)(3) (1976).

Whirlpool decision, the Supreme Court held that a refusal to work because of unsafe working conditions is an activity that section 7 embraces, unless the refusal violates a collective bargaining agreement.[123] The Labor Board subsequently construed the scope of that section 7 right broadly, holding that a single worker's activity could satisfy the "concerted" requirement of the statute.[124] Furthermore, the Board ruled that a genuinely held fear of unsafe conditions was sufficient to invoke the protection of section 7, regardless not only of whether the conditions were in fact unsafe, but also regardless of whether the employees' belief was reasonable.[125]

The protection afforded by section 7 is limited to cases in which there is no collective bargaining agreement. The provision, therefore, does not conflict with *Gateway Coal*'s policy of encouraging arbitration and enjoining strikes over all grievances that are arguably required to be arbitrated under a collective bargaining agreement. Nevertheless, the Board's interpretation of section 7 suggests a dissatisfaction with the Court's policy regarding an employee's refusal to work for safety reasons. The decisions evidence a reluctance to apply the Court's policy as broadly as possible, and a desire to use legislation to cut into the broad sweep that the Court's policy could have been given. Without pretending that a direct analogy exists between unorganized labor acting under section 7 and organized labor relying on the OSHA regulations, the broad use of section 7 to protect workers who refuse to work due to alleged unsafe conditions suggests that the courts might use the OSHA regulation — drafted explicitly to protect employee safety — in a manner which avoids the results of the Supreme Court's construction of section 502.

To construe the OSHA regulation as more protective of employee safety than section 502 does not require any unfaithfulness to *Gateway Coal*. That case construed only section 502. Any court faced with construction of the OSHA regulation can legitimately claim to be construing a different piece of legislation. Since the union in *Gateway Coal* relied only on section 502, *Gateway Coal* is not necessarily dispositive authority in cases that invoke another statute, or administrative interpretation. Even the Supreme Court can take that position, because the Court would not itself be construing a statute, as it had to in *Gateway Coal*. Instead, the Court would rely upon the presumptively correct position of the Secretary of Labor,[126] the official charged with construing the congressional intent in enacting OSHA. Such an analysis would support a

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[123] NLRB v. Washington Aluminum, 370 U.S. 9, 17-18 (1962). *Accord*, Union Boiler Co. v. NLRB, [1975-76] OSHA DEC. (CCH) ¶ 20,135, at 23,957 (4th Cir. 1975); American Beef Packers, Inc., 196 N.L.R.B. 875, 875-76 (1972).

[124] Alleluia Cushion Co., Inc., 221 N.L.R.B. 999, 1000-01 (1975).

[125] Modern Carpets Indus., Inc., 236 N.L.R.B. 1014, 1015 (1978), *enforced sub nom.* NLRB v. Modern Carpet Indus., Inc., 611 F.2d 811 (10th Cir. 1979).

In both *Alleluia Cushion*, *supra* note 124, and *Modern Carpets*, *supra* the foundation of the opinions was the Board's judgment that safety statutes had to be enforced, and that they could not be enforced unless safety complainants, usually employees, know that their jobs will be protected. *Alleluia Cushion*, 221 N.L.R.B. at 1000-01; *Modern Carpets*, 236 N.L.R.B. at 1015-16.

[126] *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980).

decision that produces results contrary to *Gateway Coal*. Approval of the OSHA regulation in *Whirlpool* might have been a first step in that direction, although the ambiguous nature of certain facts in that case prevents conclusive generalizations from being drawn.[127]

4. Section 110(b) of the Mine Safety and Health Act

The MSHA is similar to OSHA in the protections which it offers workers covered by the statute. MSHA, however, regulates the mining industry,[128] while OSHA exempts mining operations from its coverage.[129] The Secretary of the Interior, in whom enforcement of MSHA is vested, has not issued a regulation similar to the OSHA regulation that was the subject of *Whirlpool*. There is, therefore, no explicit statutory or agency-created right to refuse work for safety reasons in the mining industry, and no court has yet addressed that precise issue.[130] Section 110(b) of the Act,[131] however, a provision virtually identical to section 11(c)(1) of OSHA[132] under which the OSHA regulation was promulgated, prohibits an employer from discriminating against an employee who invokes the protections of the Act.[133] The handful of cases that have arisen

[127] See text and notes at notes 109-12 *supra*. Although none of the opinions mentions the possibility, it seems likely that the employees in *Whirlpool* could have succeeded under § 502 even as construed in *Gateway Coal*. The employees' jobs required them to climb onto a steel mesh screen twenty feet above the floor. Several months before the employees in the case refused to work, a number of employees had fallen partly through the screen, and one had fallen all the way through. Ten days before the incident that led to the case, an employee had fallen through and died. 445 U.S. at 5.

The facts suggest that the work conditions in *Whirlpool* would have been found abnormally dangerous under § 502 even as the Supreme Court construed those words in *Gateway Coal*. Only if § 502 requires expert testimony are the facts insufficient. Such a requirement is unlikely and, in any event, could probably have been met in *Whirlpool*.

[128] 30 U.S.C. § 801(g) (1976).

[129] 29 U.S.C. § 653(b)(1) (1976) ("other Federal agencies").

[130] In Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979), *aff'd sub nom.* Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980), however, the court of appeals wrote that it would be free on its own, as a matter of statutory construction, to give employees the rights that the OSHA regulation provides. 593 F.2d at 725. In so stating, the court cited with approval and as an analogy Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied sub nom.* Kentucky Carbon Corp. v. Interior Bd. of Mine Operations Appeals, 420 U.S. 938 (1975), a case that construed the MSHA to broaden protection. *Whirlpool*, 593 F.2d at 724-25. See discussion at text and note at note 134 *infra*. The Supreme Court, affirming in *Whirlpool*, made no such statement. *See* 445 U.S. 1 (1980).

[131] 30 U.S.C. § 815(c)(1) (Supp. III 1979).

[132] 29 U.S.C. § 660(c)(1) (1976).

[133] 30 U.S.C. § 815(c)(1) (Supp. III 1979) reads as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, represen-

under the MSHA have presented a series of questions regarding the scope of section 110(b). The decisions are relevant to the issue of the scope to be accorded the OSHA regulation because, like the section 7 cases, they illustrate lower court reactions to the result of *Gateway Coal*'s construction of section 502.

In a series of cases decided after *Gateway Coal*, the United States Court of Appeals for the District of Columbia Circuit successively broadened the application of section 110(b). In *Phillips v. Interior Board of Mine Operations Appeals*,[134] the court held that cases arising under the section are excepted from the requirement of judicial deference to an arbitration award,[135] as set forth in the

> tative of miners or applicant for employment has instituted or caused to be instituted any proceeding 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 miner, representative or miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

[134] 500 F.2d 775 (D.C. Cir. 1974), *cert. denied sub nom.* Kentucky Carbon Corp. v. Interior Bd. of Mine Operations Appeals, 420 U.S. 938 (1975).

[135] 500 F.2d 775, 776 n.15.

Phillips is an important decision because it broke new ground in the area of employee safety rights, avoided the result of *Gateway Coal*, and was later explicitly approved and expanded by Congress. In *Phillips*, the employee's complaints to his foreman about safety violations went unheeded for some time, so he refused to work. 500 F.2d at 774-75. The employer discharged him, and lengthy litigation began. *Id.* at 775-76. An arbitrator held that the employee had failed to show conditions that would justify refusal to work under the contract, and, furthermore, expressly stated that he was without power to construe Phillips' asserted rights under MSHA. *Id.* at 776. The employee then filed an unfair labor practice charge against the employer. The regional director of the NLRB rejected the complaint, ruling that arbitration must precede such "striking," unless the conditions for relief under § 502 were met, which, in this case, they were not. *Id.* Phillips then applied to the Secretary of Interior for a review of his discharge under the Mine Safety Act. *Id.* at 777. Although the ALJ ruled for Phillips, the Appeals Board reversed on the grounds, *inter alia*, that the protection of the Act does not begin until complaint is made to the Secretary or his representative, and that the foreman was not the Secretary's representative. *Id.* at 777-78.

On appeal, the D.C. circuit reversed the Appeals Board. The court distinguished *Gateway Coal* because there the union had not invoked the MSHA. *Id.* at 776 n.15. The court then said, in language reminiscent of the Third Circuit in Gateway Coal v. United Mine Workers of America, 466 F.2d 1157, 1159-60 (3d Cir. 1970), *rev'd.*, 414 U.S. 368 (1974), as well as the Supreme Court in Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 281-83 (1955), though it cited neither, that safety disputes are not ordinary labor disputes because Congress has legislated specially to create and protect safe working conditions. 500 F.2d at 778. The *Phillips* court reasoned that there must be practical means to enforce those statutes, and that workers are in the best position to initiate enforcement, but that they will do so only if they know that their jobs are protected. *Id.* The court then ruled that Phillips' conduct was equivalent to instituting a safety complaint within the meaning of the statute. *Id.* at 779.

The history of the 1977 amendments to the MSHA, 30 U.S.C. §§ 801-962 (Supp. III 1979), cited with approval in both Marshall v. Whirlpool Corp., 593 F.2d 715, 735-36 (6th Cir. 1979), *aff'd sub nom.* Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980), and Whirlpool Corp. v. Marshall, 445 U.S. 1, 13, n.18 (1980), shows that Congress approved of the *Phillips* decision. See notes 138-40 *infra*. The Senate Report, S. REP. NO. 95-181, 95th Cong., 1st Sess. 36 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3401, specifically approves, to the point of virtually enacting into law, both *Phillips* and Munsey v. Morton, 507 F.2d 1202, 1209-11 (D.C. Cir. 1974) (*Munsey I*):

> This section [30 U.S.C. § 815(c)(G) (Supp. III 1979)] is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law. The Committee intends to insure the continuing vitality of the various judicial

Steelworkers' Trilogy.[136] The *Phillips* court also held that an employee's complaint to a supervisor brings a case within the meaning of the statute, rejecting the view that the act was triggered only upon the institution of a formal proceeding with the Secretary or his representative.[137] In *Munsey v. Federal Mine Safety and*

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interpretations of section 110 of the Coal Act which are consistent with the broad protections of the bill's provisions; *See, e.g.*, *Phillips v. IBMA*, 500 F.2d 772; *Munsey v. Morton*, 507 F.2d 1202.

S. REP. NO. 95-181, 95th Cong., 1st Sess. 36, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3401, 3436. The language of the Senate bill gave broader protection than did that of the House bill in the relevant section and the Conference Committee adopted the Senate language. H.R. CON. REP NO. 95-655, 95th Cong., 1st Sess. 51 (1977) *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3485, 3499. The language of the Senate report is therefore sound authority for construction of the legislation in *Phillips*.

In addition, language on the floors of both houses supports the proposition that Congress meant strongly to endorse, at a minimum, *Phillips*, *Munsey I*, and cases cited at notes 138-40 *infra*. The following exchange took place in the Senate:

> Mr. CHURCH: I wonder if the distinguished chairman would be good enough to clarify a point concerning section 106(c), the discrimination clause.
>
> It is my impression that the purpose of this section is to insure that miners will play an active role in the enforcement of the act by protecting them against any possible discrimination which they might suffer as a result of their actions to afford themselves of the protection of the act.
>
> It seems to me that this goal cannot be achieved unless miners faced with conditions that they believe threaten their safety or health have the right to refuse to work without fear of reprisal. Does the committee contemplate that such a right would be afforded under this section?
>
> Mr. WILLIAMS: The committee intends that miners not be faced with the Hobson's choice of deciding between their safety and health or their jobs.
>
> The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful workplace for all miners.
>
> Mr. JAVITS: I think the chairman has succinctly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would not be able to afford themselves their rights under the full protection of the act as responsible human beings.

123 CONG. REC. S10287-88 (daily ed. June 21, 1977).

In the House, one member referred specifically to the Board's decision in Baker v. North American Coal Co., 8 IBMA 164 (1977), see note 140 *infra*, stating that the legislation was designed to eliminate that and similar narrow constructions of the act:

> If miners are to invoke their rights and to enforce the act as we intend, they must be protected from retaliation. In the past, administrative rulings of the Department of the Interior have improperly denied the miner the rights Congress intended. For example, *Baker v. North American Coal Co.*, 8 IBMA 164 (1977) held that a miner who refused to work because he had a good faith belief that his life was in danger was not protected from retaliation because the miner has no "intent" to notify the Secretary. This legislation will wipe out such restrictive interpretations of the safety discrimination provision and will insure that they do not recur.

123 CONG. REC. 35410 (Remarks of Rep. Perkins).

The *Whirlpool* court of appeals wrote: "[O]ur review of the floor debate reveals no controversy whatsoever on . . . [the discrimination provision] issue, although other provisions of the Act were heatedly debated. Marshall v. Whirlpool Corp., 593 F.2d 715, 736 (6th Cir. 1979), *aff'd sub nom.* Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980).

[136] See text and notes at notes 20-29 *supra*.

[137] *Phillips*, 500 F.2d at 779. The court decided that in the circumstances of the case, the foreman was, as a matter of statutory construction, the equivalent of the Secretary's representative. *Id.*

Health Commission (*Munsey II*),[138] the court ruled that the statute does not protect only those complaints later found by a judge to be non-frivolous and in good faith, but, rather, protects all complaints.[139] Simultaneously, the court decided that the statute's protection exists even if a judge later finds that the complaining employee never intended to pursue the complaint.[140]

These cases show that at least one important court has elected to construe section 110(b) broadly, despite the availability of a reasonable, narrow construction,[141] and despite the fact that such a broad construction produces results that protect employees more than the *Gateway Coal* decision would have encouraged. Administrative action also bolsters the conclusion that the MSHA has been used to avoid the implications of *Gateway Coal*. The MSH Administration and the Labor Board have agreed that enforcement of safety complaints through the MSHA has priority over enforcement of such complaints through the Labor Act,[142] the statute interpreted in *Gateway Coal*. This agreement suggests that the view of the two agencies is that protection under MSHA, whatever its scope, should not be subordinated to the policies that have led to narrow construction of section 502.

Taken together, decisions and other developments under section 110(b) of the MSHA and section 7 of the Wagner Act show a reluctance to place safety grievances in the same category as other employee complaints. Of course, *Gateway Coal*, construing section 502, promises different treatment for some safety grievances too, but decisions under the other statutes, including *Whirlpool*, show an impetus to protect employees to a significantly greater extent than *Gateway Coal* would allow. Although various devices have been used, there has been a consistent theme underlying the actions of courts and agencies implementing the safety statutes — an unwillingness to subject employees to the narrow right to refuse work that *Gateway Coal* would allow, if its policies were extended to embrace construction of other statutes, would have provided.

III. Suggested Scope of the OSHA Regulation

In *Gateway Coal*, the Supreme Court, construing section 502 of the LMRA, held that the policy of encouraging arbitration to settle disputes and the concomitant use of injunctions to prevent strikes that violate an arbitration agreement, mean that an employee may refuse to work only if he can prove

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[138] Munsey v. Federal Mine Safety & Health Comm'n, 595 F.2d 735, 742-43 (D.C. Cir. 1978) (*Munsey II*). *See also* Munsey v. Morton, 507 F.2d 1202, 1208 n.52 (D.C. Cir. 1974) (*Munsey I*, *on remand*, Munsey v. Smitty Baker Coal Co., 34 Interior Dec. 336 (1977), *rev'd*, Munsey v. Federal Mine Safety & Health Comm'n, 595 F.2d 735, 742-43 (D.C. Cir. 1978).

[139] 595 F.2d at 742-43.

[140] Baker v. United States Dept. of Interior Bd. of Mine Operations Appeals, 595 F.2d 746, 748-50 (D.C. Cir. 1978).

[141] Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772, 783 (D.C. Cir. 1974) (Robb, J., dissenting).

[142] 45 Fed. Reg. 6189 (Jan. 25, 1980); [1979-80 Transfer Binder] EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 11,886.

that his fears of unsafe conditions were accurate.[143] Proof that the employee's fears were reasonable will not suffice.[144] The Court did not pretend to rest its result on the plain meaning of section 502, nor on the legislative history of that section. *Gateway Coal*, is, as the opinion makes clear, an extension of a Court-created policy,[145] operating under a Court-created mandate to fashion labor policy.[146] While the case leaves some protection pursuant to section 502, it seems to have preserved as little of that protection as possible. Since the basis of the decision is the Court-created policy, one might assume that the Court would apply the same policy, whenever possible, to other sources of law that allow safety concerns to justify a refusal to work.

By upholding the OSHA regulation in *Whirlpool*, however, the Court has set the stage for a re-evaluation of the policy underlying *Gateway Coal*. It is submitted that an analysis of case law developed under statutes other than section 502, combined with a number of policy concerns that are ill-served by *Gateway Coal*, militate in favor of reading the OSHA regulations to grant employees a right to refuse to work if they reasonably believe conditions to be dangerous, regardless of (1) a general no-strike clause in a collective bargaining agreement, or (2) a clause in the collective bargaining agreement specifically waiving, even if for stated consideration, the right not to work for fear of unsafe conditions. While this application of the regulation may conflict with the premises underlying *Gateway Coal*, it advances the policies of OSHA.

Gateway Coal enforces the judicially-developed labor policy that a strike over any grievance should be prevented whenever the collective bargaining agreement can be construed to assign the grievance to arbitration. Arbitration, under the *Gateway Coal* view, should settle the problems that provoke strikes — strikes over arbitrable grievances should be enjoined. In contrast, OSHA declares its purpose to be to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . . ."[147] This purpose grew out of Congress' finding that "personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments."[148] Both policies are based on a perception of what is best for the

[143] 414 U.S. 368, 386-87 (1974).

[144] *Id.* at 385-86.

[145] *Id.* at 385-87. Although the Court relied in part on a statute, § 203(d) of the LMRA, 29 U.S.C. § 173(d) (1976), *see* 414 U.S. at 377, that statute is not sufficient to support the Court's decision in *Gateway Coal* or Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 253-55 (1970) that the injunction of strikes is an appropriate remedy for breach of a no-strike clause. The statute offers even less support for enjoining safety strikes. It simply declares that labor disputes should be settled by a method to which both parties have agreed. 29 U.S.C. § 173(d) (1976). It says nothing about arbitration and nothing about whether an injunction is an appropriate remedy for breach of either an arbitration agreement or an undertaking not to strike.

[146] *See* Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448, 456-57 (1977), discussed in text at notes 14-19 *supra*. See note 145 *supra* for a discussion of § 203(d) of the LMRA, 29 U.S.C. § 173(d) (1976).

[147] 29 U.S.C. § 651(b) (1976).

[148] 29 U.S.C. § 651(a) (1976).

economic condition of the country.[149] More specifically, the Court in *Gateway Coal* and Congress in OSHA each thought they were stating and implementing a policy that would facilitate production and commerce. Similarly, the Court's approval of the Secretary's regulation in *Whirlpool* should mean that the Court believed that the regulation would facilitate production and commerce. At a minimum, the Court agreed with the Secretary that the regulation was a reasonable method of increasing production and commerce by decreasing illness and injury.

The precepts that lie behind *Gateway Coal* are at odds with those that support the OSHA regulation, because *Gateway Coal*, construing section 502, requires evidence that the alleged unsafe condition was in fact unsafe. This approach reduces the likelihood of strikes and the resulting slowdown of production. The OSHA regulation, however, requires only a reasonable belief that the condition was unsafe.[150] This approach reduces the likelihood of injuries in the workplace, another burden on the economy. In a proper case[151] there will be head-on conflict between these two approaches, and the Court will have to

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[149] It could be argued that the OSHA states two or more purposes. Although the language is not explicit, the words of statutory purpose could be read to mean that Congress wanted to save life and limb for humanitarian purposes. Before conceding the point *arguendo*, it should be pointed out that the Act does not explicitly state such a purpose. The Act proposes to assure every worker a safe workplace, but does not immediately say why such a workplace is desirable. The Act desires to preserve our human resource, but does not immediately say why we should preserve that resource. Those questions are most nearly answered in the section that lists Congress' findings. That section identifies the problem as merely an economic one — namely, that industrial accidents are a burden on the economy. It does not even suggest that there is value to preserving life and limb *per se*.

Assuming *arguendo*, however, that Congress wanted to preserve life and limb for its own sake, and that economic benefit or loss was irrelevant, that purpose largely reinforces the thesis of this article — broad application of the subjective standard of the OSHA regulation, 29 C.F.R. § 1977.12 (1980), will lead to more instances of refusal to work for safety reasons, thus furthering the assumed purpose of the Act. The hard case, therefore, is based on the assumption that Congress wanted to increase productivity, and that safety is a means, not an end.

[150] *Compare* Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 386-87 (1974) *with* Whirlpool Corp. v. Marshall, 445 U.S. 1, 11-13 (1980); Marshall v. Whirlpool Corp., 593 F.2d 715, 720 (6th Cir. 1979), *aff'd*, 445 U.S. 1 (1980); Marshall v. Daniel Constr. Co., Inc., 563 F.2d 707, 708 (5th Cir. 1977). To object that no conflict exists between the approaches because different sources of law are involved misses a fundamental point. Neither the OSHA regulation nor § 502 mandates the means which have been adopted to meet their ends. There is nothing in the language of § 502 or its history to suggest or require the construction given in *Gateway Coal*. The Court's reasons for the objective evidence construction further its 20-year policy of encouraging arbitration and discouraging strikes. *Gateway Coal*, 414 U.S. at 385-87. The Court explicitly burdened Congress with the task of clearly commanding a looser construction of § 502. *Id.* at 386. Similarly, nothing in the language of the OSHA regulation requires the interpretation given to it in *Whirlpool*. The regulation uses the words "good faith" and "reasonable person" to trigger protection. The operative words of § 502 are also "good faith." There is, therefore, no *a priori* reason to conclude that § 502 requires objective evidence but that the regulation's requirements are satisifed by something less exacting. Because Congress and the Secretary chose not to define terms, courts could reasonably have arrived at identical constructions for § 502 and the OSHA regulation. The fact that they have not done so creates the conflict.

[151] A proper case is one in which there is a collective bargaining agreement with a no-strike clause, and the employee can prove that his fear of unsafe conditions was reasonable, but cannot prove that it was accurate.

decide which set of assumptions will lead to a superior method of increasing production and commerce.[152]

There are at least three ways to approach the question of whether expanding *Gateway Coal* or expanding *Whirlpool* is the proper solution to the problem of reasonably perceived, but not objectively proven, imminent danger in the workplace. Two situations merit special attention: (1) cases in which there exists a general no-strike clause in the collective bargaining agreement, and (2) cases in which the agreement specifically waives rights under the OSHA regulation.

First, an analysis of *Whirlpool* could begin by noting that none of the *Whirlpool* opinions states or suggests whether the plant was unionized, whether a collective bargaining agreement governed employment, nor, if a collective bargaining agreement did exist, whether it contained a no-strike clause. Thus, *Whirlpool* could be read narrowly, to apply only where there is not a no-strike clause in a collective bargaining agreement. Indeed, since there is no mention of a collective bargaining agreement, even the implied no-strike clause cases need not be considered to conflict with *Whirlpool*. Such an analysis effectively reconciles *Whirlpool* with *Gateway Coal*. A second interpretation could be that *Whirlpool* effectively overrules *Gateway Coal*. This reading assumes that *Whirlpool* would apply to cases in which a no-strike clause exists,[153] reducing *Gateway Coal*'s scope to cases in which neither OSHA nor MSHA is applicable, and to cases where the employee inexplicably fails to force the Secretary to bring the suit. Third, particular trades of safety guarantees for economic benefits in the collective bargaining agreement could be judged on a case-by-case basis, with the courts deciding on the facts of each case whether concerns for safety or continuous production should prevail. This approach could apply only to the issue of whether to allow a waiver of OSHA regulation rights, not to whether OSHA should apply to a general no-strike clause.

The remainder of this article will explore these three possible readings of *Whirlpool*. It will be shown that the narrow reading of *Whirlpool*, which limits an employee's right to stop working to cases where a collective bargaining agreement does not contain a no-strike clause, is, notwithstanding its merits, an in-

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[152] An illustration may serve to crystallize the differences between the two approaches. *Gateway Coal* represents the car owner who believes that his money is most efficiently spent by driving his car hard, spending as little as possible for necessary repairs, and then junking the machine when it requires major work. The OSHA regulation is like the driver who is slower, more cautious, and spends money on preventive maintenance, all in an effort to prolong the life of his car. The OSHA car may well last longer, but whether it costs less per mile than the *Gateway Coal* automobile is unknown. Similarly, it is not clear whether *Gateway Coal* or OSHA represents a more efficient use of labor.

[153] There is no mention of a union, collective bargaining agreement, or no-strike clause in *Whirlpool*. None of the other cases that considered the regulation mentioned the existence or absence of a no-strike clause. The only reference to this aspect of the problem was in Usery v. Babcock & Wilcox Co., [1976-77] OSHA DEC. (CCH) ¶ 21,330, at 25,615-4 n.5 (E.D. Mich. 1976). There the court cited a piece of legislative history, 116 CONG. REC. 38,393 (1970) (remarks of Rep. Michel), that claimed that OSHA would encourage employees to disregard contractual no-strike obligations. *Id.*

appropriate approach to safety cases. The broader interpretation of *Whirlpool*, which allows an employee to refuse to work on the basis of safety concerns regardless of whether a no-strike clause exists, will be examined with regard to a general no-strike clause as well as to explicit waiver clauses or trade-offs of safety protection in collective bargaining agreements. The liberal approach of *Whirlpool*, it will be shown, requires that a union not be allowed to bargain away safety rights in return for economic benefits. Finally, the value of a case-by-case approach to particular trade-offs of safety protection by unions will be presented. Analysis of all three interpretations will demonstrate not only that an employee should be allowed to stop working due to unsafe conditions without having to submit his grievances to arbitration, but also that no labor union should be allowed to waive or to trade any of the OSHA protections.

A. *The General No-Strike Clause*

The first suggested reading of *Whirlpool*, denying an employee the right to refuse work in cases where a collective bargaining agreement can be read as containing a no-strike clause, accommodates the case with *Gateway Coal*. Such an analysis leaves the *Gateway Coal* effect on no-strike clauses intact. In addition, such a reading is consistent with a notion basic to contract law — that an individual should be responsible for his mistakes, at least after promising not to err. Whenever an employee refuses work, there is a net loss to the economy. To be sure, the loss is small if one employee fails to work one shift, but the loss exists nonetheless. Furthermore, if many employees fail to work many shifts, the loss becomes more substantial. The real issue, then, is who should bear the loss caused by such refusals to work, the employee, or society as a whole? If the former, then *Whirlpool* should not apply to no-strike clause cases; if the latter, then *Whirlpool* should protect the employee and pass the loss on to the rest of society.

The standards of conduct this society sets for its members also supports the first application of *Whirlpool*. Absent an enforceable promise to the contrary, our society generally holds its members to a standard not more exacting than reasonableness. Tort law generally invokes liability only if a defendant has behaved unreasonably.[154] Contract law, on the other hand, generally holds an individual to his promise, whether the promise was reasonable or not.[155] Thus, absent a promise, the loss occasioned by reasonable but destructive conduct is usually left where it falls. A promise, however, usually requires the promisor to bear the consequences of his conduct. Under a purely contractual analysis, then, the application of the OSHA regulation, *Whirlpool*, or any similar right to refuse work that might emerge from MSHA could be limited to cases in which the labor contract does not contain a general no-strike clause.

Emphasis on the contractual nature of the employee-employer relationship, then, supports a narrow reading of the *Whirlpool* decision. Furthermore,

[154] *See generally* W. PROSSER, THE LAW OF TORTS 145-52 (4th ed. 1971).

[155] *See generally* J.D. CALAMARI & J.M. PERRILLO, CONTRACTS ch. 1 (2d ed. 1977).

to construe the OSHA regulation as warranting an employee refusal to work only in the absence of a no-strike clause does not render the safety statutes nullities. The statutes would continue to bolster the right of non-union labor to refuse work on the basis of reasonably perceived unsafe conditions — a right recognized under section 7 of the Wagner Act.[156] Furthermore, unionized labor could make use of the right to refuse work provisions at the bargaining table. The union could trade those rights, in whole or in part, for other kinds of benefits.

Notwithstanding the merits of a narrow reading of *Whirlpool*, there is much support for the proposition that the protections offered by the OSHA regulation should not be limited to cases where there is an absence of a no-strike clause. The Supreme Court has ruled that strikes do not always violate a general no-strike clause, thus creating a foundation for broad construction of the OSHA regulation. In *Mastro Plastics*,[157] for example, the Court held that a strike to protest an unfair labor practice was protected activity under section 7 of the NLRA, and a no-strike clause had not forfeited that right.[158] Despite the apparently all-embracing language of the no-strike clause in *Mastro Plastics*,[159] the Court ruled that the clause was intended to cover only issues concerning the economic relationship between the parties.[160] The Court said that such issues were limited to grievances which allege, on their face, nothing more than a defect in normal plant operations.[161] A dispute that arose from an abnormal event at the plant might not be within the jurisdiction of the no-strike clause.[162] The Court held that an unfair labor practice was such an abnormal event, because, on its face, the grievance was outside the scope of the items negotiated, and hence not subject to the arbitration and no-strike clause.[163]

Similarly, in *Buffalo Forge v. United Steelworkers of America*,[164] the Court declined to order an injunction as a remedy for a strike in apparent violation of a no-strike clause, because the cause of the strike was not subject to the *Boys Markets* presumption of arbitrability. The Court said that an injunction is authorized under *Boys Market* only if the Court, or lower court, concludes that the issue that precipitated the strike was one over which the parties were bound to arbitrate.[165] Accordingly, the *Buffalo Forge* Court ordered postponement of an injunction until the arbitrator could decide whether the no-strike clause em-

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[156] 29 U.S.C. § 157 (1976), discussed in text at notes 120-27 *supra*.

[157] 350 U.S. 270 (1956), discussed in text at notes 36-42 *supra*.

[158] 350 U.S. at 281-84.

[159] *Id.* at 281. The union pledge provided that there would be "no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members." *Id.* The union also pledged "to refrain from any strike or work stoppage." *Id.*

[160] *Id.*

[161] *Id.* at 281-83.

[162] *Id.* at 283-84.

[163] *Id.*

[164] 428 U.S. 397 (1976). See discussion in text at notes 41-48 *supra*.

[165] Buffalo Forge Co. v. Steelworkers of America, 428 U.S. 397, 406-07 (1976).

braced this type of strike.[166] Because the *Gateway Coal* Court said that the issues of arbitrability and enjoinability of a strike are analytically distinct, though generally coterminous,[167] two questions must be answered to decide if an injunction is warranted in light of *Buffalo Forge*: (1) is the issue that precipitated the grievance within the arbitration clause, and (2) does a strike over that issue breach the no-strike clause? One key to an exception to the *Boys Markets* pre-

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[166] *Buffalo Forge* is either a major retreat from Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), an extremely narrow decision, correct for reasons not stated in the opinion, or wrongly decided.

In *Buffalo Forge* the district court found that the arbitration clause did not cover sympathy strikes. 428 U.S. at 402-03. That finding was not challenged in the Supreme Court. *Id.* at 407. The Supreme Court concluded that, under *Boys Markets*, the district court has both the power and the duty to make an initial determination of arbitrability. *Id.* There is nothing in the Court's opinion that restricts the subject of that determination. The language of the arbitration/no-strike clause was as broad as could be, without specifying every type of dispute to which it applied. See note 43 *supra*. A district court, therefore, is now free to decide whether an issue is arbitrable, and hence, whether a strike is enjoinable. As the dissent in *Buffalo Forge* stated, "[t]he Court [held] that only a part of the union's *quid pro quo* is enforceable by injunction." 428 U.S. at 413 (Stevens, J., dissenting).

In the Supreme Court, however, the employer conceded the accuracy of the district court's findings, including a finding that the arbitration clause did not cover sympathy strikes. *Id.* at 403, 407. With that concession, *Buffalo Forge* is significantly different from *Boys Markets*. Certainly parties are free to agree to arbitrate or not, even if national labor policy, as created by the Court, prefers arbitration and no-strike clauses. Some members of the Supreme Court are readier than others to imply a no-strike or arbitration clause, or to read such clauses broadly. Yet if the parties agree that the issue is only permissibly arbitrable, not mandatorily so, then it is difficult to see why a mandatory no-strike clause should be imposed on the parties. At the same time, the parties' concession means that *Buffalo Forge* holds only that absent mandatory arbitration there can be no pre-arbitration injunction, a proposition that is not obvious but is no bolder than implying a no-strike clause where none exists at all. *See* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102-06 (1962), discussed in text at notes 27-28 *supra*.

Alternatively, Freed, *Injunctions Against Sympathy Strikes: In Defense of Buffalo Forge*, 54 N.Y.U. L. REV. 289 (1979), argues that the strike in *Buffalo Forge* was not over a grievance between the union and employer, hence did not disturb the *quid pro quo* nature of the deal between the parties, and thus should not have been subject to injunction before (not mandatory but agreed-upon) arbitration. *Id.* at 323-26.

Professor Freed suggests a sensible limit to the *Buffalo Forge* exemption from *Boys Markets*. It the employer had exchanged binding arbitration for a promise not to strike with the primary unions, thus making the primary strike enjoinable under *Boys Markets*, the sympathy strike should also be enjoinable. *Id.* at 326-27. This is so because the employer has bargained collectively and as a result has obtained promises not to disrupt production over grievances from all unions involved. Having given binding arbitration for those promises, he ought to get the specific benefit of his combined bargain. *Id.*

Finally, *see* Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397, 413-32 (1976) (Justice Stevens, dissenting, with whom Justices Brennan, Marshall and Powell joined). Justice Stevens argued that not to issue the injunction would destroy an important part of the *quid pro quo* character that the Court had given to promises to arbitrate and promises not to strike. *Id.* at 413. The Court's opinion, he wrote, would open a large hole in the policy of encouraging employers to agree to arbitration clauses, because employers will not know what they are getting. *Id.* at 423, 424. Justice Stevens' argument appears compelling as well as consistent with the trend to encourage arbitration and no-strikes. He did not, however, mention that the parties had stipulated to the district court's findings, and that the majority treated the district court's statement that the sympathy strike was not mandatorily arbitrable as one of those stipulated findings.

[167] Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 382 (1974).

sumption, then, is whether the parties were bound to arbitrate the grievance at issue.

It is reasonable to conclude that a strike conducted as a result of safety violations is not an arbitrable issue under a collective bargaining agreement. Given the federal government's substantial involvement in occupational safety, which OSHA and MSHA evidence, it could be said that Congress found it undesirable to leave resolution of safety issues in the hands of an arbitrator. Absent affirmative evidence that the workers had opted to submit safety issues to arbitration, the workers apparently had not intended to proceed in a direction contrary to Congress' expression. Similarly, given organized labor's known efforts on behalf of safety legislation,[168] it is even more doubtful that a union would have intended its no-strike obligation to extend to imminent threats to safe working conditions, nor would it be reasonable for an employer to disagree. Thus, a general no-strike/arbitration clause reasonably can be construed not to include safety strikes. Although some language in *Gateway Coal* seems contrary to this position,[169] the Supreme Court did not necessarily reject the argument. In *Gateway Coal* the Court did not construe the collective bargaining agreement against the backdrop of the safety statutes invoked here. The union evidently did not make an argument based on MSHA, the applicable safety statute, nor did the Court address the bearing of MSHA on the case. The Court's language in *Gateway Coal* should be considered in the context of that case. Whether the Court would have construed the contract in the same way had it considered MSHA remains uncertain.[170]

The special nature of the rights endowed on employees by the safety statutes, then, supports a broad reading of the *Whirlpool* decision. A second reason to prefer a broad application of *Whirlpool* is that a narrow reading does not rely on the policy behind *Gateway Coal*. Therefore, *Whirlpool* is not a principled reconciliation of the cases but, rather, marks a new direction taken by the Court in the area of employee safety. If the right to strike over safety conditions is to be limited, as *Gateway Coal* would have it, on the ground that strikes

[168] *See The Occupational Safety and Health Act of 1970: The Right to Refuse Work Under Hazardous Conditions*, 1979 WASH. L.Q. 571-72 & n.6; *but compare Attleson*, *supra* note 56, at 656 & n.53.

[169] The Court may have meant to say that the union intended, and the employer understood the union to intend, that both the arbitration and no-strike clauses applied to imminent safety threats. By definition, the drawn-out arbitration process cannot resolve such grievances quickly enough. If the Court thought that the parties had those intentions, then the Court was probably wrong. *See* Gateway Coal Co. v. United Mine Workers of America, 466 F.2d 1157 (3d Cir. 1972), *rev'd*, 414 U.S. 368 (1974), discussed in text at notes 59-69 *supra*. Also, the Court's ruling on that phase of the case should be limited, distinguished, and generally avoided whenever an appropriate device exists. *See, e.g.*, Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772, 776 n.15 (D.C. Cir. 1974); *accord*, Munsey v. Morton, 507 F.2d 1202 (D.C. Cir. 1974); Munsey v. Federal Mine Safety & Health Comm'n, 595 F.2d 735 (D.C. Cir. 1978); Baker v. United States Dept. of Interior Bd. of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978).

[170] Shortly after the decision in *Gateway Coal*, and with full awareness of it, the United States Court of Appeals for the District of Columbia Circuit decided Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974). The court considered the impact of MSHA where the employees refused work due to allegedly unsafe conditions despite the presence of a broad no-strike clause. Indeed, *Phillips* involved the same collective bargaining agreement present in *Gateway Coal*. 500 F.2d at 776 n.15. For discussion of *Phillips* and its progeny, see text at notes 134-40 *supra*. See also text at notes 174-75, and note 174 *infra*.

retard production more than do unsafe conditions, then *Whirlpool* was wrongly decided. The result in *Whirlpool* gives a right to leave work over unsafe conditions. The legislation, however, did not compel the Court to uphold the OSHA regulation at issue in *Whirlpool*. Either result, upholding the regulation or invalidating it, would have been reasonable, because there was enough legislative history on which to rely if the Court believed that striking down the regulation would represent sounder policy. The Court, it seems, thus freely adopted a new approach towards worker safety.[171]

A third consideration that supports a broad interpretation of *Whirlpool* is that a narrow reading and application of the case would be contrary to the growth of the national policy to promote safety in the workplace. Significantly, Congress has pursued a different course of action in this area than has the Court. In *Boys Markets*, the Court lifted an explicit prohibition against federal courts enjoining strikes. Thus, the Court overruled a decision only eight years old[172] and reversed one of the greatest triumphs of the early labor movement. In addition, the Court had to explain why an apparently explicit prohibition of federal court injunctions of strikes[173] no longer made sense, although it had not been repealed. But even as the Court handed down this significant decision to seal the arbitration/no-strike/continuous-production policy, the Congress was enacting the MSHA and OSHA. Those Acts placed responsibility for occupational safety primarily outside the hands of both the Labor Board, the agency designated to mediate the formation and viability of organized labor, and the courts. While Congress began to separate issues of employee safety from other labor concerns, lower federal courts tried to avoid the results of a broad application of the Supreme Court's policy underlying *Gateway Coal*. *Gateway Coal*, probably the zenith of no-strike clause enforcement because it enjoined a safety strike, began to be judicially undermined only months after it was handed down. The District of Columbia Circuit almost immediately began to read MSHA broadly[174] with only a passing reference to *Gateway*.[175] The Supreme

[171] The legislative history that would support a decision to invalidate the regulation is set out at length in Marshall v. Daniel Constr. Co., 563 F.2d 707, 712-15 (5th Cir. 1977) and accompanying notes (invalidating regulation).

[172] Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962).

[173] Section 4 of the Norris LaGuardia Act, 29 U.S.C. § 104 (1976).

[174] *See* cases cited and discussed in text and notes at notes 137-41 *supra*. That *Phillips* should have been the beginning of the line of cases that tended to undermine *Gateway Coal* is both ironic, and suggestive of how the law can develop. It may be recalled that *Gateway Coal* came to the Court from the Third Circuit, 466 F.2d 1157 (3d Cir. 1973), where the union had prevailed. Judge William Hastie wrote the opinion for the court of appeals, manifesting considerable concern for the safety of coal miners. By chance, Judge Hastie sat by designation on the District of Columbia Circuit when *Phillips* came before that court. Although he did not write the opinion, there was a dissent, so Judge Hastie's vote was necessary for the result. The *Munsey* and *Baker* cases, *supra*, Munsey v. Morton, 507 F.2d 1202 (D.C. Cir. 1974), Munsey v. Federal Mine Safety & Health Comm'n, 595 F.2d 735 (D.C. Cir. 1978) and Baker v. United States Dept. of Interior Bd., 595 F.2d 746 (D.C. Cir. 1978), extended the reach of *Phillips*. *Munsey* and *Baker* showed that several judges in the District of Columbia Circuit accepted the fundamental principle behind *Phillips*, that courts should, if reasonable, put safety considerations above no-strike policies. In *Whirlpool* the Supreme Court seems finally to have agreed. Thus, Judge Hastie's views may ultimately have triumphed, and possibly because of his coincidental presence on the *Phillips* panel.

[175] Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772, 776 n.15 (1974).

Court's own treatment of *Gateway* in *Whirlpool* is instructive. The Court cited *Gateway* once, in a footnote, and, ironically, for the proposition that even without the OSHA regulation, federal law, specifically section 7 of the NLRA and section 502 of the LMRA, provided workers a right to refuse labor under hazardous conditions.[176] That citation to *Gateway Coal* does not mention the objective evidence standard endorsed in that case, nor does it note that the regulation at issue in *Whirlpool* required a lesser standard.

That *Gateway Coal* was the culmination of a common law development beginning with *Lincoln Mills*[177] suggests a fourth reason to read *Whirlpool* broadly. The Court's decision in *Lincoln Mills* inferred from the nebulous legislative history of the LMRA[178] a desire for the courts to create substantive labor law. Although open to severe criticism,[179] it seems likely that the outcome of the case was a desirable one. The decision both saved and encouraged the growth of binding labor-management contracts, and does not appear to contravene congressional intent. It is quite different, however, to set up an element of that judge-made law against a statute that specifically deals with one aspect of labor-management relations, and claim that the judge-made law is entitled to greater respect than regulations issued under the statute, and approved by the Supreme Court.

Finally, *Boys Markets* does not purport to make an injunction the proper response to every strike in violation of a no-strike clause. The Court insisted that ordinary equity requirements must be met, including a determination that " 'the employer will suffer more from the denial of an injunction than will the union from its issuance.' "[180] The existence of OSHA and MSHA, the statement of congressional findings[181] and purposes in those statutes,[182] and the Secretary's regulation, all suggest that Congress has already struck the balance in safety cases. A court of equity should always, therefore, conclude that if the situation described in the regulation exists[183] an employer will never suffer more from the denial of an injunction than an employee will from its issuance.

In summary, there is ample support for the proposition that the OSHA regulation should be construed to apply to those situations where a general no-

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The court there distinguished *Gateway Coal* on the ground that in *Gateway* the union had done nothing to begin the statutory mine safety complaint process. *Id.*

[176] 445 U.S. 1 at 17-18 n.29.

[177] See discussion in text at notes 14-35 *supra.*

[178] *See, e.g.*, Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448, 452, and Justice Frankfurter dissenting, at 462, for a discussion of the legislative history.

[179] *Id.* at 462 (Frankfurter, J., dissenting).

[180] Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 254 (1970) (quoting Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 228 (Brennan, J., dissenting); *accord*, Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397, 406-07 (1976).

[181] 29 U.S.C. § 651(a) (1976); 30 U.S.C. § 801(a-f) (1976).

[182] 29 U.S.C. § 651(b) (1976); 30 U.S.C. § 801(g) (1976).

[183] *Cf.* American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. 2478 (June 17, 1981) (Courts may not require the Secretary to analyze costs and benefits of a particular safety standard, because Congress has already done cost-benefit analysis, and has decided that safety, where feasible, is a benefit that is always greater than its cost.).

strike clause exists. The special treatment that both Congress and the federal courts have accorded to the problem of safety in the workplace, as well as established principles of equity, demonstrate that the *Whirlpool* decision marks a new direction taken by the Supreme Court in the area of worker safety. This national concern for employee safety would be unduly limited by a narrow reading of the scope of the OSHA regulation.

B. *Explicit Waiver Clauses*

If the OSHA regulation protects a worker who refuses hazardous work conditions in the case of a general no-strike clause, a more difficult issue arises. Suppose that collective bargaining produces a no-strike clause that explicitly includes a commitment not to strike or otherwise refuse to work on the ground that work conditions are hazardous. Such an agreement might even go so far as specifically to renounce the right given in the OSHA regulation. To put the most difficult case, assume that the agreement recites specific consideration for the waiver. Should such a clause be enforced? A court might choose not to enforce the clause on the ground that it is unconscionable or contrary to public policy. A court that enforced the clause would probably summon freedom of contract notions, assert that Congress expected unions to represent employees adequately, and emphasize that the union had won a concession from the employer in exchange.

The real issue, though, is whether Congress' purpose would be served by putting another tool in labor's camp, to be used as is or traded for some other benefit, at labor's option. That statement of the issue suggests another formulation — whether production and commerce are better served by forced safety or by permitting a group of workers, through representatives of only majority selection,[184] to trade safety for some other benefits. A judge who voids a trade of employee safety for economic benefits will probably do so on one of two theories. He might reason that Congress has made the decision that safety is to be given top priority, and that it is not within the court's province to permit a different arrangement. Alternatively, he might base his decision on a finding that to impose safety on the workplace will result in more net production than will allowing safety to be traded for union benefits. A judge who allows such a trade will first have to decide that Congress did not intend to dictate the route to the desired goal of maximum net production, thus warranting a decision that employees will be more productive if they receive an economic benefit than if safety measures are imposed upon them. Such a judge would be very likely to adopt this view in cases where the collective bargaining agreement reflects that conclusion by explicitly making the trade of safety for economic benefits. While it is probably true that some workers will be more productive if their wages are higher than if conditions are safe, courts do not

[184] Section 9(a) of the Wagner Act, 29 U.S.C. § 159(a) (1976), provides that an entity that has majority support in a given bargaining unit represents all of the employees in that unit, and has authority to bargain, with binding effect, for the whole unit.

allow full freedom of contract to reign when other policies are adjudged to be more important.[185] The structure of OSHA suggests that courts should not permit unions to trade safety rights for economic benefit. Five circuits of the United States courts of appeals as well as several district courts, have thus far held that OSHA does not provide a private cause of action for personal injuries.[186] These decisions support a holding that a union may not trade safety for economic benefit. If Congress had intended to confer a benefit on workers personally, a personal remedy for deprivation of that benefit would probably also have been provided. From Congress' decision not to provide such a remedy, it follows that the safety rules do not exist largely as a personal benefit to workers. Rather, the predominant purpose of the Act is to benefit society by preventing both injury and the costs associated with injury. Trading safety will not accomplish that goal, but enforcing safety will.

Explicit support for the conclusion that employee rights under OSHA are not waivable can be found in the purpose of the OSHA statute. Congress' findings, enacted into law as part of OSHA,[187] specifically state that work-related injuries and illnesses burden and disrupt commerce. The statement of purpose, also enacted into law,[188] expresses concern for employees' work conditions as well as concern for the nation's human resources. Since Congress stated specific safety objectives, trades of safety protection for economic benefit will hinder attainment of Congress' stated goals. Such trades are therefore contrary to the reasons that led Congress to enact OSHA.

In addition to the findings and purposes of OSHA, Congress took care to say, in the Act itself, that OSHA was not designed to create a new basis for a private recovery for damages.[189] Congress was content to allow existing and evolving law to take care of the worker who is injured because an employer does not comply with OSHA standards.[190] Since Congress did not intend to create a private right of action in OSHA, and since the courts have uniformly refused to find that the statute provides that remedy,[191] it follows that the purpose of the statute is predominantly public and should be so construed. One

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[185] *See, e.g.*, U.C.C. § 2-302 (1972 version) (unconscionable contracts).

[186] Taylor v. Brighton Corp., 616 F.2d 256, 258-64 (6th Cir. 1980) provides the fulles discussion of the issue. *Accord*, Davo Corp. v. Occupational Safety and Health Review Comm'n, 613 F.2d 1227, 1230 n.2 (3d Cir. 1980); Jeter v. St. Regis Paper Co., 507 F.2d 973, 976-77 (5th Cir. 1975); Byrd v. Fieldcrest Mills, Inc., 496 F.2d 1323 (4th Cir. 1974) (*per curiam*); Russell v. Bartley, 494 F.2d 334, 335 (6th Cir. 1974) (*per curiam*); Skidmore v. Travelers Ins. Co., 483 F.2d 67 (5th Cir. 1973) (*per curiam*) affirming on basis of lower court opinion, 356 F. Supp. 670, 671-72 (E.D. La. 1973)).

[187] 29 U.S.C. § 651(a) (1976). The relevant portion is quoted in text at note 148 *supra*.

[188] 29 U.S.C. § 651(b) (1976). The relevant portion is quoted in text at note 147 *supra*.

[189] 29 U.S.C. § 653(b)(4) (1976). The relevant provision is: "Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." *Id.*

[190] *Id.*; Jeter v. St. Regis Paper Co., 507 F.2d 973, 977 (5th Cir. 1975); Russell v. Bartley, 494 F.2d 334, 335-36 (6th Cir. 1974).

[191] See cases cited at note 186 *supra*.

element of such a construction is to prohibit and invalidate contractual provisions that trade safety protection for economic benefit.

The courts, therefore, ought not allow unions to waive OSHA-MSHA protections in collective bargaining agreements. The statutes represent many years of legislative consideration and deliberation about what is best for the national welfare. A particular group of workers should not be able to trade its contribution to the general welfare for gains to the union itself. While one might argue that to allow such trades will increase production, Congress has decided that they will not.[192] Furthermore, there is no justification for putting another bargaining tool in labor's hands. If the courts allow safety protections to be treated as bargaining tools, the government would be well advised to do away with such protections in order to maintain its historically neutral position at the bargaining table.[193]

C. *Case-by-Case Analysis*

The third possible reading of *Whirlpool* is to judge trades of safety for economic benefits on a case-by-case basis. Whenever an employee invokes the regulation and his employer defends with an explicit safety for economic benefit trade clause, the courts could decide whether to allow the particular safety item in question to be traded without formulating an absolute rule. Although courts often strive for a case-by-case approach to law,[194] to do so in this context would frustrate the policies of safety and freedom of contract, the two policies at stake here, and therefore should be rejected.

At a minimum, the case-by-case approach contemplates collective bargaining sessions in which neither party knows whether the clause upon which they agree will be effective. The union will be unable to bind the employees and will also be unable to guarantee them the benefit for which it traded the regulation's protection. Only one sufficiently dissatisfied employee is necessary to test and perhaps destroy the trade. Similarly, the employer will not know whether he has successfully bought freedom from disruption of production. Generally the fine-tuning of government interference with private relationships that a case-by-case approach provides is valuable because it minimizes such interference. Such an approach, however, would not be a worthwhile one under the OSHA regulation. A case-by-case approach is valuable only after concluding that Congress has decided to occupy a large area, the exact size of which is as yet unknown. In the OSHA situation,

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[192] See text and notes at notes 183-85 *supra*.

[193] Although research had revealed no decisions on the point, it is a corollary of the approach suggested that the employer could refuse, at any time, to perform on the promise he made in exchange for the waiver. This adds an element of uncertainty about the meaning of the contract, and hence, instability to labor-management relations. If it were decided that such clauses were void, the instability would vanish.

[194] *See, e.g.*, Bazley v. Comm'r, 331 U.S. 737, 741 (1947) ("The search for relevant meaning is often satisfied not by a futile attempt at abstract definition but by pricking a line through concrete applications. Meaning frequently is built up by assured recognition of what does not come within a concept the content of which is in controversy.").

though, the affected parties will be unable to know for an extended period of time, if ever, which aspects of their relationship are within their control and which the Congress has preempted through OSHA's safety provisions. Thus, the value of minimizing interference by fine-tuning is greatly diminished, if not lost altogether.

The uncertainty which a case-by-case analysis imposes upon labor and management is not the only troubling aspect of such an approach. For example, rather than decide that particular safety protections can always be traded and that others cannot, courts might make finer distinctions, depending on the precise circumstances of each case. Trading a particular safety protection might be upheld in one case because the nature of the workplace permits the conclusion that that protection is not especially important in that shop. Yet the same protection in another shop could be deemed too important to permit a trade. Such narrowly written opinions would result in great unpredictability, and hence frustrate the goals of both collective bargaining and safety legislation. Furthermore, more broadly written opinions, attempting to deal uniformly with a particular protection, can create similar uncertainties, since lawyers can be expected to search for factual differences between cases and to urge such distinctions upon courts. This article has offered reasons to adopt a broad rule that gives safety legislation priority over no-strike clauses.[195] The case-by-case approach would frustrate the purposes of collective bargaining as well as those of safety. Consequently, such a method is an inappropriate means of balancing the interest of safety against that of continuous production.[196]

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[195] See text at notes 186-93 *supra*.

[196] The premises of government regulation of private relationships in general, although beyond the scope of this article, lend additional support to application of the regulation despite an explicit contractual waiver of OSHA protection, and *a fortiori*, to application of the regulation in the face of a general no-strike clause. Implicit in the Constitution's guarantee that property shall not be taken without due process of law is an initial premise that persons protected by the Constitution shall be free to structure their business relationships as they please. *See, e.g.*, Minnesota v. Clover Leaf Dairy Co., 101 S. Ct. 715, 722-23 (1981) (legitimate state purpose must be cited to support legislation); Lochner v. New York, 198 U.S. 45 (1905). *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29-31 (1937); *See generally* L. TRIBE, *American Constitutional Law* ch. 8 (1978). The Constitution promises that the government shall not interfere with those relationships unless experience in a particular area shows that a *laissez faire* policy produces problems that should be solved, but will not be resolved satisfactorily without governmental action. *E.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937) (sustaining constitutionality of NLRA). To be sure, the government retains power to decide when it should act, and initial government interference, in areas such as crime, tort, contract and property, is centuries old. There also is, at present, massive governmental interference in and regulation of our lives. Yet the justifications for regulation ought still to be that private enterprise has failed to solve a problem that the government decides must be solved. *E.g.*, § 1 of the NLRA (Wagner Act), 29 U.S.C. § 151 (1976); § 2 of OSHA, 29 U.S.C. § 651(b) (1976); § 1 of MSHA, 30 U.S.C. § 801 (1976).

Given the premise that government action is justified only if the private sector fails, it follows that enactment of the safety acts means that safety is a problem that Congress has decided must be solved, and that private arrangements will not be able to solve the problem. The purpose of regulation is to provide a specific remedy for a specific evil. It is not to create a right that may then be bartered for some other item desired by the party to whom the right is given and offered by the party against whom the right exists.

One variation of trading rights granted by OSHA deserves special consideration. Suppose that a union believes that a particular condition, call it condition X, is dangerous, but that the OSH Administration does not, and hence does not require the employer to correct it. At collective bargaining the union proposes to waive the employees' right under the regulation with respect to some other condition, say condition A, if the employer will correct condition X. The employer agrees. Here the parties have traded safety for safety, except that the regulation might not protect an employee who refused to work on the grounds that condition X had not been repaired. This possibility exists because the Administration had already determined that condition X was not dangerous, and OSHA's protections are triggered only when the Administration classifies a condition as dangerous.[197] The safety-for-safety trade, however, arguably furthers Congress' purpose in enacting OSHA even if the Administration disagrees with the employees about which conditions are more dangerous. Here, perhaps, the union ought to be able to use OSHA as a bargaining tool.

Two considerations, however, militate against permitting even the safety-for-safety trade. First, although the union represents all the employees, that representation exists by statutory fiat,[198] not because each employee in fact wants the union as his representative. A significant minority, indeed, at times even a majority, of the employees may not desire the union to represent them. Although the union has broad powers to negotiate on behalf of all the employees, the safety acts could be viewed as non-negotiable. The provisions thus afford union non-adherents some protection against a union's broad representative status. Just as the union may not trade society's interest in safety for the economic interests of the employees, so too, it may not determine that non-statutory safety protections are more desirable than those included within the statute.

The safety-for-safety trade, then, can be viewed as a subversion of a legislative enactment. In addition, such trades could be used to disguise a safety-for-economic-benefit trade. The condition that the union selects, condition X, may not be unsafe at all, and may be easy to repair. Indeed, the fact that the Administration chose not to designate the condition as dangerous suggests that the condition was not dangerous. Thus, in exchange for the waiver

To be sure, the holder of a right may choose not to assert it, and often does so. This occurs, however, when the beneficiary elects not to approach the organs of government and request their assistance to coerce the alleged offender. The victim makes this choice after his right has been invaded. The system could allow the choice to be made beforehand. In opting for the post-injury approach, however, the system appears to assume that an informed choice can be made only after the victim has received the injury, or is in imminent peril of suffering the injury. The right, therefore, cannot be protected if its holder may forfeit it in a setting that does not adequately acquaint him with the consequences of his decision. Given this theory of government regulation, arguments based on the precepts of private contract disappear because the legislature's action has explicitly removed them from consideration. Examples can be found throughout the field of regulated industries generally. Rate-making commissions are an excellent example.

[197] 29 U.S.C. §§ 658(a), 659 (1976).

[198] 29 U.S.C. § 159(a) (1976).

with regard to condition A, the condition that is dangerous in fact, the employer may give the union a better economic package *sub rosa*. This combination of government pre-emption of the definition of dangerous conditions and the possibility of abuses of safety-for-safety trades suggests that such practices ought not be allowed.

This conclusion, however, has serious implications for the present structure of labor-management relations. Collective bargaining agreements often provide for a multi-step grievance procedure.[199] Safety-based grievances will normally be within the scope of the contract's grievance provisions.[200] The initial stages of the procedure will be attempts to settle a grievance within the plant, by having representatives of union and of management endeavor to reach a resolution.[201] The grievance procedure generally leads to binding arbitration.[202] This system has become a nearly indispensable part of our economy. Thus, unions and management have for some time been making safety-for-safety trades, or at least have contracted for a system that contemplates and implements such trades. When the union agrees in the collective bargaining agreement to accept the arbitrator's decision, it forfeits its rights under the OSHA regulation. Under ordinary notions of contract construction, the union would be required to abide by its promise to arbitrate.[203] If the safety-for-safety trade is prohibited, the grievance committee, as well as the rest of the grievance procedure, loses its value in the safety area.

Although that change in the effectiveness of private dispute resolution arrangements is disturbing because it may upset a system that seems to handle difficult issues well, some courts have already held that an employee dissatisfied with an arbitrator's award may proceed *de novo* in court under the safety acts.[204] The unarticulated assumption behind these decisions must be that Congress did not intend to allow safety trades. Otherwise, the courts would be expected to let a workable system alone.[205] The grievance committees, however, are not subject to the concerns that should lead to general prohibition of safety-for-safety trades. They are not likely to disguise safety-for-economic-benefit trades,[206] because there is no way to guarantee the deal. They are

[199] *E.g.*, Anaconda Aluminum Co., 197 N.L.R.B. 336, 338 (1972); Knight-Morley Corp., 116 N.L.R.B. 140, 160 (1956), *enforced sub nom.* NLRB v. Knight-Morley Corp., 251 F.2d 753 (6th Cir. 1957), *cert. denied sub nom.* Knight-Morley v. NLRB, 357 U.S. 927 (1958).

[200] *See* cases cited at note 199 *supra*. *See also* Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 379-80 (1974).

[201] *See* cases cited at note 199 *supra*.

[202] *See, e.g.*, cases cited at notes 199-200 *supra*.

[203] Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 386-87 (1974); Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448, 455-56 (1957).

[204] *E.g.*, N.L. Indus., [1980] OSHA DEC. (CCH) ¶ 24,354, at 29,689-90 (7th Cir. 1980); Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772, 776-77 (D.C. Cir. 1974). For district court cases in accord, *see* cases cited at note 113 *supra*.

[205] See text at notes 186-93 *supra*.

[206] It is possible, of course, that a union and an employer would have some sort of understanding that the grievance committee would not press a particular kind of grievance. Also the committee could be asked to screen a safety-for-economic-benefit-trade. Implementation of such deception, however, seems unlikely.

unlikely to suppress a minority employee interest because all grievances, including those conditions that OSHA regulates, would be subject to the system. Thus, there is no reason to interfere with freedom of contract here. Decisions that permit litigation after an arbitrator's decision should be reversed.[207]

In summary, a broad interpretation of OSHA and the imminent danger regulation promulgated thereunder is the best solution to potential conflicts between the policies of enjoining strikes under a no-strike clause and that of promoting safety in the workplace. Unlike the narrow interpretation, that approach would be true to Congress' purpose in enacting the safety statutes and would avoid the unpredictability of using an alternative case-by-case resolution. In *Whirlpool Corp. v. Marshall*, the Supreme Court supported the Secretary's authority to issue a regulation that allows work refusals based on subjective evidence of a safety hazard. This result accentuated the conflict between the Court's policy favoring continued production and the legislature's goal of promoting safety in the workplace. It is submitted that this conflict should be resolved in favor of worker safety.

CONCLUSION

Congress intended OSHA and MSHA to have a profound impact on the connection of the federal government to labor-management relations. Those statutes should be construed to state and reflect a policy that supersedes whatever policies the Supreme Court has or would have created under the mandate it held itself to possess in *Lincoln Mills*. The lower courts should hold, and the Supreme Court should state, when the appropriate case comes before it, that OSHA and the imminent danger regulation promulgated under it, are congressional judgments that the productivity of the nation is enhanced if workers' subjective, but reasonable, perceptions of dangerous working conditions are respected, any contractual promise to the contrary notwithstanding.

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[207] This proposition is easier to accept if the arbitrator considers OSHA violations in reaching his result. That is not, however, strictly necessary. The arbitration result could be upheld on the ground that the union bargained for the procedure, and the individual employee chose to use it. The proposition is not so broad as to preclude the employee from electing to litigate through the Secretary under OSHA instead of pursuing his contractual grievance procedure remedy.