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Labor Law - Arbitration - Presumption of Arbitrability Applicable to Safety Disputes - Injunction Authorized as Remedy for Breach of Implied No-Strike Obligation - Objective Evidence Standard Established for Section 502 of Taft-Hartley Act

Anthony Allen Geyelin

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However, there are two obstacles to the overruling of *Weeks*. First, the exclusionary rule has been in use in federal trials for sixty years.[75] Such a history may give the rule some sanctity, although this factor obviously was not enough to sway the Court in *Calandra*. The second obstacle is more substantial. Even proponents of revocation recognize that there must be a viable replacement for the rule before it can be revoked.[76] However, this objection could be overcome if the damage remedy proves efficacious.[77] If recoveries are obtained, the Court may be less hesitant in abandoning the practice of excluding illegally seized evidence.

In conclusion, then, *Calandra's* import is twofold: First, it drastically alters the scope of one's fourth amendment rights by allowing evidence seized in violation thereof to be used by the grand jury in its broadly-bounded investigations. The Court clearly demonstrated its continuing belief in the model of the grand jury as a citizen-protecting device, despite widespread criticism of that view; and it is submitted, this view led to its failure to consider fully whether the fourth amendment rights of grand jury witnesses are adequately protected during investigations. Second, and perhaps more importantly, it reveals a willingness in the Court to re-examine closely the efficacy of the exclusionary rule, and may portend its passing.[78]

Leland G. Ripley

LABOR LAW — ARBITRATION — PRESUMPTION OF ARBITRABILITY APPLICABLE TO SAFETY DISPUTES — INJUNCTION AUTHORIZED AS REMEDY FOR BREACH OF IMPLIED NO-STRIKE OBLIGATION — OBJECTIVE EVIDENCE STANDARD ESTABLISHED FOR SECTION 502 OF TAFT-HARTLEY ACT.

Gateway Coal Co. v. Local 6330, UMW (U.S. 1974)

Gateway Coal Company (Company) and Local 6330 of the United Mine Workers (Union) were parties to a collective bargaining agreement that contained a broad binding arbitration provision without an express

75. *Weeks* was decided in 1914. It must be noted that since *Mapp* was decided in 1961, this argument would not weigh so heavily against an abandonment of the exclusionary rule in state courts.

76. Oaks, *supra* note 15 at 756. *See also* Chief Justice Burger's dissent in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting).

77. History points to the opposite conclusion. *See* note 17 *supra*. But recovery of damages has been effective in Canada. *See* Spiotto, *supra* note 17 at 277; Oaks, *supra* note 15 at 703-04.

78. The Ninth Circuit Court of Appeals has extended *Calandra* to require grand jury witnesses to answer questions even though allegedly grounded on information obtained, prior to the convening of the grand jury, in violation of the witness' fifth amendment right against self-incrimination. United States v. Weir, 495 F.2d 879 (9th Cir. 1974).

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no-strike clause.[1] When it was discovered that three foremen had apparently falsified safety records after an accident at the Company's mine,[2] a dispute arose and the Union membership voted not to work unless the foremen were suspended. The Company acquiesced in that demand, but, when two of the foremen were subsequently reinstated, the miners went out on strike.[3] Following a rejection of its offer to submit the dispute to arbitration,[4] the Company sought injunctive relief in federal court under section 301 of the Taft-Hartley Act.[5] The district court issued a temporary restraining order,[6] subsequently converted into a preliminary injunction,[7] requiring the Union to end the strike and submit the dispute to binding arbitration by an impartial umpire.[8] The two foremen were ordered suspended until the arbitrator resolved the controversy.[9]

The Court of Appeals for the Third Circuit reversed the order of the district court and vacated the preliminary injunction.[10] Relying on what it considered a congressional policy against arbitration of safety disputes, the Third Circuit found that the Union was not under any contractual duty to submit the controversy to arbitration or to refrain from striking.[11]

The United States Supreme Court, Justice Douglas dissenting, reversed the decision of the Third Circuit, *holding* that the presumption of arbitrability was applicable to safety disputes as well as to other labor disagreements, and that injunctive relief could be granted under section 301 even in the absence of an express no-strike clause in the collective bargaining agreement. *Gateway Coal Co. v. Local 6330, UMW,* 414 U.S. 368 (1974).

A federal policy favoring arbitration of labor disputes is embodied in section 203(d) of the Taft-Hartley Act, which declares that a final adjust-

1. The bargaining agreement in question was the National Bituminous Coal Wage Agreement of 1968. A section of that agreement entitled "Settlement of Local and District Disputes" provided that "any local trouble of any kind" should be settled through direct negotiations between the parties. If those procedures failed, the issue was to be referred to an impartial umpire for a final decision. The arbitration clause also covered disputes over interpretation of the contract provisions and over any matter not specifically mentioned in the agreement. Gateway Coal Co. v. Local 6330, UMW, 414 U.S. 368, 376 (1974).

2. Section 303(d)(1) of the Federal Coal Mine Health and Safety Act of 1969 requires anemometer checks of the airflow in the mine to be made within the three hours immediately preceding the beginning of each shift. 30 U.S.C. § 863(d)(1) (1970). The instant controversy was initiated when one of the ventilation structures at the mine collapsed, significantly reducing the airflow through the shaft, and causing the mine to be evacuated. When a subsequent check of the Company's records revealed a report of normal airflow for this time period, the state of Pennsylvania instituted criminal proceedings against the three foremen who were responsible for the anemometer checks. 414 U.S. at 371-72.

3. 414 U.S. at 372.

4. *Id.* The Union maintained that the dispute was not arbitrable under the terms of the collective bargaining agreement. Gateway Coal Co. v. Local 6330, UMW, 466 F.2d 1157, 1159 (3d Cir. 1972).

5. Labor-Management Relations Act § 301, 29 U.S.C. § 185 (1970).

6. Gateway Coal Co. v. Local 6330, UMW, 80 L.R.R.M. 2633 (W.D. Pa. 1971).

7. *Id.* at 2634.

8. 414 U.S. at 372-73.

9. *Id.* at 373.

10. Gateway Coal Co. v. Local 6330, UMW, 466 F.2d 1157 (3d Cir. 1972).

11. *Id.* at 1160.

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Geyelin: Labor Law - Arbitration - Presumption of Arbitrability Applicable

ment by a method agreed upon by the parties is desirable.[12] In the *Steelworkers Trilogy*[13] the Supreme Court held that this policy could be effectuated only if collective bargaining provisions were given "full play,"[14] and therefore established a presumption in favor of arbitrability for all contract disputes where the contract contains an arbitration clause.[15]

Section 301 of the Act confers jurisdiction upon the federal courts to entertain suits by both parties for violations of the terms of their collective bargaining agreement.[16] In *Textile Workers Union v. Lincoln Mills*[17] the Supreme Court declared that section 301 authorized the development of a body of *substantive* federal law, "which the courts must fashion from the policy of our national labor laws."[18] Federal jurisdiction, however, was not to be exclusive; in *Dowd Box Co. v. Courtney,*[19] the Court found that Congress had intended merely to expand forum availability, and held that state courts retained concurrent jurisdiction over labor disputes.[20]

The broad policy behind enforcement of collective bargaining agreements reflected in the language of section 301(a) clearly conflicted with the concept of judicial abstention that had been imposed fifteen years earlier by the Norris-LaGuardia Act.[21] That Act was a response to several decades of judicial intervention on management's behalf in labor controversies,[22] and withdrew from the federal courts the jurisdiction to grant injunctions in peaceful labor disputes.[23] Since a literal reading of section 301(a) appeared

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12. 29 U.S.C. § 173(d) (1970).
13. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).
14. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960).
15. *Id.* at 574, 582, 583 (1960). The Court noted that an order to arbitrate should not be denied unless it was clear that the contract's arbitration clause was "not susceptible of an interpretation that covers the asserted dispute." All doubts were to be resolved in favor of coverage. *Id.*
16. Section 301 provides in part:

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

29 U.S.C. § 185(a) (1970).
17. 353 U.S. 448 (1957).
18. *Id.* at 456. Prior to *Lincoln Mills,* it had been unclear whether Section 301 was substantive or merely procedural, conferring jurisdiction upon the federal courts to apply *state* law to labor disputes. H. WELLINGTON, LABOR AND THE LEGAL PROCESS 99 (1968).
19. 368 U.S. 502 (1962).
20. *Id.* at 506. State courts nonetheless are required to apply federal law.
21. 29 U.S.C. §§ 104 *et seq.* (1970).
22. H. WELLINGTON, *supra* note 18, at 39-40.
23. Section 4 of the Norris-LaGuardia Act provides in part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104 (1970).

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to confer power on the federal courts to provide any appropriate remedy, including the injunction, in suits for violations of collective bargaining agreements, the Supreme Court was faced with the task of reconciling the two statutes.

The Court's initial response relied on the policy underlying the Norris-LaGuardia Act, and prohibited federal courts from issuing injunctions in situations in which workers had violated no-strike clauses in their collective bargaining agreements.[24] However, if the agreement required the parties to submit disputes to binding arbitration, under the decision in *Teamsters Local 174 v. Lucas Flour*[25] management still had the right to sue and recover damages for breach of contract if the union went out on strike.

In 1970 the Court re-evaluated its synthesis of the Norris-LaGuardia and Taft-Hartley Acts, and, in *Boys Markets v. Retail Clerks Union, Local 770*[26], decided that the absence of the injunctive remedy presented a serious impediment to the congressional policy favoring the arbitration of labor disputes.[27] Observing that the "core purpose" of the Norris-LaGuardia Act would not be sacrificed by a limited use of equitable remedies, the Court allowed injunctive relief where the collective bargaining agreement provided for mandatory arbitration procedures and contained a no-strike provision.[28]

Even after *Boys Markets* a labor walkout could not be enjoined, no matter what the Union's contractual obligations, if the strike grew out of a good faith belief in the existence of abnormally dangerous conditions at the job: under section 502 of the Taft-Hartley Act this conduct was not deemed a strike and therefore was not a violation of any collective bargaining agreement.[29] Although it was not entirely clear what criteria had to be satisfied to bring a walkout within this section, it was generally held that the dangerous condition had to be established by objective evidence.[30]

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24. Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962). While injunctive relief remained available in the state courts, this became a meaningless alternative when the Court subsequently ruled that the action could be removed to federal court. Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968).

25. 369 U.S. 95 (1962).

26. 398 U.S. 235 (1970).

27. *Id.* at 253. The Court noted that an action for damages after a dispute was settled "was no substitute for an immediate halt to an illegal strike." *Id.* at 248.

28. *Id.* at 253-54.

29. Section 502 provides in part:

> [N]or 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 . . . be deemed a strike under this chapter.

29 U.S.C. § 143 (1970).

30. One of the first cases interpreting section 502 was NLRB v. Knight Morley Corp., 251 F.2d 753 (6th Cir. 1957), *cert. denied,* 357 U.S. 927 (1958). In *Knight Morley* objective evidence, including the testimony of an expert witness, was introduced to establish the existence of an abnormally dangerous condition. *Id.* at 758-59. The opinion, however, contained language which indicated that a subjective belief in the dangerousness of the working conditions was sufficient to bring the walkout within section 502. *Id.* at 759. The Eighth Circuit subsequently criticized this portion of *Knight Morley* in NLRB v. Fruin-Colon Constr. Co., 330 F.2d 885 (8th Cir. 1964). The *Fruin-Colon* court held that objective evidence of the existence of an abnormally

In *Gateway* the Court of Appeals interpreted section 502 as an indication of a congressional policy against the arbitration of safety disputes. The Third Circuit determined that the test for inclusion under this section was that of subjective good faith, and then used this finding to reinforce its conclusion that there was no duty to arbitrate on the Union's part.[31]

Against this background Justice Powell, writing for an eight-justice majority, recognized the "considerable importance" of the questions raised by *Gateway* to the development of federal policy towards the arbitration of safety disputes and the enforcement of a contractual duty not to strike.[32] Justice Powell found three questions posed by the case: (1) Did the collective bargaining agreement impose a duty on the parties to submit safety disputes to impartial arbitration? (2) If it did, should that duty create an implied no-strike obligation that would support a *Boys Markets* injunction? (3) Did the circumstances in this case satisfy the traditional equitable considerations that control the availability of injunctive relief?[33] All of these questions were answered in the affirmative.[34]

The Court initially observed that a duty to arbitrate can arise only by contract,[35] and then decided that the "Local Disputes" clause in the Gateway-UMW agreement was broad enough to encompass the instant dispute.[36] The Third Circuit had reasoned that there was sufficient ambiguity in the agreement to make it impossible to state categorically that the Union had bound itself to arbitration.[37] It found an exception to the presumption of arbitrability where safety issues were involved, stressing that walkouts over matters of "life or death" should be treated differently

dangerous situation had to be presented. *Id.* at 892. The National Labor Relations Board, although citing *Knight Morley* as authority, has adopted the objective standard noting that the actual working conditions as shown by "competent evidence" are controlling, not the state of mind of the employees. Redwing Carriers, Inc., 130 N.L.R.B. 1208, 1209 (1961), *enforced as modified*, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964). A more recent Board decision suggests that the employees must also establish the existence of their subjective good faith. Curtis Mathes Mfg. Co., 145 N.L.R.B. 473, 475 n.4 (1963). For a more detailed discussion of the various interpretations which have been given section 502, *see* 76 W. VA. L. REV. 57, 58-62 (1974).

31. 466 F.2d at 1160. The court reasoned that if section 502 relieved workers of a duty not to strike, then it also freed them from any obligation to arbitrate since the two were "opposite sides of a single coin." *Id.* There was a strong dissent. *Id.* at 1161 (Rosenn, J., dissenting).

32. 414 U.S. at 370.

33. *Id.* at 374.

34. The Court's treatment of the third question was very brief; it affirmed the district court's issuance of the injunction, noting that the lower court had found the harm threatened to be irreparable, and indicating that the equitable requirements previously articulated in *Boys Markets* had been met. 414 U.S. at 387-88. Generally, a district court may not issue an injunction under the *Boys Markets* test until: (1) It finds that the parties are contractually bound to arbitrate; (2) it orders the employer to arbitrate as a condition of his obtaining an injunction; and (3) it decides that an injunction would be proper under "ordinary principles of equity." *See* 398 U.S. at 254, *citing* Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 228 (1962) (dissenting opinion).

35. 414 U.S. at 374. The Court emphasized that no obligation to arbitrate can be created solely by operation of law. *Id.*

36. *Id.* at 376.

37. 466 F.2d at 1159.

than strikes over "ordinary" disputes.[38] Following what it saw as a policy against the arbitration of safety disputes, the Third Circuit had refused to find that the collective bargaining agreement required such a procedure in this situation.[39]

The Supreme Court refused to recognize this newly-grafted exception to what it viewed as the well-established policy of encouraging arbitration of all labor controversies.[40] The Court reaffirmed the traditional justifications offered in favor of arbitration by Justice Douglas in *United Steelworkers v. Warrior & Gulf Nav. Co.*[41] — the labor arbitrator has a greater knowledge of the conditions surrounding the contract than does a court of law; the parties choose the arbitrator because of their confidence in his ability; and his decision will not only reflect what the letter of the contract requires, but will capture its spirit as well, taking into account the parties' own specialized needs.[42] The Court observed that these factors were as applicable in the area of safety disputes as in any other, and that the workers' interests would be no more secure if grievances were to be resolved on the basis of the parties' relative economic strengths.[43] Having concluded that the presumption of arbitrability was applicable to safety disputes, the Court held that the *Gateway* controversy was covered by the arbitration section of the collective bargaining agreement.[44]

The Court also rejected the Third Circuit's contention that section 502 was relevant to the arbitration question,[45] noting that this section appeared to be directed more towards relieving unions from their no-strike

38. *Id.* at 1160. The Third Circuit had found support for its position in section 502, which it saw as a "strong legislative mandate" to protect good faith work stoppages over safety disputes from any interpretation of an ambiguity in a labor contract that would submit such an issue to binding arbitration. *Id.*

39. 466 F.2d at 1160.

40. 414 U.S. at 377, *citing* the *Steelworkers Trilogy.*

41. 363 U.S. 574 (1960).

42. 414 U.S. at 378-79, *citing* 363 U.S. at 581-82.

43. 414 U.S. at 379. The Court saw little justification for the Third Circuit's fear that the arbitrator would not fully appreciate the worker's interests in his own safety. The parties were, it noted, always free to choose an arbitrator they trusted. *Id.*

44. *Id* at 379-80. While the logic of the *Gateway* Court may be persuasive in its reconciliation of the differences between the arbitration of safety disputes and those controversies which involve economic issues, its more general premise, that indulging a presumption of arbitrability will lead to a reduction in industrial strife, is subject to some criticism. A presumption in favor of arbitration would seem to have little impact on the labor disputes that arise during the negotiation of collective bargaining agreements. Such a presumption is only effective during the life of the contract itself; even then, if the differences between the parties are felt strongly enough, it may only purchase short-term "peace" at the price of more protracted subsequent industrial strife when the old agreement expires and a new one is being negotiated. One alternative to the present approach would be to have the courts not refer any disputes to arbitration until they had determined that this had in fact been the actual intention of the parties. If an exercise of presumptions in favor of arbitrability is viewed as merely postponing eventual industrial strife, then at least this alternative method has the virtue of being more consistent with the traditional contract law which forms the underpinning of federal policy in this area. Its disadvantage lies in the added burden it places on the courts. *See* H. WELLINGTON, *supra* note 18, at 118-22.

45. *See* note 30 *supra.*

obligations than from their responsibility to arbitrate.[46] A narrow reading of section 502 on this issue had in fact been urged by the dissent in the circuit court; Judge Rosenn saw no reason to conclude that a court's inability to enjoin a walkout under section 502 rendered it equally helpless to enforce a contractual duty to arbitrate.[47] The Supreme Court did not directly address this issue, and the question of whether or not section 502 relieves workers from their duty to arbitrate those safety disputes that fall within its purview remains open.[48]

Justice Douglas dissented from the Court's treatment of the arbitration question. While he did not take issue with the general presumption of arbitrability,[49] he considered that the language of section 502 indicated a legislative intent to protect workers that "seriously weakened" the general policy in favor of arbitration.[50] Having concluded that Congress had not intended to apply the presumption of arbitrability to safety disputes, Justice Douglas concluded that the instant controversy was not arbitrable under the terms of the collective bargaining agreement, and that there had been no wrong to enjoin.[51] In the alternative, even if the bargaining agreement had authorized arbitration of this dispute, Justice Douglas found that such a procedure would be barred by the Coal Mine Health and Safety Act of 1969,[52] which he concluded had displaced all contractual agreements to arbitrate safety disputes in the mining industry.[53]

The other major question before the Court involved the appropriateness of the injunction issued by the district court. Since the Third Circuit had found no duty on the Union's part to arbitrate the dispute, it had not considered it necessary to discuss whether an injunction would have been

46. 414 U.S. at 376 n.8.

47. 466 F.2d at 1162 (Rosenn, J., dissenting).

48. 414 U.S. at 376 n.8. The Court observed that, "[t]o the extent that § 502 might be relevant to the issue of arbitrability, we find that the considerations favoring arbitrability outweigh the ambiguous import of that section *in the present context.*" *Id.* (emphasis added). The "present context" was a walkout that the Court found to be outside of the scope of section 502. *See* note 70 *infra.*

49. Justice Douglas conceded that, in an ordinary case, the exercise of the presumption might well lead to the conclusion that this dispute fell within the arbitration clause of the Gateway-UMW contract. 414 U.S. at 391 (Douglas, J., dissenting).

50. *Id.* Justice Douglas stressed the dangers inherent in coal mining, calling it the "most dangerous occupation in America." *Id.* at 388.

51. *Id.* at 392. If Justice Douglas' opinion is interpreted as an assertion that the alleged congressional exception to its general pro-arbitration policy is coterminous with the applicability of section 502, then it is subject to the rather obvious criticism that this walkout was not one that deserved the protection of that section. *See* note 70 *infra.* If the dispute did not fall within the scope of section 502, then there would appear to be little reason to discard the presumption of arbitrability. Justice Douglas' opinion, however, could also be read as utilizing section 502 only as a specific example of a general congressional policy of separate treatment for safety disputes. Under this view, the actual applicability of section 502 to the facts of this dispute would not be germane.

52. 30 U.S.C. §§ 801 *et seq.* (1970).

53. 414 U.S. at 394 (Douglas, J., dissenting). Justice Douglas interpreted this Act as having established certain safety standards for mines which he feared would be compromised if arbitrators were given any authority in this area. *Id.* The majority could not find congressional intent to accomplish such a "drastic result." 414 U.S. at 380 n.10.

proper in this situation had such an obligation existed.[54] Prior decisions of the Supreme Court had not resolved the issue of whether, absent an express no-strike provision in a collective bargaining agreement, a walkout in violation of a contractual duty to arbitrate could be enjoined by a federal court. In *Lucas Flour* the Court had allowed an employer to recover damages from a union which had struck despite a term in the contract requiring that the dispute be submitted to binding arbitration, even though the agreement did not contain a no-strike clause.[55] In *Boys Markets* the same type of walkout in violation of a contractual duty to arbitrate had been enjoined, but in that case the underlying collective bargaining agreement had included an express covenant by the union not to strike.[56] After *Boys Markets,* the availability of the anti-strike injunction as a means of insuring the specific performance of a duty to arbitrate remained unclear. While dicta in that opinion indicated that an injunction might be an appropriate remedy any time a union violated its agreement to submit a dispute to arbitration,[57] the contract at issue had contained a no-strike clause,[58] and the Court itself had characterized its holding as a "narrow" one.[59]

In *Gateway* the Court discarded many of the self-imposed restraints of *Lucas Flour* and *Boys Markets* and considerably expanded the power of the federal courts to enjoin violations of collective bargaining agreements. While recognizing that a no-strike clause had been present in *Boys Markets,* the Court nevertheless held that injunctive relief could also be granted on the basis of an *implied* duty not to strike.[60] Although the parties could avoid such a result by an express contractual negation of any no-strike obligation, "absent an explicit expression of such an intention . . . the

54. *See* 466 F.2d at 1160 n.1.

55. 369 U.S. at 104–05. The Court was willing to imply the no-strike clause because such a term is considered the *quid pro quo* for a binding arbitration clause. The Court indicated, however, that it did not suggest that a no-strike agreement should be implied beyond the area that the parties had agreed would be exclusively covered by binding arbitration. *Id.* at 106.

56. 398 U.S. at 239.

57. For example, ". . . a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration." *Id.* at 247–48 (emphasis supplied by the Court).

58. *Id.* at 248 n.16.

59. *Id.* at 253. The Court pointed out that its decision did not mean that injunctive relief would be appropriate "as a matter of course" in every case of a walkout over an arbitrable grievance. *Id.* at 253–54.

Because of such language, a number of courts and commentators were unwilling to undertake an expansive reading of *Boys Markets.* The Second Circuit refused to enjoin a strike where the union presented a "colorable claim" that the walkout was within a specific exception to its express no-strike obligation. Standard Food Prod. Corp. v. Brandenburg, 436 F.2d 964, 966 (2d Cir. 1970). The Third Circuit thought that *Boys Markets* only applied to situations where there was an express no-strike agreement. Avco Corp. v. Local 787, 459 F.2d 968, 972 (3d Cir. 1972). *See* Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability,* 85 HARV. L. REV. 636 (1972); Comment, *The Return of the Strike Injunction,* 51 BUFFALO L. REV. 665 (1971).

60. 414 U.S. at 381. The Court relied on the broader dicta in *Boys Markets* to support its position that to deny equitable relief for breaches of no-strike "obligations" (not agreements) would be "devastating" to the enforcement of arbitration agreements. *Id.* at 382, *quoting* 398 U.S. at 247. Justice Douglas did not address this issue in his dissent.

agreement to arbitrate and the duty not to strike should be considered as having coterminous application."[61]

The Court's decision to extend injunctive relief to the situation where the union is under an implied duty not to strike appears to be a reasonable one. An employer who binds himself to arbitrate disputes with his union clearly sacrifices a degree of economic and administrative independence in return for a promise, express or implied, that the union will not interrupt his business with a strike. If an employer cannot rely on this promise then his incentive for entering into arbitration agreements certainly lessens, and to this extent the federal goal of industrial peace via the arbitration method will suffer.[62] Furthermore, the policies underlying the anti-injunction sections of the Norris-LaGuardia Act do not appear to be greatly affected by the decision in *Gateway,* as the union is vulnerable to the injunctive sanction only if it violates its own contract to arbitrate, a danger the union can avoid if it expressly reserves the right to strike within the collective bargaining agreement.[63]

While the *Gateway* decision may be supported as another logical step in the development of an effective national labor policy, it is somewhat difficult to defend in terms of traditional principles of contract law. As Justice Black pointed out in his dissent to *Lucas Flour,* the presence or absence of a no-strike clause in a collective bargaining agreement would appear to represent a deliberate choice by the parties to that contract.[64] The *Gateway* Court, however, applied a presumption of arbitrability to support its conclusion that the parties had intended to submit the dispute in question to arbitration, and then held that, absent an express disclaimer of a no-strike obligation, the union would also be presumed to have intended to contract away the right to strike — its most effective economic weapon. While the intent of the parties remains the final control over the availability of injunctive relief,[65] after *Gateway,* unions that wish to avail themselves of the protection of the anti-injunction provisions of section 4 of the Norris-LaGuardia Act while retaining the advantages of binding arbitration would be well advised to incorporate that desire into the terms of the collective bargaining agreement.

Having adopted what was in effect a presumption in favor of a no-strike obligation, the Court examined the Third Circuit's interpretation of section 502 of the Taft-Hartley Act.[66] Although it recognized that section

61. 414 U.S. at 382.
62. *See The Supreme Court, 1969 Term,* 84 HARV. L. REV. 1, 199–201 (1970).
63. *Id.* at 200.
64. 369 U.S. at 107 (Black, J., dissenting).
65. 414 U.S. at 382.
66. *Id.* at 385–87. The Third Circuit had actually used section 502 to demonstrate the absence of a duty to arbitrate on the Union's part, and never reached the strike injunction issue. 466 F.2d at 1160. *See* note 30 *supra.* The Supreme Court rejected this analysis. 94 S. Ct. at 376 n.8.

The Third Circuit had also relied on section (e) of the collective bargaining agreement to establish that this dispute was not arbitrable. 466 F.2d at 1160. Section (e) established a procedure whereby the mine could be evacuated if the mine safety

502 was not applicable to the facts of the instant case,[67] the Supreme Court conceded that the section did provide a "limited exception to an express or implied no-strike obligation,"[68] and seized this opportunity to clarify the standard which had to be satisfied in order to bring a walkout within its scope. The Third Circuit had relied on section 502 to establish the existence of a congressional policy against the arbitration of safety disputes.[69] While the court of appeals had not specifically found that the *Gateway* walkout fell within the scope of section 502,[70] it had indicated that the appropriate test for non-enjoinable activity under that section was "a refusal to work because of a good faith apprehension of physical danger."[71] The Supreme Court disagreed and declared that to bring a walkout within section 502 a union must present "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists."[72] Absent such objective evidence, courts would face a "wholly speculative" inquiry into the workers' motives.[73]

It is submitted that the standard which the Supreme Court established for section 502 is preferable to the one adopted by the court of appeals since it is far easier for courts to administer, and, with its objective criteria, establishes a much more effective control over potential abuse[74] of what has heretofore been a very limited exception to a union's no-strike obligation.

In conclusion, *Gateway* has clarified much of what *Boys Markets* had left unresolved. The Court's decision is significant not only for its extension of injunctive relief to those situations wherein a no-strike obligation can only be implied, but also for its willingness to take such a step in cir-

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committee found a condition of immediate danger. The collective bargaining agreement stated that compliance with this procedure would not constitute a violation of the contract. 414 U.S. at 383. The Third Circuit found that there had been substantial compliance with this procedure. 466 F.2d at 1158. The Supreme Court was unwilling to reach the same conclusion; it noted that this was, in any event, a question of contractual interpretation — just the type of dispute which was, under the terms of the collective bargaining agreement, subject to arbitration. 414 U.S. at 384.

67. 414 U.S. at 387. The Court noted that the district court had resolved this issue by conditioning the issuance of the injunction on the continued suspension of the foremen pending the outcome of the arbitration. *Id.*

68. *Id.* at 385.

69. *See* note 38 *supra.*

70. Section 502 would seem to be inapplicable to the *Gateway* dispute for several reasons: (1) It is not clear whether the negligence of a fellow employee constitutes the "abnormally dangerous condition" contemplated by the Act; (2) the Union apparently never raised the issue at the district court level; and (3) all the employees at the mine walked off the job, not merely the workers on the same shift with the "abnormally dangerous" foremen.

71. 466 F.2d at 1160.

72. 414 U.S. at 387, *quoting* 466 F.2d at 1162 (Rosenn, J., dissenting). The test adopted by the Court is in accord with prior decisions interpreting this section in the lower courts. *See* note 30 *supra.* Justice Douglas did not indicate what he considered to be the proper test to apply for inclusion within the exemption provisions of section 502.

73. 414 U.S. at 386.

74. Judge Rosenn was particularly concerned with this aspect of the Third Circuit's subjective good faith standard. *See* 466 F.2d at 1161 (Rosenn, J., dissenting).