

June 1974

The Right to Strike over Safety Issues

Robert C. Stephens

Follow this and additional works at: <http://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

Recommended Citation

Robert C. Stephens, *The Right to Strike over Safety Issues*, 51 Chi.-Kent. L. Rev. 200 (1974).

Available at: <http://scholarship.kentlaw.iit.edu/cklawreview/vol51/iss1/9>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

THE RIGHT TO STRIKE OVER SAFETY ISSUES

INTRODUCTION

Section 301(a)¹ of the Taft-Hartley Act gave the federal courts jurisdiction over suits involving the violation of contracts between an employer and a labor organization. This Section has recently been interpreted by the United States Supreme Court as giving the federal courts the power to enjoin strikes under certain circumstances where there is a collective bargaining agreement.² This power to enjoin such strikes was limited in the Taft-Hartley Act, however, by the "saving provision." Section 502³ of the Act stated that, "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act." The meaning and impact of Section 502 is the topic of this article.

The right to strike over safety issues, referred to in Section 502, arises in two main situations. First, where the collective bargaining agreement has an express or implied no-strike clause, the employer may seek to enjoin the strike⁴ or seek damages for the strike if it violates the no-strike clause.⁵ However, if the strike is a valid safety strike within the meaning of Section 502, then Section 502 bars the employer from obtaining an injunction or damages.

The second major situation in which the right to strike over a safety issue arises is in unfair labor practice proceedings involving the discharge of employees. Section 7 of the National Labor Relations Act⁶ gives to employees the right to "assist labor organizations, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" The courts have held that participation in a valid Sec-

1. 29 U.S.C. § 185(a) (1973).

2. In *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 253 (1970), the Court held that federal courts may enjoin a strike where it was found that: (1) the collective bargaining agreement contained a mandatory grievance procedure which covered the dispute out of which the strike arose, (2) that either the employer was ready and willing to settle the dispute through the grievance procedure or the court would order him to settle the dispute in this manner, and (3) the ordinary principles of equity warranted such an injunction (i.e. that the strike will continue, will cause irreparable harm, and the injunction will cause less harm to the union than the continuing strike would cause to the employer).

3. 29 U.S.C. § 143 (1973).

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

5. For cases upholding the right to sue for damages due to a breach of a no-strike clause, see *Teamsters, Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962) and *Furniture Workers v. Colonial Hardware Flooring Co.*, 168 F.2d 33 (4th Cir. 1948).

6. 29 U.S.C. § 157 (1973).

tion 502 safety strike is one of these protected rights to which Section 7 refers.⁷ The National Labor Relations Act also declares it an unfair labor practice for an employer to either: (1) "interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7"⁸ or (2) to hire or fire employees in a discriminatory manner in order to discourage membership in a labor union.⁹ Therefore, the discharge of employees for participating in a valid Section 502 safety strike would constitute an unfair labor practice.

TWO TESTS: A GOOD FAITH BELIEF OR AN ACTUAL FINDING OF ABNORMALLY DANGEROUS WORKING CONDITIONS

In interpreting the phrase in section 502¹⁰ that the work stoppage was "in good faith because of abnormally dangerous conditions for work . . .", the courts and the National Labor Relations Board have followed two lines of reasoning. The first line of reasoning states that, in order to bring such a strike within activities protected by the Act, one must show that the work stoppage is based upon a good faith belief that the working conditions are abnormally dangerous, regardless of whether the conditions are, in fact, abnormally dangerous. In a work stoppage over a mine safety issue, the United States Court of Appeals for the Third Circuit stated, "the miners themselves . . . should make the determination as to what constitutes a safety hazard."¹¹ The second line of reasoning is that it must be shown that the working conditions which caused the work stoppage were, in fact, abnormally dangerous. The National Labor Relations Board in *Redwing Carriers, Inc.*¹² set forth this interpretation by saying the test should be:

[A]n objective as opposed to a subjective test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances be reasonably considered 'abnormally dangerous'.

Other Board and court decisions have also supported this latter viewpoint.¹³

7. *Philadelphia Marine Trade Ass'n v. NLRB*, 330 F.2d 492, 495 (3rd Cir. 1964); *NLRB v. Knight Morley Corp.*, 251 F.2d 753, 759 (6th Cir. 1957), *cert. denied* 357 U.S. 927 (1958), *rehearing denied* 358 U.S. 858 (1958); and *NLRB v. Southern Silk Mills*, 209 F.2d 155 (6th Cir. 1953).

8. 29 U.S.C. § 158(a)(1) (1973).

9. 29 U.S.C. § 158(a)(3) (1973).

10. *Id.* § 143.

11. *United States Steel Corp. v. United Mine Workers*, 469 F.2d 729 (3rd Cir. 1972). *Accord*, *Gateway Coal Co. v. United Mine Workers*, 466 F.2d 1157, 1159, 1160 (3rd Cir. 1972).

12. 130 NLRB 1208, 1209 (1961), *affirmed* *Teamsters Local No. 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963).

13. *NLRB v. Fruin-Colnon Const. Co.*, 330 F.2d 885 (8th Cir. 1964); *Stop & Shop, Inc.*, 161 NLRB 75 (1966), *affirmed* *Machaby v. NLRB*, 377 F.2d 59 (1st Cir. 1967); *Myers Industrial Electric*, 177 NLRB 817 (1969).

This dispute as to the meaning of Section 502 of the Act has been put to rest by the very recent United States Supreme Court decision, *Gateway Coal Co. v. United Mine Workers*¹⁴ which upheld the second line of interpretation. The employer asked that the district court grant an injunction against a strike which had been caused by a safety dispute. The dispute arose when some of the miners discovered that three foremen had been falsifying records concerning the air flow in the mine by stating the air flow was adequate when actually it was not. The miners demanded the foremen be fired. After a short suspension of the foremen they were reinstated, which caused all the miners to walk off the job. The Third Circuit dissolved a temporary injunction issued by the district court finding that the miners had stopped work upon a "good faith concern for safety"¹⁵ The Third Circuit, therefore, felt it necessary to avoid any construction of the collective bargaining agreement which would imply a no-strike clause which encompassed such safety disputes.¹⁶

The Supreme Court found that a good faith belief that the conditions were abnormally dangerous was not, by itself, sufficient to invoke the protection of Section 502. The Court held that "objective evidence of such conditions [must] actually obtain" and that a union seeking to invoke this defense "must present 'ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.'"¹⁷ Noting that the district court conditioned its injunction on the suspension of the foremen in question, it found that any possible dangerous conditions which may have existed were, therefore, removed.¹⁸

Is the requirement that there must in fact have been abnormally dangerous conditions before the courts will protect strikers under Section 502 a wise rule? The dilemma faced by the employees under this rule was stated by the Eighth Circuit:

[I]f employees acting concertedly leave their jobs believing in good faith abnormally dangerous working conditions prevail, they run the risk of discharge for engaging in a "strike" in contravention of a "no-strike" clause in their collective bargaining agreement¹⁹

In *Gateway* the danger was removed when the Court conditioned the granting of the injunction upon the suspension of the foremen at the time the

14. 94 S. Ct. 629 (1974).

15. *Gateway Coal Co. v. United Mine Workers*, 466 F.2d 1157, 1160 (3rd Cir. 1972).

16. *Id.* at 1160.

17. *Gateway Coal Co. v. United Mine Workers*, 94 S. Ct. 629, 641 (1974), citing Judge Rosenn's dissent in the appellate court's decision of this case, 466 F.2d at 1162 (1972).

18. *Id.* at 641.

19. *NLRB v. Fruin-Colnon Const. Co.* 330 F.2d 885, 892 (8th Cir. 1964).

injunction was granted, and no employees had been discharged. The situation is quite different in an unfair labor practice hearing where employees are discharged for their work stoppage. This rule forces them to either continue work under conditions which may be abnormally dangerous or stop work and take the chance that they will lose their jobs with no chance of a reinstatement order by the National Labor Relations Board, unless it is found that abnormally dangerous conditions actually prevailed.

A solution to this problem would be to restrict the *Gateway* rule to injunction cases and allow the Board and the courts to apply the good faith rule to cases involving discharges. However, there is no language in the Supreme Court's opinion which would lend itself to this interpretation. The only remaining solution, barring a subsequent overruling of *Gateway* by the Supreme Court, is a congressional act amending the wording of Section 502. If such a change is contemplated, there are several arguments on either side which would support or weaken the argument for a change to a good faith rule. The undesirability of making employees choose between taking a serious risk of injury or losing their jobs when they in good faith believed their working conditions are abnormally dangerous speaks for the good faith rule. Further, an employee's safety should take precedence over the other concerns involved. The congressional concern for employees safety has already been shown by the enactment of Section 502, in addition to the recent enactment of several major acts in the area of occupational safety.²⁰

On the other hand, a good faith rule may be abused because it might force courts to uphold work stoppages as protected activities whenever the strikers merely assert there is an abnormally dangerous condition.²¹ Also, there is a strong federal policy in favor of submitting disputes to arbitration rather than allowing the employees to try and settle them by a strike.²² At least where a grievance procedure, including arbitration, is available this may be a good argument. Whether industrial peace through arbitration outweighs workers' safety, however, is an issue the Congress should decide. The courts, however, may guard against the possible abuses suggested by the first argument that under the good faith rule bare assertions of unsafe conditions will protect the strikers. The courts may examine whether there was in fact a good faith belief that abnormally dangerous conditions existed.

20. The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1973); The Coal Mine Health and Safety Act of 1970, 30 U.S.C. §§ 801-878 (1973).

21. See Judge Rosenn's dissent in *Gateway Coal Co. v. United Mine Workers*, 466 F.2d 1157 (3rd Cir. 1972).

22. In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 583 (1960), the Court felt that if the collective bargaining agreement contained an arbitration clause, the particular grievance should be submitted to arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

The courts could examine objective evidence to decide whether reasonable persons under similar circumstances could have concluded that abnormally dangerous conditions were prevailing, even if later analysis would show no such abnormally dangerous condition actually existed.

TOWARD A DEFINITION OF ABNORMALLY DANGEROUS WORKING CONDITIONS

Whether or not the requirement that actual abnormally dangerous working conditions must be shown is a good rule, it is the law today. Therefore, a definition of what constitutes abnormally dangerous working conditions is of vital importance. Of course the National Labor Relations Board or the courts which face this question must examine each situation on a case by case basis as the spectrum of possibilities is too great to file them away in neat pigeonholes. However, a survey of cases and board decisions which have faced this issue will be useful to bring out what factors have been held important in considering what constitutes abnormally dangerous working conditions.

One important factor is whether the work stoppage was brought about by purportedly dangerous conditions which were new and not merely conditions which prevailed for some time. This factor was pointed out most effectively in the National Labor Relations Board decision of *Anaconda Aluminum Co.*²³ The decision stated:

Absent the emergence of new factors or circumstances that change the character of the danger, work that is recognized and accepted by employees as inherently dangerous does not become abnormally dangerous merely because employee patience with conditions ceases.²⁴

Another case²⁵ examined a work stoppage by construction workers who were engaged in digging a deep shaft. A number of complaints were made by the workers concerning water leakage, slippery surfaces and the possibility of falling objects which might cause the men to fall off a ledge on which they worked. In finding no abnormally dangerous conditions, the court pointed out that the men had been working under the same, if not worse, conditions the prior day when no complaints or work stoppages occurred.²⁶ Another Board decision²⁷ noted that the breakdown of a ventilation system, which created a high dust content in the air, was an occurrence which had

23. 197 NLRB No. 51, 72 L.C. 31,263 (1972).

24. *Id.*, 72 L.C. at 31,264. The decision went on to say that where the operations were being carried out in a manner which had been utilized before and that the danger the employees were concerned with here was a normal one they regularly had faced before, the danger was merely a normal one and not an abnormal one.

25. NLRB v. Fruin-Colnon Const. Co. 330 F.2d 885 (8th Cir. 1964).

26. *Id.* at 890, 891.

27. Curtis Mathes Mfg. Co., 145 NLRB 473, 474 (1963).

happened a number of times in the past. Even if the danger is a new one on the particular job in question, the fact that this danger is regularly faced by workers on similar jobs elsewhere may mean it is not an abnormally dangerous working condition.²⁸

A second factor, tied directly to the rationale of the "new danger" rule examined above, is whether the job is *normally* a dangerous one. It is common knowledge that certain types of jobs involve a substantial amount of danger. Mining, construction work and work on power lines are a few examples. When a person takes a job of this nature he is usually aware that it will entail a certain amount of risk and his compensation often reflects this fact. Therefore, it would be unreasonable for him to stop work and expect not to be fired where his only reason for his work stoppage is a danger which a reasonable person would expect to face in this job. In *Anaconda Aluminum*, the Board pointed out that the job of working with molten metal, was "recognized and accepted by employees as inherently dangerous."²⁹ In other words, what is normally dangerous is not abnormally dangerous.

Another extremely important factor is whether an effective grievance procedure is available concerning safety disputes. A good example of this is *Hanna Mining Co. v. United Steel Workers of America*.³⁰ The workers involved had been fired for a work stoppage over allegedly dangerous working conditions and were petitioning to be reinstated. The workers alleged their firing was for striking over dangerous conditions, and therefore was an unfair labor practice. The collective bargaining agreement provided not only that grievances could be filed concerning safety disputes, but that the employee filing such a grievance may cease the work which is allegedly unsafe while the grievance is being processed. The employees here failed to utilize the grievance procedure. The court held that utilizing the grievance procedure was the proper route for such a dispute.³¹ Another court granted an injunction where a union ignored a special safety committee set up by the collective bargaining agreement for safety disputes and called a strike. In granting the injunction against the strike, the court ignored the union's contention that it had a defense under Section 502 because the strike was caused by abnormally dangerous working conditions. The court merely said the union had a duty to utilize the safety committee to solve the problem.³²

28. *Myers Industrial Electric*, 177 NLRB 817 (1969). This decision involved a complaint by electricians that they were forced to work without the aid of a second electrician while handling high voltage wires.

29. 197 NLRB No. 51, 72 L.C. 31,263, 31,264 (1972). See also *NLRB v. Fruin-Colnon Const. Co.*, 330 F.2d 885, 889 (8th Cir. 1964).

30. 464 F.2d 565 (8th Cir. 1972).

31. *Id.* at 568.

32. *Peabody Coal Mine v. Local No. 7869, U.M.W.*, 360 F. Supp. 615, 620 (W.D. Ark. 1973).

A fourth factor in determining whether there was, in fact, an abnormally dangerous working condition is the testimony or statements of disinterested third parties as to their opinion of whether such conditions prevailed. In *Philadelphia Marine Trade Association v. NLRB*³³, a work stoppage among a group of longshoremen resulted from the employer requiring them to unload a ship with pallets for the cargo rather than a sling. After a short walkout, an arbitrator was called in by the parties to determine if this method was dangerous. He found it was dangerous. However, the employer, who was apparently not bound by the arbitrator's decision, ignored this fact and ordered the men back to work. Upon their refusal to return to work, he locked them out. The lockout was found to be an unfair labor practice as retaliation for protected activity (i.e. a valid safety strike). Other court and Board decisions have given great weight to the testimony of disinterested witnesses,³⁴ the results of an inspection by the company safety engineer³⁵ and a subsequent government inspection.³⁶

A fifth factor is whether the condition or practice violates a safety statute or regulation. One court noted that a statute requiring certain devices was evidence that the breakdown of such devices constituted a dangerous working condition.³⁷ The Board or a court has a limited amount of time and expertise when they look into the question of whether abnormally dangerous conditions prevailed. It is not unreasonable for them to rely upon such safety statutes and regulations which presumably were based upon more extensive investigation than is possible in a judicial hearing.

A number of other factors and sources of information have been utilized in Section 502 disputes. As in many other areas of judicial and quasi-judicial endeavor, expert witnesses play an important part.³⁸ The workers own beliefs and reactions to the conditions are also important. In one Board decision, it was pointed out that while some of the workers walked off the job due to an extremely high dust content in the air, the vast majority of the workers remained on the job, including all of those who were working in the area of greatest dust concentration.³⁹ The fact that everyone walked off the job due to the allegedly dangerous working condition is evidence that

33. 330 F.2d 492 (3rd Cir. 1964), *cert. denied*, 379 U.S. 833 (1964).

34. *NLRB v. Fruin-Colnon Const. Co.*, 330 F.2d 885, 892 (8th Cir. 1964); *Myers Industrial Electric*, 177 NLRB 817, 819 (1969).

35. *Stop & Shop, Inc.*, 161 NLRB 75 (1966), *affirmed*, *Machaby v. NLRB*, 377 F.2d 59 (1st Cir. 1967).

36. *Myers Industrial Electric*, 177 NLRB 817, 819 (1969).

37. *NLRB v. Knight Morley Corp.*, 251 F.2d 753, 758 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958), *rehearing denied*, 358 U.S. 858 (1958).

38. In *NLRB v. Knight Morley Corp.*, 251 F.2d 753, 758 (6th Cir. 1957), *cert. denied* 357 U.S. 927 (1958), *rehearing denied* 358 U.S. 858 (1958), great weight was given to the testimony of an industrial health expert who testified as to the probable effects of extremely high temperatures and humidity within the work area. *See also*, *Myers Industrial Electric*, 177 NLRB 817, 819 (1969).

39. *Curtis Mathes Manufacturing Co.* 145 NLRB 473, 474 (1963).

there was wide-spread belief of the seriousness of the condition.⁴⁰ The availability of safety equipment⁴¹ or failure of the striking employees to use the safety equipment⁴² is a mitigating factor which weighs against the employees who claim they are being exposed to abnormal dangers.

In summary, the Board and the courts have utilized a number of factors or sources of information when determining whether abnormally dangerous working conditions prevailed at the time of the work stoppage. These factors include whether it was a new danger, whether the job was normally dangerous, whether an effective grievance procedure for safety issues was available and was used, the testimony of disinterested witnesses, whether a violation of a safety statute existed, testimony of expert witnesses, whether the affected employees were unanimous in their expressed belief that the conditions were dangerous, and the availability of safety equipment. This list, of course, is not exhaustive of all the relevant factors which might be considered in future cases, but it should serve as a useful guide to one attempting to prove or disprove the existence of an abnormally dangerous condition.

The *Gateway* case is not the only major recent development in the area of safety disputes, however. There has been considerable activity in the legislative arena concerning occupational safety which has culminated in The Occupational Safety and Health Act of 1970 or OSHA.⁴³

THE IMPACT OF OSHA UPON SAFETY DISPUTES

Upon examination of the Occupational Safety and Health Act of 1970, two main questions may be asked. First, what impact does this Act have on the law concerning the requirement for an abnormally dangerous working condition, and secondly, does OSHA provide a viable alternative means of settling safety disputes other than through strikes. Before facing these questions directly, a brief overview of the Act is necessary. OSHA was enacted in order "to assure so far as possible every working man and woman . . . safe and healthful working conditions . . ." ⁴⁴ The Secretary of Labor with the assistance of a National Advisory Committee was empowered to set up mandatory occupational safety and health standards applicable to businesses that affect interstate commerce.⁴⁵ In order to enforce these standards, the Secretary was given the power to conduct inspections of work sites

40. In *NLRB v. Knight Morley Corp.*, 251 F.2d 753, 758, 759 (6th Cir. 1957), *cert. denied* 357 U.S. 927 (1958), *rehearing denied*, 358 U.S. 858 (1958), it was noted that every one walked off the job due to excessive in-plant temperatures and that it was certainly competent for laymen to testify to the conditions.

41. *Myers Industrial Electric*, 177 NLRB 817, 819 (1969).

42. *Curtis Mathes Manufacturing Co.*, 145 NLRB 473, 474 (1963).

43. 29 U.S.C. §§ 651-678 (1973).

44. *Id.* § 651(b).

45. *Id.* §§ 651(b)(3), 656(a)(2).

without notice or search warrant.⁴⁶ In addition, investigations of safety violations may be made and witnesses and evidence may be subpoenaed.⁴⁷ The employees themselves may also request an inspection which the Secretary will order if he finds reasonable grounds to believe a violation is occurring.⁴⁸ If, upon inspection or investigation or both, the Secretary finds such a violation is existant, he shall issue a citation describing such violation and fix a reasonable time for the abatement of the violation.⁴⁹ The employer has fifteen days to contest this citation. If he does contest the citation, a hearing will be held. If he fails to so contest the citation, it becomes a final, non-appealable order.⁵⁰

When examining OSHA for the impact it has upon the law concerning strikes over safety issues, three main themes appear. The first is the philosophy that safety disputes should be settled through peaceful means. This would support the *Gateway* rule and its policy underpinnings. The Act creates machinery to settle safety disputes. This philosophy of peaceful settlement of such disputes is clearly spelled out in the Act. The Act notes that one of its purposes is to stimulate the creation or perfection of existing in-plant programs designed to promote safe working conditions and to build upon already existing employer-employee safety programs and to encourage such joint employer-employee programs.⁵¹

On the other hand, the Act also seems to strengthen the position of those who desire to justify work stoppages over safety issues or establish that there actually are abnormally dangerous working conditions. The Act establishes a statutory duty on the part of employers to "furnish . . . a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees"⁵² It would not be unreasonable to argue that if the employer breaches his statutory duty, then the employees may be justified in breaching their contractual duty to respect a no-strike clause. The third theme of the Act is the Act's direction that national safety standards be set up.⁵³ If these standards are violated, the employees may use this as evidence that there were abnormally dangerous working conditions. As was noted earlier⁵⁴, the violation of a safety statute is at least evidence that an

46. *Id.* § 657(a). However, this potential violation of the fourth amendment rights against unreasonable searches and seizures is tempered by the Department of Labor's regulation 29 C.F.R. § 1903.4 which allows the employer to deny the inspector entrance to the worksite.

47. 29 U.S.C. § 657(b).

48. *Id.* § 657(f)(1).

49. *Id.* § 658(a).

50. *Id.* § 659.

51. *Id.* § 651(b).

52. *Id.* § 654(a)(1).

53. *Id.* § 655.

54. See note 42 *supra*.

abnormally dangerous working condition exists. As yet, there have been no cases interpreting OSHA in relation to the right to strike over safety issues, but the Act certainly provides ammunition for either side. At least in the absence of an effective and safe method of settling a safety dispute through a grievance procedure, it appears the employees position is strengthened by OSHA.

The other question is whether OSHA provides a viable alternative to strikes over safety issues. Certainly, if those who would strike over safety matters could just as effectively protect their safety by utilizing the administrative machinery of OSHA, this would negate the need for safety strikes. Whether OSHA does perform such a function adequately depends upon the speed and the reliability with which the administrative machinery can act. The reliability of the OSHA process appears to be its strongest point. The safety regulations under which it will operate are to be made up by experts in the field of industrial safety, and both management and labor are to participate in the National Advisory Committee which advises the Secretary of Labor on such matters.⁵⁵ The Act provides for the training and development of a professional corps of safety inspectors.⁵⁶ The Act also provides for hearings where both sides may be represented,⁵⁷ allows both union and management representatives to accompany the inspector,⁵⁸ and gives employees the right to object to the time period allowed for the abatement of the violation.⁵⁹ This guarantee of participation by both sides will insure that particular dangers, unique to that work area, will be brought out. The fact that there is no safety standard yet promulgated which would cover the condition in question, does not provide any loophole for the employer. Where there is in fact a dangerous working condition the employer may be cited for violating the general duty clause of the Act.⁶⁰

The other line of inquiry, in examining whether OSHA is a viable alternative to the right to strike over safety issues, is the speed with which the OSHA machinery can act. There are two major routes one can take to clear up a safety problem. The first one begins with inspections and investigations and culminates with the issuance of a citation to abate the work hazard. When faced with a long term danger, such as exposure to harmful materials which may effect the worker's health over the long run, this

55. 29 U.S.C. § 656 (1973).

56. *Id.* § 657.

57. *Id.* See also, *id.* § 659(c).

58. *Id.* § 657(e).

59. *Id.* § 659(c).

60. The report of the Senate Labor and Public Welfare Committee, S. REP. No. 1282, 91st Cong., 2d Sess. 10 (1970), explains the purpose of the general duty clause and its relationship to the specific standards as follows: "The general duty clause in this bill would not be a general substitute for reliance on standards, but would simply enable the Secretary to ensure the protection of employees who are working under special circumstances for which no standard has yet been adopted."

method may be sufficient. It does not suffice where the worker is faced with a new and immediate danger. The time taken to request an inspection, have the inspection made and get a citation issued, which could, of course, be contested, is too long if great bodily harm is imminent. The Act does provide a much faster means to alleviate such dangers. It gives the Secretary of Labor the power to seek an injunction to remove such condition or prohibit exposure of employees to such conditions. The injunction should be issued by a federal court if it finds that certain work conditions might "reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided" by the Act.⁶¹ A temporary restraining order may be issued without notice to the employer, but is limited to five days in duration.⁶² If the Secretary arbitrarily fails to act, employees or their representatives may seek a writ of mandamus in a federal court to compel the Secretary to act.⁶³

This injunctive provision will go far in remedying the problem of imminent dangers, but it is not a complete solution. Under the best of situations, it would take at least twenty-four hours to have such an injunction issued. In the case of an immediate threat of serious harm, this could be twenty-four hours too late. The right to stop work in the face of such a threat must be preserved, at least for the period of time that would be necessary to get a hearing on the injunction action.

CONCLUSIONS

The *Gateway* rule, which requires that actual abnormally dangerous working conditions be found before the NLRB or a court may protect those who participated in a work stoppage from discharge or an injunction, puts a harsh burden upon the workers. The workers will often be faced with the unpleasant choice between working under dangerous conditions or taking a chance of losing their jobs. The Occupational Safety and Health Act of 1970, however, provides at least a partial solution to the problem by giving the employees a means of removing any such hazards which are actually found to be dangerous. Better safety grievance procedures encouraged by the Act may also go far to settle such safety disputes without recourse to strikes or the necessity of endangering the employees. However these administrative and in-plant remedies are not adequate to meet immediate dangers. Therefore, the right to strike over safety issues should be preserved.

A compromise solution, which would partially satisfy both the employee's grievance of being exposed to serious occupational hazards and the employer's grievance of being subject to unjustified strikes, should be at-

61. 29 U.S.C. § 662(a) (1973).

62. *Id.* § 662(b).

63. *Id.* § 662(d).

tempted. The *Gateway* rule should be overruled by an amendment to Section 502 which would provide that work stoppages are protected activities in the case of unfair labor practice actions where the employees in good faith believed abnormally dangerous conditions prevailed. In the case of actions to enjoin strikes, the *Gateway* rule that required an actual finding of abnormally dangerous working conditions could be retained. This right to strike in violation of a no-strike clause, however, should be limited by a provision that the work stoppage would become unprotected activity if the strikers or union had not, within a reasonable time, either utilized the local grievance procedure, if available, or filed a petition with the Secretary of Labor under OSHA. This latter provision would protect employers against unwarranted or unreasonably long strikes over safety issues.

ROBERT C. STEPHENS