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Labor Law - The Effect of a General No-Strike Clause on the Right to Sympathy Strike: A Clear and Unmistakable Waiver

Richelle Sandmeyer Maestro

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LAW—THE EFFECT OF A GENERAL NO-STRIKE CLAUSE ON THE RIGHT TO SYMPATHY STRIKE: A CLEAR AND UNMISTAKABLE WAIVER

International Brotherhood of Electrical Workers, Local 803 v. NLRB (1987)

The National Labor Relations Act ("N.L.R.A." or "the Act") grants employees the right to form and join labor organizations, bargain collectively with their employers through such organizations and engage in other concerted activities for their mutual aid and protection. The right to strike and the right to honor picket lines are included in the right to engage in concerted activities. While these rights are statutory in origin, the union may waive them in a collective bargaining agreement. Such a waiver may be implied by the existence of an arbitration clause in the contract or may be explicitly stated in a no-strike clause.

1. 29 U.S.C. § 157 (1982). Section 7 of the N.L.R.A. provides in pertinent part: "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. See Delaware Coca-Cola Bottling Co. v. General Teamster Local Union 326, 624 F.2d 1182, 1184 (3d Cir. 1980) (right of employees to engage in sympathy strike protected under N.L.R.A.).

3. See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) ("[T]he union may even bargain away [the employee's] right to strike during the contract term, and his right to refuse to cross a lawful picket line."); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1956) (waivers of employees' right to strike "contribute to the normal flow of commerce and to the maintenance of regular production schedules"); NLRB v. Rockaway News Supply Co., 345 U.S. 71, 80 (1953) (no-strike provisions may be agreed upon by parties when appropriate to business involved); Delaware Coca-Cola, 624 F.2d at 1184 (right to engage in sympathy strike can be waived in collective bargaining agreement).


Justice Brennan explained the connection between an arbitration clause and a no-strike obligation in Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), when he noted that "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 248 (citing Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)).

This Casebrief will be limited to a discussion of express no-strike clauses.

5. Boys Markets, 398 U.S. at 248 (no-strike obligation may be express or implied); Delaware Coca-Cola, 624 F.2d at 1185 ("[A] no-strike obligation may be
but in any case must be "clear and unmistakable." 6

Many labor contracts contain a generally worded no-strike clause which does not specifically state that the right to engage in "sympathy strikes"7 has been waived. 8 The United States Court of Appeals for the Third Circuit addressed the issue of whether such a clause acts as a waiver in International Brotherhood of Electrical Workers, Local 803 v. NLRB 9 (IBEW, Local 803). The court held that the no-strike clause in that case did extend to sympathy strikes. 10 The Third Circuit pointed to the fact that the waiver was both comprehensive and "clear and unmistakable." In making this determination, the court looked to both the language in the agreement and extrinsic evidence. 11

IBEW, Local 803 involved a dispute between Metropolitan Edison Company (Met. Ed.) and members of the International Brotherhood of Electrical Workers, Local 803 (Local 803). 12 The collective bargaining

created in one of two ways: by implication from the arbitration clause or by an express clause in the contract."

6. Metropolitan Edison Co. v. NLRB, 663 F.2d 478, 482 (3d Cir. 1981) ("[A]lthough statutory rights may be waived, courts will generally not find a waiver unless it is clear and unmistakable."). aff. d, 460 U.S. 695 (1983); Delaware Coca-Cola, 624 F.2d at 1187-88 (general rule is that waiver must be clear and unmistakable); United Steelworkers v. NLRB, 536 F.2d 550, 555 (3d Cir. 1976) ("waiver of a statutory right must be clearly and unmistakably established") (citations omitted).

7. A sympathy strike has been defined as one that takes place whenever workers refuse to work, either by a concerted decision to walk out or by a refusal to cross picket lines established by others, not because they have any grievance against or dispute with their own employer, but rather because they wish to support other workers in a dispute with their employer. Frequently, but not always, the workers involved belong to unions, and the sympathetic workers belong to a different union than the original strikers. The two groups of workers may be employed by the same or different employers.


8. See Comment, Labor Law—The Presumption Against the Application of No-Strike Clauses Toward Sympathy Strikes is Revoked: Indianapolis Power & Light Co., 12 J. Corp. L. 123, 124 (1986) ("[N]o strike provisions rarely indicate whether sympathy strikes are one of the particular kinds of work stoppages forbidden by the no-strike clause.").

For the text of one such general no-strike clause which was analyzed by the United States Court of Appeals for the Third Circuit in International Brotherhood of Electrical Workers, Local 803 v. NLRB, 826 F.2d 1283 (3d Cir. 1987), see infra note 15.

9. 826 F.2d 1283 (3d Cir. 1987).

10. Id. at 1299.

11. Id. For a discussion of the court's reasoning, see infra notes 39-63 and accompanying text.

12. Id. at 1284. Met. Ed. is an electric utility, headquartered in Reading, Pennsylvania. Id. The International Brotherhood of Electrical Workers, AFL-CIO (IBEW), organized into five local unions (including Local 803), represented approximately 1600 of Met. Ed.'s operating employees. Id. The five local unions bargained jointly for one collective bargaining agreement governing the entire utility system. Id.
agreement in dispute contained both a Grievances and Arbitration clause and a No Strikes-No Lockouts clause. Identical clauses had appeared in all contracts between the parties for at least twenty-five years.

During the term of the contract, Met. Ed. was installing a transformer at Berks TV Cable Company, a Met. Ed. customer. The Reading Building and Trades Council maintained an informational picket line at Berks TV at the time the installation work was scheduled, and a Met. Ed. work crew represented by Local 803 refused to cross the picket line to complete the installation. Met. Ed. advised the union that employees who continued to refuse to cross the picket line would be subject to disciplinary action. Thereafter, the employees crossed the picket line and completed the installation. Although no disciplinary action was taken, Local 803 filed a charge against Met. Ed., alleging that the threat of discipline constituted an unfair labor practice under section

13. This contract was in effect from May 1, 1981, through April 30, 1983.
14. The “Grievances and Arbitration” clause, Article IX of the agreement, defined a grievance as “a violation of the law governing employer-employee relationship, or a violation of the terms of this agreement, or any type of supervisory conduct which unjustly causes any employee to lose his/her job or any benefits arising out of his/her job.” The clause further provided:
   Should a dispute arise between the Brotherhood and the Company as to any unadjusted grievance or as to the rights of either party under this agreement, both parties shall endeavor to settle such matters, as promptly and timely as possible under the circumstances, in the simplest and most direct manner. . . .
15. The “No Strikes-No Lockouts” clause provided:
   The Brotherhood and its members agree that during the term of this agreement there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public.
16. The Reading Building and Trades Council is a construction industry union.
17. The informational picket line was established at Berks TV on April 8, 1981. A Met. Ed. crew was originally assigned to the Berks TV site on June 15, 1981. While this crew refused to cross the picket line, it did complete the assigned work after the picket line departed for the day. Met. Ed. assigned a second crew to the Berks TV site on June 18, 1981. This crew refused to cross the picket line and did not immediately complete the installation work assigned.
18. Met. Ed. threatened disciplinary action on June 22, 1981, following the employees’ continued refusal to cross the picket line as of June 18, 1981.
19. The Met. Ed. work crew completed the transformer installation in the period between June 23 and June 28, 1981.
8(a)(1) of the N.L.R.A.\textsuperscript{22} An Administrative Law Judge (A.L.J.) conducted a hearing on the charge\textsuperscript{23} and concluded that "absent extrinsic evidence concerning the parties' intent, the general no-strike clause contained in the parties' contract could not be read to clearly and unmistakably waive the employees' statutorily protected right to engage in a sympathy strike."\textsuperscript{24} The N-

\textsuperscript{22} Id. Section 8(a)(1) of the N.L.R.A. provides in pertinent part: "(a) It shall be an unfair labor practice for an employer—\(1\) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . ." 29 U.S.C. \$ 158(a)(1) (1982). For a discussion and the text of section 157, see supra note 1 and accompanying text.

\textsuperscript{23} 826 F.2d at 1285. For a discussion of the procedures by which an unfair labor charge is heard by an administrative law judge, the National Labor Relations Board (Board or NLRB) and, eventually, the federal court system, see generally R. Gorman, Basic Text on Labor Law, Unionization and Collective Bargaining 7-20 (1976). See also 29 U.S.C. \$ 160 (1982) (discussing the Board's powers).

The NLRB has regional offices in major cities across the United States. R. Gorman, supra, at 7. To institute an unfair labor practice case, the aggrieved party generally files a charge with the regional office where the wrongdoing occurred. \textit{Id}. The regional office then investigates the charge and decides whether to issue a complaint against the charged party. \textit{Id}. at 7-8.

If a complaint is issued the case is tried before an A.L.J. \textit{Id}. at 8. The A.L.J. conducts the hearing in a manner similar to a federal court proceeding. \textit{Id}. The A.L.J. then prepares a decision (or "intermediate report") containing factual findings, conclusions of law and a recommended disposition. \textit{Id}.

The Board generally endorses the A.L.J.'s decision if no exceptions to the intermediate report are filed. \textit{Id}. If, however, exceptions are filed, the Board formally reviews the case. \textit{Id}. at 8-9. The Board must dismiss the complaint "unless it finds 'upon a preponderance of the testimony taken' that an unfair labor practice has been committed. . . ." \textit{Id}. (quoting 29 U.S.C. \$ 160(c) (1982)). If the Board determines that an unfair labor practice has been committed it must issue a "cease and desist" order. \textit{Id}. Other relief, such as reinstatement or backpay, may also be ordered as appropriate. \textit{Id}.

Judicial review of a Board decision may occur in two ways. If the Board seeks enforcement of its order against an unwilling party, it may petition a federal court of appeals to convert the Board order into a court order. \textit{Id}. at 10. In addition, "any person aggrieved by a final order of the Board" may seek judicial review by a federal court of appeals. \textit{Id}. (quoting 29 U.S.C. \$ 160(f) (1982)). Upon review, the court must consider the whole record, including evidence that supports as well as undermines the Board's findings of fact. \textit{Id}. at 11. The court owes deference to the Board's findings of fact not only when the findings relate to a matter in which the Board has expertise, but also when the Board's findings are reasonable. \textit{Id}. Courts are generally less deferential toward the Board's conclusions of law. \textit{Id}. at 13. However, the Board's remedial order may not be overturned unless it is demonstrated that the order was designed to serve some purpose other than furthering the policies of the N.L.R.A. \textit{Id}. at 14 (citing Virginia Elec. & Power Co. v. NLRB, 44 N.L.R.B. 404, enforced, 132 F.2d 390 (4th Cir. 1943), \textit{aff'd}, 319 U.S. 533 (1943)).

\textsuperscript{24} 826 F.2d at 1285. Thus, the A.L.J. decided that Met. Ed. violated section 8(a)(1) of the N.L.R.A. \textit{Id}. For a discussion and the text of section 8(a)(1), see supra note 22 and accompanying text.

In reaching this decision the A.L.J. relied on the Board's decision in International Union of Operating Engineers, Local Union 18 (\textit{Davis-McKee}), 238 N.L.R.B. 652 (1978). In that case, the union disciplined two of its members for
tional Labor Relations Board (the Board), however, reversed the A.L.J. and dismissed the complaint. The Board held that the right to engage in sympathy strikes is waived by a general no-strike clause unless extrinsic evidence demonstrates that the parties intended otherwise. The Board subsequently charged that the union violated section 8(b)(1) of the N.L.R.A. by this disciplinary action. An A.L.J. dismissed the complaint, and the Board affirmed. Section 8(b)(1) provides in relevant part: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." 29 U.S.C. § 158(b)(1) (1982).

The outcome of the Davis-McKee case turned on whether the union had waived its members' right to sympathy strike; if so, sympathy striking would have been an unprotected activity and the union would have violated section 8(b)(1)(A) by disciplining its members for refusing to participate. 238 N.L.R.B. at 652. The Board asserted, "[w]aiver may be found in express contractual language or in unequivocal extrinsic evidence bearing upon ambiguous contractual language." Id. Applying this standard, the Board determined that a waiver of the right to sympathy strike would not be inferred solely from general no-strike language (the contract in question contained an agreement to refrain from all "stoppages of work"). Id. at 652-53. In order for a waiver to be inferred, the Board asserted that, at a minimum, the parties must have specifically discussed the issue in the collective bargaining process; the Board preferred a more explicit expression in the agreement itself of the intent of the parties. Id. at 653.

Within this framework, the Board concluded that Local 18 had not waived its members' right to sympathy strike by a general no-strike provision. Id. at 655. Therefore, the union did not violate section 8(b)(1) of the N.L.R.A. when it disciplined its two members. Id. at 652.

In IBEW, Local 803, the A.L.J., using the standard set forth in Davis-McKee, considered the following evidence: (1) in a separate unfair labor practice proceeding the union had stipulated that the no-strike clause was not intended to be determinative of the union's right to sympathy strike; (2) the contractual language itself did not specifically address sympathy strikes and no evidence was presented regarding discussions between the parties on the issue; (3) prior arbitration awards construing the no-strike clause as prohibiting sympathy strikes were not considered determinative because those awards were binding only for the term of the contracts then effective and the arbitrators in those decisions failed to consider extrinsic evidence when interpreting the clause; and (4) there was no evidence of the parties' intent to provide "uninterrupted and continuous service to the public," even though the collective bargaining agreement used that phrase. 826 F.2d at 1285-86. The A.L.J. concluded that the union had not waived its members' right to sympathy strike and, therefore, Met. Ed. had violated its employees' rights when it threatened to discipline them. Id. at 1286.

26. Id. The Board relied on its previous decision in Indianapolis Power & Light Co., 273 N.L.R.B. 1715 (1985), remanded sub nom. Local Union 1395, International Brotherhood of Electrical Workers v. NLRB, 797 F.2d 1027 (D.C. Cir. 1986). In that case, Indianapolis Power assigned an employee to read a meter at Indiana Bell Telephone. 273 N.L.R.B. at 1715. When he arrived, Bell employees were picketing and Indianapolis Power's employee refused to cross the picket line. Id. Indianapolis Power suspended the employee and warned him that failure to complete a job assignment due to refusal to cross a picket line was cause for termination. Id. Indianapolis Power asserted that the union had
Board found no such evidence of an alternative intention under the facts of the case.\textsuperscript{27} Local 803 appealed the decision.\textsuperscript{28}

The Third Circuit began its analysis with a review of section 7 of the N.L.R.A.\textsuperscript{29} and the contractual waiver of statutorily granted rights.\textsuperscript{30} Recognizing that a waiver of the statutory right to strike must be “clear and unmistakable,” the court noted that “any analysis of the waiver issue must begin with an identification of the no-strike obligation in the parties’ contract and a determination of its scope.”\textsuperscript{31}

The court next reviewed the standards in the Third Circuit which govern interpretation of a union’s no-strike obligation.\textsuperscript{32} In *Delaware*

waived its members’ right to engage in sympathy strikes by a no-strike clause in their contract. *Id.* The agreement in question read as follows:

\textit{[T]he Union and each employee covered by the agreement agree not to cause, encourage, permit or take part in any strike, picketing, sit-down, stay-in, slow-down, or other curtailment of work or interference with the operation of the Company’s business, and the Company agrees not to engage in a lock-out.}

*Id.*

The Board agreed with Indianapolis Power and concluded that the no-strike clause barred the employees from engaging in a sympathy strike. *Id.* The Board announced a new standard to govern waiver of the right to sympathy strike under a general no-strike clause. Such clauses, the Board stated, prohibit sympathy strikes unless extrinsic evidence indicates that the parties intended to exclude sympathy strikes from the ban. *Id.* The Board recognized its departure from the standard set forth by previous Boards. However, it stated that it could “discern no logical or practical basis for the proposition that the prohibition of all ‘strikes’ does not include sympathy strikes merely because the word ‘sympathy’ is not used.” *Id.* Holding that the no-strike clause constituted a clear and unmistakable waiver of the employees’ right to sympathy strike, the Board concluded that the employees’ refusal to cross the picket line at Bell was not a protected activity under section 7 of the N.L.R.A. *Id.* Therefore, Indianapolis Power was free to discipline him. *Id.* at 1716.

Based on *Indianapolis Power*, the Board concluded in *IBEW, Local 803* that Local 803’s agreement to a general no-strike clause constituted a waiver of the right to engage in a sympathy strike. 826 F.2d at 1286-87. Therefore, Met Ed.’s threat of discipline to employees who refused to cross the picket line was not a violation of section 8(a)(1) of the N.L.R.A. *Id.* at 1287. For the text of section 8(a)(1) of the N.L.R.A., see *supra* note 22.

27. 826 F.2d at 1286. The Board noted the lack of evidence of either bargaining history or past practice which would demonstrate the parties’ intent to exclude sympathy strikes from the no-strike obligation. *Id.*

28. *Id.* at 1287. The court of appeals had jurisdiction to hear appeals from Board decisions pursuant to section 10(f) of the N.L.R.A. (codified at 29 U.S.C. § 160(f) (1982)).


30. 826 F.2d at 1287-89. For a discussion of the waiver principles that governed this case, see *supra* notes 3-6 and *infra* notes 32-38 and accompanying text.

31. *Id.* at 1287. The court noted that “the complexity of the waiver determination is compounded by the fact” that the scope of a no-strike obligation can be implied from the arbitration provision or can be expressed in the contract. *Id.* For a discussion of implied and express no-strike obligations, see *supra* notes 4-5 and accompanying text.

32. *Id.* at 1288-89. The court began its discussion with a review of United
Coca-Cola Bottling Co. v. General Teamster Local Union 326, the court specifically considered the question involved in IBEW, Local 803: "whether an express no-strike clause . . . would waive the right to engage in a sympathy strike." In Delaware Coca-Cola, the court concluded that a general no-strike clause alone was not enough to waive the right to engage in a sympathy strike.35

States Steel Corp. v. UMW, 548 F.2d 67 (3d Cir. 1976), cert. denied, 431 U.S. 968 (1977). In that case, the contract did not contain a no-strike clause but did contain detailed provisions for the arbitration of grievances. 548 F.2d at 70. U.S. Steel brought an action against the union to recover money damages when its employees went on strike. Id.

The trial court concluded that the work stoppage was a sympathy strike. Id. The Third Circuit applied the coterminous interpretation doctrine which, based on the presumed contractual connection between an arbitration clause and a no-strike obligation, limits the no-strike obligation to arbitrable disputes. Because the contract did not contain an express no-strike clause, the union's no-strike obligation was, under the coterminous interpretation doctrine, co-extensive with the arbitration provision. Therefore, liability for money damages turned on a determination of whether the dispute underlying the strike was arbitrable. Id. at 72. Because the strike was a sympathy strike, the underlying cause was not a dispute with U.S. Steel and was not, therefore, subject to arbitration. Id. at 73. Since the strike was not precipitated by an arbitrable grievance, the court concluded that the sympathy strike did not constitute a violation of the union's no-strike obligation as implied by the arbitration clause. Id. For a discussion of coterminous interpretation, see infra note 35.

33. 624 F.2d 1182 (3d Cir. 1980).

34. Id. at 1185. In Delaware Coca-Cola, General Teamster Local 326 represented production and maintenance employees and drivers at Delaware Coca-Cola Bottling Company's Wilmington, Delaware plant. Id. at 1183. The contract between the union and the employer covering the production and maintenance workers contained a three-step grievance procedure that culminated with arbitration. Id. It also contained a no-strike clause which provided as follows:

The Union will not cause nor will any member of the bargaining unit take part in any strike, sit-down, stay-in, slow down in any operation of the Company or any curtailment of work or restriction of service or interference with the operation of the Company or any picketing or patrolling during the term of this Agreement.

Id. The contract also granted the employer the right to discipline any employee who participated in a strike or slow-down during the term of the contract. Id. at 1183-84.

After several months of unsuccessful negotiations between the company and its drivers, as well as unsuccessful personnel transfers, the drivers established a picket line at the plant. Id. at 1184. For nine days the production and maintenance employees refused to cross the drivers' picket line. Id. The drivers continued to picket for approximately two weeks following the production and maintenance workers' return to work. Id.

The employer brought suit for money damages against the union under section 301 of the N.L.R.A., 29 U.S.C. § 185 (1982), charging that the production and maintenance employees' work stoppage violated the no-strike clause in the collective bargaining agreement. 624 F.2d at 1184. The trial court found that the work stoppage was a sympathy strike and that the production and maintenance employees had waived the right to engage in such a strike by the no-strike clause. Id. Therefore, the court awarded damages of $67,922.85 plus interest to the employer. Id.

35. 624 F.2d at 1185, 1187. The court based its decision in part on the
The Third Circuit again analyzed an express no-strike obligation as it related to a strike over a non-arbitrable issue in *Pacemaker Yacht Co. v. NLRB.*36 In that case, the court found that a general no-strike clause waived the employees' right to engage in such a strike.37 The *Pacemaker*
doctrine of coterminous interpretation. *Id.* at 1186-87. The court defined coterminous interpretation as follows:
Coterminous interpretation means that if the subject matter of the strike is arbitrable, then the strike violates the no-strike clause. The theory underlying this is that the no-strike clause is a quid pro quo for the arbitration clause. In short, the obligation to not strike is read to be an obligation to not strike over arbitrable issues. *Id.* at 1185-86 (citation omitted).
The court found authority for this position within the Third Circuit in United States Steel Corp. v. UMW, 548 F.2d 67 (3d Cir. 1976), cert. denied, 431 U.S. 968 (1977). While *United States Steel* involved an implied rather than express no-strike obligation, the court reasoned that the quid pro quo theory was equally applicable where the union expressly gave up its right to strike. 624 F.2d at 1186. The court found further support for its position in Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976), a suit for injunctive relief in which the Supreme Court applied these same principles. For a discussion of *Buffalo Forge*, see *supra* notes 79-82 and accompanying text.
While the *Delaware Coca-Cola* court recognized that the application of coterminous interpretation depended on the facts of each case, it concluded that, absent evidence to the contrary, the restrictions under the no-strike clause would presumptively be limited to the terms of the arbitration clause. 624 F.2d at 1187.
In addition to the express language in the contract, the court in *Delaware Coca-Cola* reviewed the extrinsic evidence used by the trial court to support its decision. *Id.* at 1188-90. The court concluded that none of the evidence demonstrated that the union intended for the no-strike clause to waive the production and maintenance employees' right to sympathy strike. *Id.* at 1190.
37. *Id.* at 460. In *Pacemaker Yacht*, under the terms of a collective bargaining agreement, the employer contributed money to a union administered fund that provided employee health and welfare benefits. *Id.* at 456. The collective bargaining agreement contained two no-strike clauses; one clause was within the grievance procedure clause while the other was a separate “No Strikes or Lockout” clause. *Id.* at 458. In this second clause the company agreed not to lockout the employees and the union agreed not to strike or otherwise interrupt the company's operations. *Id.* The company retained the right to take disciplinary action, including discharge, in the event one or more employees failed to abide by the agreement. *Id.*
The fund failed to pay the premiums to the union’s insurance company and, as a result, employee claims were not paid. *Id.* at 456. Although the employer satisfied all of its obligations under the collective bargaining agreement, the employees went on strike to protest the fund’s delinquency. *Id.* Both the union and the employer warned the striking employees that the work stoppage was in violation of their contract, and the employer threatened the striking workers with termination. *Id.* One hundred twenty-six employees were discharged as a result of the strike; subsequently, the company reinstated all but the strike instigators following an arbitration award. *Id.* at 456-57. In response, the union filed an unfair labor practice charge against the employer on behalf of the discharged employees. *Id.* at 457.
An A.L.J. held that the union had waived its members' right to strike in the collective bargaining agreement, and dismissed the complaint. *Id.* The Board reversed, reasoning that since this strike was precipitated by an unforeseeable
Yacht court specifically noted that Delaware Coca-Cola did not stand for the proposition that "a general no-strike clause may never waive the right to strike over unspecified, nonarbitrable disputes." 38

Against this background, the IBEW, Local 803 court addressed the specific issues raised by this case and the arguments presented by Local 803. The union first argued that the Board's position regarding general no-strike clauses, as reflected in its decision in Indianapolis Power & Light Co., 39 was inconsistent with the policies underlying the N.L.R.A. 40 In that decision, the Board established the presumption that a general no-strike clause encompasses sympathy strikes absent evidence of contrary intent. 41 Local 803 contended that Indianapolis Power was inconsistent with the generally accepted principle that a waiver of the right to strike must be "clear and unmistakable," and that adoption of the rule in Indianapolis Power could result in "a substantial risk of inadvertent relinquishment" of statutory rights. 42

event, the union could not have clearly and unmistakably waived its right to strike in these circumstances. Id.

The Third Circuit, noting that "coterminous interpretation . . . is not a rule of law, but merely a tool of contract interpretation," determined that the second no-strike clause was not given in exchange for the grievance and arbitration clause. Id. at 457-58. Therefore, coterminous interpretation was not applicable, meaning that the no-strike clause was not limited to arbitrable disputes but barred strikes over non-arbitrable disputes as well. Id. at 458-59.

The court rejected the Board's reasoning that, absent extrinsic evidence as to the parties' intent, this no-strike clause did not constitute a clear and unmistakable waiver of the right to engage in a strike over a non-arbitrable issue. Id. at 458. Rather, the court held that when the no-strike clause is not coterminous with the arbitration clause the only requirement is a "clear and unmistakable comprehensive waiver." Id. Evidence that the parties intended the no-strike clause to encompass precisely the type of strike that occurred is not necessary. Id. The court further supported its holding by noting that union officials advised the employees that their action was prohibited by the no-strike clause. Id. at 459. In addition, the court inferred from the inclusion of two separate no-strike clauses that the parties intended to waive the right to strike, even over unforeseeable disputes. Id.

38. Id. at 459-60 (emphasis added).
40. 826 F.2d at 1289.
41. 273 N.L.R.B. at 1715. For a discussion of Indianapolis Power, see supra note 26.
42. 826 F.2d at 1289 (quoting Brief for Petitioner at 19, IBEW, Local 803, 826 F.2d 1283 (No. 86-3302)). For the text of the no-strike clause here at issue, see supra note 15 and accompanying text. For a discussion of the clear and unmistakable standard, see supra notes 4-6 and accompanying text.

The court interpreted the union's position as an assertion that "a broad no-strike clause can never constitute a clear and unmistakable waiver of the right of employees to honor a picket line." 826 F.2d at 1290. The court noted that a similar contention was rejected by the United States Court of Appeals for the District of Columbia Circuit in Local Union 1395, International Brotherhood of Electrical Workers v. NLRB, 797 F.2d 1027 (D.C. Cir. 1986). 826 F.2d at 1290. That court relied on the Supreme Court's decision in NLRB v. Rockaway News
The Third Circuit disagreed with the Union's assertion and noted that the Supreme Court's decision in *NLRB v. Rockaway News Supply Co.* supported its conclusion. The court stated that, "Rockaway News thus establishes, at a minimum, that nothing in the Act prevents the Board or a court from finding a waiver of the right to honor picket line in a contractual no-strike clause of sufficient breadth." In rejecting Local 803's argument, the court reasoned that the union's attempt to minimize the significance of the contractual language threatened to undermine the collective bargaining process, which is the foundation of the N.L.R.A.

The union also argued that the Board's *Indianapolis Power* rule violated settled principles of contract interpretation as developed in the line of cases applying the doctrine of coterminous interpretation. This doctrine directs that the scope of a no-strike obligation will be limited by arbitration provisions. The union asserted that *Delaware Coca-Cola*, which applied coterminous interpretation to a section 301 action for money damages, was precisely on point, and required a holding that the general no-strike clause did not constitute a waiver of the right to sympathy strike unless Met. Ed. could point to contrary evidence. The


34. 345 U.S. 71 (1953).

35. 826 F.2d at 1299. In *Rockaway News*, a truck driver refused to cross a stranger picket line he encountered at one of his regularly scheduled pick-up stops. 345 U.S. at 72-73. After two days of refusing to cross the picket line, the employer informed the driver that he would be fired immediately if he continued to refuse to cross the line. *Id.* at 73. All other drivers employed by Rockaway News crossed the picket line. *Id.* at 74. The collective bargaining agreement between Rockaway News and the employee's union contained a no-strike clause. *Id.* The Court held that the no-strike and arbitration clauses in the contract were valid and, in light of such clauses, dismissal of the employee for refusing to cross a stranger picket line was not an unfair labor practice. *Id.* at 81.

36. 826 F.2d at 1289-90 (quoting Local Union 1395, Int'l Bhd. of Elec. Workers v. NLRB, 797 F.2d 1027, 1034 (D.C. Cir. 1986)).

37. *Id.* at 1290. The court was careful to note, however, that the contractual language should not be read in a vacuum and interpreted it based solely on its "plain meaning." *Id.* at 1290 n.10. The Third Circuit merely asserted that a general no-strike clause may prohibit sympathy strikes. *Id.* at 1291.

38. *Id.* The cases the union relied on for support of its argument include Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976) (applying coterminous interpretation in action seeking injunctive relief); Gateway Coal Co. v. UMW, 414 U.S. 368 (1974) (agreement to arbitrate and duty not to strike should be applied coterminously absent explicit expression of intent to negate implied no-strike obligation); Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1970) (applying coterminous interpretation in section 301 injunctive action).

For a discussion of the Board's *Indianapolis Power* decision, see *supra* note 26.

39. For a discussion of the coterminous interpretation doctrine, see *supra* note 35.

40. 826 F.2d at 1292. The damage action in *Delaware Coca-Cola* was brought pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C.

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Board counterargued that, following *Pacemaker Yacht*, the doctrine of coterminous interpretation should be flexibly applied in cases involving express no-strike provisions,\(^5\) and under the facts of *IBEW, Local 803*, the doctrine was inapplicable.\(^6\) These contentions raised two questions: “first, whether *Pacemaker Yacht* legitimately modified [the Third Circuit’s] prior holding in *Delaware Coca-Cola*; and second, whether [the court] may properly disregard newly articulated Board policy and apply the principles of federal contract law previously and independently developed by this Court in a § 301 proceeding.”\(^7\)

The court responded to the first issue by saying that *Delaware Coca-Cola* and *Pacemaker Yacht* were consistent with each other in that *Pacemaker Yacht* merely clarified the holding in *Delaware Coca-Cola*.\(^8\) Reading the two cases together, the court determined that “the applicability of the coterminous interpretation doctrine is an independent, preliminary determination, separate and distinct from the ultimate question whether an express, broadly worded no-strike clause constitutes a clear and unmistakable waiver of employees’ statutory rights.”\(^9\) In both cases, extrinsic evidence was considered when determining the parties’ intent.


\(^6\) 826 F.2d at 1292. For a discussion of *Pacemaker Yacht*, see supra notes 36-38 and accompanying text. For a discussion of the coterminous interpretation doctrine, see supra note 35.

\(^7\) 826 F.2d at 1293. The Board argued that the coterminous interpretation doctrine was developed in *Delaware Coca-Cola*, a section 301 action. *Id.* Therefore, the Board asserted that coterminous interpretation was not applicable to *IBEW, Local 803*, which was an unfair labor practice case. Specifically, the Board asserted that *Pacemaker Yacht*, also an unfair labor practice case, “should be applied . . . or *Delaware Coca-Cola* should be overruled.” *Id.*


\(^9\) 826 F.2d at 1293. In reaching this conclusion, the court noted that the Third Circuit’s Internal Operating Procedures prohibit any panel from overruling any prior decision of another panel of the court. “Court in banc consideration is required to overrule a published opinion of this court.” *Id.* at 1293 n.16. The court also noted that Judge Seitz wrote both the *Delaware Coca-Cola* and *Pacemaker Yacht* opinions and that he specifically referred to *Delaware Coca-Cola* in the *Pacemaker Yacht* decision. *Id.* at 1292-93. As a result, the court stated that it was unreasonable to infer that the two decisions were inconsistent. *Id.* at 1293.

Furthermore, the court identified the similarities between the two cases. *Id.* at 1293-94. The court began its analysis in both cases by looking at the no-strike obligation as expressed in the contractual language. *Id.* The court determined in *Delaware Coca-Cola* that the doctrine of coterminous interpretation was applicable, while it found that the doctrine was not applicable to the facts of *Pacemaker Yacht*. *Id.* at 1294 & n.19. In addition, both panels examined extrinsic evidence as well as the contractual language to determine if a “clear and unmistakable waiver was effected.” *Id.* at 1294.

\(^9\) *Id.*
with respect to the scope of the waiver.\(^55\)

With respect to the second issue, the court rejected the Board's argument that application of Delaware Coca-Cola should be limited to section 301 actions.\(^56\) The court noted that such a limitation would lead to the undesirable result of a "dual system of law" governing unfair labor proceedings and section 301 actions.\(^57\) Accordingly, the court considered both Delaware Coca-Cola and Pacemaker Yacht when reviewing the Board's application of Indianapolis Power to this case.\(^58\) It noted that Indianapolis Power would apply to the extent it was consistent with Third Circuit precedent.\(^59\)

Finally, the court interpreted the specific no-strike clause in Local 803's contract under the law of the Third Circuit.\(^60\) The court held that the no-strike clause was an exchange for the no-lockout clause.\(^61\) Therefore, the no-strike clause was not limited by the arbitration clause and the doctrine of coterminous interpretation was not applicable. Reading the contract as a whole, the court determined that the parties intended to waive the employees' right to sympathy strike.\(^62\) The court asserted that this construction of the contract was also supported by extrinsic evidence.\(^63\)

55. Id. The court noted that its conclusion was in accord with Local Union 1395, International Brotherhood of Electrical Workers v. NLRB, 797 F.2d 1027, 1036 (D.C. Cir. 1986) ("[W]ords parties use in drafting contracts are only evidence of their intent; the words are not themselves the parties' intent.") and International Brotherhood of Electrical Workers, Local 387 v. NLRB, 788 F.2d 1412, 1414 (9th Cir. 1986) ("Other relevant considerations include the bargaining history, the context in which the contract was negotiated, the interpretation of the contract by the parties, and the conduct of the parties bearing upon its meaning."). 826 F.2d at 1294.

56. 826 F.2d at 1295.

57. Id. The court said such a system would hinder its preference for uniform standards governing waiver and would allow Board decisions to "undermine federal policy developed by the courts in section 301 proceedings." Id.

58. Id.

59. Id. However, the court did not explain in what ways Indianapolis Power was consistent or inconsistent with Third Circuit precedent nor whether it applied to the facts of the present case. See id. at 1295-99. For a further discussion of Indianapolis Power and Third Circuit precedent, see infra notes 64-71 and accompanying text.

60. 826 F.2d at 1295-99.

61. Id. at 1295. The court made this determination based on the express contractual language. Id. The relevant agreement was that "'there shall be no strikes or walkouts by the Brotherhood or its members,' and . . . 'there shall be no lockouts of the Brotherhood or its members. . . .'" Id.

62. Id. at 1296. In reaching this conclusion the court also noted that the no-strike clause was physically separate from the arbitration clause in the contract, the structure of the contract indicated that the parties did not intend for the two clauses to be coextensive, and both parties expressed their desire to provide continuous, uninterrupted service. Id. at 1295-96. This goal of providing uninterrupted service would be frustrated by excluding sympathy strikes from the no-strike obligation. Id. at 1296.

63. Id. The court considered several factors when weighing the extrinsic
The significance of IBEW, Local 803 is not the specific holding of the case but rather the issues that the court left unresolved. The Third Circuit and the Board have taken opposite positions with respect to whether general no-strike clauses waive the right to sympathy strike. IBEW, Local 803 failed to resolve this conflict.

In the Third Circuit, the doctrine of coterminous interpretation is applied if the court determines that the no-strike clause was given as a

evidence. These included: "(1) the prevailing case law at the time the no-strike clause was [last actively] negotiated; and (2) past arbitration awards interpreting the no-strike clause and the parties' conduct thereafter..." Id. The no-strike clause had been a part of the collective bargaining agreement for at least 25 years and had not been discussed in the three most recent contract negotiations held in 1978, 1980 and 1981. Id. The court determined that, prior to the Board's 1978 Davis-McKee decision, general no-strike clauses were interpreted as a waiver of the employees' right to participate in a sympathy strike. Id. at 1296-97. For a discussion of the historical development of the Board's interpretation of no-strike clauses, see infra notes 109-19 and accompanying text. Case law thus supported a conclusion that the parties intended the no-strike clause to waive the employees' right to sympathy strike. Id.

The court also considered two arbitration awards in which the arbitrators concluded that the same no-strike language prohibited sympathy strikes. Id. at 1297. Local 803 made no attempt to renegotiate the obligations embodied in the no-strike clause after either of these awards. Id. at 1298. While these arbitration awards did not conclusively demonstrate the parties' intent, the court noted that they had evidentiary value in determining that intent. Id.

64. Specifically, this case was resolved without applying the doctrine of coterminous interpretation. Id. at 1295. However, in the Third Circuit, application of coterminous interpretation creates a presumption that general no-strike language does not waive employees' right to sympathy strike, absent extrinsic evidence demonstrating a contrary intent. See Delaware Coca-Cola Bottling Co. v. General Teamster Local Union 326, 624 F.2d 1182, 1187 (3d Cir. 1980) ("[A] broadly worded no-strike clause does not waive the right to strike over non-arbitrable matters that are not covered by the strikers' contract."). Under the current Board, however, the general rule is that a broadly worded no-strike clause encompasses a waiver of the right to sympathy strike unless extrinsic evidence demonstrates that the parties intended to exempt sympathy strikes. See, e.g., Indianapolis Power & Light Co., 273 N.L.R.B. 1715, 1715 (1985) ("If a collective-bargaining agreement prohibits strikes, we shall read the prohibition plainly and literally as prohibiting all strikes, including sympathy strikes."). remanded sub. nom. Local Union 1395, Int'l Bhd. of Elec. Workers v. NLRB, 797 F.2d 1027 (D.C. Cir. 1986). Thus, the Third Circuit and the Board appear to be using opposite presumptions under similar fact situations.

The Third Circuit stated that Indianapolis Power would apply to the facts of IBEW, Local 803 "to the extent [it] is consistent with [Third Circuit] precedent." IBEW, Local 803, 826 F.2d at 1295. It appears that Indianapolis Power is not consistent with Third Circuit precedent, at least in situations where the Third Circuit would apply coterminous interpretation. However, because coterminous interpretation was held to be inapplicable to the facts of IBEW, Local 803, the Third Circuit avoided having to decide whether to follow or reject Indianapolis Power.

65. Under the coterminous interpretation doctrine developed in Delaware Coca-Cola, general no-strike language does not bar union members from sympathy striking. However, under Indianapolis Power, general no-strike language will prohibit sympathy striking absent evidence that the parties intended otherwise.
quid pro quo for the arbitration clause. The court has repeatedly stated that coterminous interpretation is a tool of contract interpretation and not a rule of law. In fact, the court concluded that coterminous interpretation was not applicable to the facts of IBEW, Local 803.

It is submitted that application of the doctrine of coterminous interpretation is at odds with the Board’s current posture with respect to interpreting the scope of general no-strike language. In Indianapolis Power, the Board created a presumption that general no-strike language constitutes a waiver of the right to sympathy strike absent extrinsic evidence that the parties intended for sympathy strikes to be excluded from the waiver. In contrast, application of coterminous interpretation in essence creates the opposite presumption; under that doctrine general no-strike language does not waive the right to sympathy strike unless extrinsic evidence demonstrates that the parties intended for the waiver to include sympathy strikes. Since the Third Circuit found that coterminous interpretation was inapplicable to the facts of IBEW, Local 803, it was unnecessary for the court to state its position or resolve the conflict that has arisen as a byproduct of the Board’s Indianapolis Power decision.

It is submitted that the IBEW, Local 803 court correctly decided that the union waived its members’ right to engage in sympathy strikes. However, the analytical framework that the Third Circuit has developed through Delaware Coca-Cola and its progeny arguably promotes litigation because it is highly fact sensitive. This Casebrief will suggest an alternate analytical framework which if adopted could serve to reduce fact sensitivity and, as a result, the amount of litigation surrounding the interpretation of general no-strike clauses.

66. See Pacemaker Yacht Co. v. NLRB, 663 F.2d 455, 458-59 (3d Cir. 1981) (no-strike clause was not quid pro quo for arbitration clause, therefore barred strikes over all disputes); Delaware Coca-Cola, 624 F.2d at 1186-87 (“[T]he quid pro quo theory underlying coterminous interpretation applies where there is an express no-strike clause in the contract,” however, “‘coterminous interpretation must be applied to the facts in each case.’”).

67. See, e.g., Pacemaker Yacht, 663 F.2d at 457-58.

68. 826 F.2d at 1295. For a discussion of the holding in IBEW, Local 803, see supra notes 60-63 and accompanying text.

69. See Indianapolis Power, 275 N.L.R.B. at 1715 (“[A] broad no-strike prohibition encompasses direct and indirect work stoppages, including sympathy strikes. . . .”). For a discussion of the Board’s holding in Indianapolis Power, see supra note 26.

70. See Pacemaker Yacht, 663 F.2d at 458 (“When limited by the principle of coterminous interpretation, a no-strike clause encompasses only arbitrable disputes.”); Delaware Coca-Cola, 624 F.2d at 1187 (“[W]here the sympathy strikers and their employer cannot arbitrate the subject matter of the primary dispute, a generally worded no-strike clause does not bar the sympathy strike.”).

71. The court did state that Indianapolis Power was applicable to the extent that it was consistent with Third Circuit precedent. 826 F.2d at 1295. However, it neither elaborated on nor referred to Indianapolis Power in the rest of the opinion. Id. at 1295-99.
There are three general contexts in which it might be necessary for a court to interpret the scope of a no-strike clause: 1) an action under section 301 of the N.L.R.A. seeking to enjoin a strike because it violates a no-strike clause; 72 2) a section 301 action seeking money damages for a strike which violates a no-strike clause; 75 and 3) a Board proceeding initiated following the discipline or discharge of employees for engaging in (or possibly, refusing to engage in) a strike which violates a no-strike clause. 74

The Supreme Court of the United States addressed the application of coterminous interpretation in a section 301 injunction action in Boys Markets, Inc. v. Retail Clerks Union, Local 770, 75 which arose as a result of the conflict between section 4 of the Norris-LaGuardia Act 76 and section

72. See, e.g., Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 401 (1976) (employer sought injunctive relief on ground that work stoppage violated no-strike clause); Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 240 (1970) (employer sought to enjoin work stoppage precipitated by union protest over non-union and supervisory employees performing certain work alleged to be union work).

73. See, e.g., Delaware Coca-Cola, 624 F.2d at 1183 (employer sought money damages following nine day sympathy strike alleged to be violation of no-strike clause).

74. See, e.g., NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953) (employer challenged Board's cease and desist order finding that employer committed unfair labor practice by discharging employee who independently refused to cross stranger picket line); IBEW, Local 803, 826 F.2d 1283 (3d Cir. 1987) (union challenged Board's dismissal of its complaint that employer committed unfair labor practice by threatening discharge of employees who refused to cross stranger picket line); Pacemaker Yacht, 663 F.2d 455 (3d Cir. 1981) (employer appealed from Board order that employer reinstate employees discharged for striking).

75. 398 U.S. 235 (1970). In Boys Markets, the collective bargaining agreement at issue contained both arbitration and no-strike provisions. Id. at 238-39. The dispute centered around work which was done by supervisory and non-union employees that the union claimed should have been done by its members. Id. at 239. The employer continued with the work despite the union's demands and the union called a strike in protest. Id.

When the union refused to terminate the work stoppage, the employer filed a complaint in state court seeking a temporary restraining order, injunctive relief and specific performance of the arbitration clause. Id. at 239-40. The state court issued the temporary restraining order but the union removed the case to federal district court. Id. at 240. The district court issued the injunction and ordered the parties to arbitrate. Id. The court held that the dispute was subject to arbitration under the terms of the contract and the strike violated the no-strike clause. Id. Although the court of appeals reversed the district court, on further appeal the Supreme Court affirmed the district court's order. Id. at 254-55.

76. 29 U.S.C. § 104 (1982). Section 4 of the Norris-LaGuardia Act is essentially an anti-injunction measure and provides in pertinent 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 (as these terms are
301 of the Labor Management Relations Act. The Court held in Boys Markets that a strike in violation of a no-strike clause may be enjoined by a federal court if "it is over a grievance which both parties are contractually bound to arbitrate." The Supreme Court addressed a request for injunctive relief as it related to sympathy strikes in Buffalo Forge Co. v. United Steelworkers. In that case, the Court refused to enjoin a sympathy strike while its validity was being arbitrated, because the strike was not "over" an arbitrable dispute. The Court limited the exception it had created in Boys Markets herein defined) 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; (c) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute; (i) Advising, urging or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

77. 29 U.S.C. § 185 (1982). In contrast to section 4 of the Norris-LaGuardia Act, which precludes courts from granting injunctive relief in labor disputes, section 301 of the Labor Management Relations Act (L.R.M.A.) empowers federal courts to hear and resolve suits arising from violations of labor contracts. Id. at § 185(a). Section 4 of the Norris-LaGuardia Act essentially limits the power and role of federal courts in the resolution of labor disputes while section 301 of the L.R.M.A., which was enacted after section 4, grants power to the courts to resolve such disputes.


80. Id. at 402-03. In Buffalo Forge, the United Steelworkers represented Buffalo Forge's production and maintenance (P & M) employees. Id. at 399. The contract between the parties contained no-strike and arbitration provisions. Id. at 399-400. During the term of this contract, the United Steelworkers were certified to represent Buffalo Forge's office clerical-technical (O & T) employees. Id. at 400. Following several months of unsuccessful negotiations, the O & T employees called a strike and established picket lines. Id. The P & M employees honored the O & T employees' picket line and remained out of work for about one month despite the employer's attempt to arbitrate the dispute. Id. at 400-01.

The employer filed suit in district court alleging that the P & M work stoppage violated the no-strike provisions and seeking injunctive relief against the strike during arbitration. Id. at 401, 405-06. The district court found that the work stoppage constituted a sympathy strike and denied injunctive relief. Id. at 402-03. The court held that section 4 of the Norris-LaGuardia Act precluded issuance of the injunction because the strike was not over an arbitrable dispute and, therefore, did not fall within the narrow Boys Markets exception. Id. The decision was affirmed by both the court of appeals and the Supreme Court. Id. at 403-04.
by holding that a strike allegedly in violation of a no-strike clause may be enjoined only if the dispute underlying the strike is subject to arbitration.\textsuperscript{81} While the question of whether the sympathy strike violated the no-strike clause was subject to arbitration, the events which led to the sympathy strike were not.\textsuperscript{82}

The Third Circuit expanded the use of the coterminal interpretation doctrine and its \textit{Buffalo Forge} limitations by applying it to section 301 actions for money damages\textsuperscript{83} and to appeals from Board proceedings which had been instituted as a result of employee discharges or discipline.\textsuperscript{84} It is submitted that this extension expanded the use of coterminal interpretation beyond its originally intended scope. In addition, by viewing coterminal interpretation as a tool of contract interpretation rather than a rule of law, the Third Circuit has created an environment in which it is difficult to predict the outcome of a given case.

To create a more predictable environment that will conform more closely to the Board’s present position, it is suggested that the Third Circuit limit the applicability of coterminal interpretation as it relates to sympathy strikes. Under this analytical framework it is suggested that the no-strike obligation be limited to, and interpreted in light of, the arbitration clause only: (1) when the contract does not contain an express no-strike clause; or (2) when the case is a section 301 injunctive action; or (3) when the contract contains an express no-strike clause which is located within, or makes reference to, the grievance/arbitration clause. In other cases, a presumption should arise that a general no-

\textsuperscript{81} \textit{Id.} at 404. The Court recognized that the employees did not have a grievance with their employer but rather were acting in support of sister local unions that were striking a common employer. \textit{Id.} at 405. On this factual ground the Court distinguished \textit{Boys Markets}, which involved a dispute between the union and the employer that was subject to binding arbitration. \textit{Id.} at 406. Because there was no dispute in \textit{Buffalo Forge} “that was even remotely subject to the arbitration provisions of the contract,” \textit{Boys Markets} was not controlling. \textit{Id.} at 407.

The Court further stated:

If an injunction could issue against the strike in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express prohibitions of § 4 [of the Norris-LaGuardia Act]. \textit{Id.} at 410.

\textsuperscript{82} \textit{Id.} at 405-07. The Court noted that, if in arbitration the strike was found to be in violation of the contract, an injunction could issue to enforce that decision. \textit{Id.} at 405.

\textsuperscript{83} \textit{See} Delaware Coca-Cola Bottling Co. v. General Teamsters Local Union 326, 624 F.2d 1182, 1186-87 (3d Cir. 1980) (noting that \textit{Buffalo Forge} was relevant Supreme Court precedent).

\textsuperscript{84} \textit{See} Pacemaker Yacht Co. v. NLRB, 663 F.2d 455, 457-58 (3d Cir. 1981). The court noted that the doctrine of coterminal interpretation was a tool of contract interpretation, the applicability of which was based on the facts of the case. \textit{Id.} The court made this statement without regard to the type of proceeding involved.
strike clause waives the right to sympathy strike unless extrinsic evidence demonstrates that the parties intended otherwise. The general rule would therefore be that broad no-strike language waives an employee's right to sympathy strike. One exception to this rule should be to allow sympathy strikes as a protest against unfair labor practices committed by the sympathy strikers' own employer.85 This suggested approach, or some variant thereof, is supported by several commentators and courts.86

85. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (waiver of right to strike over unfair labor practice must be explicitly stated).

86. See, e.g., O'Connor & Dorsey, An Analysis of the "No-Strike Clause" in Contemporary Collective Bargaining Agreements, 7 W. New Eng. L. Rev. 147, 170 (1984) (No-strike language is clear and unambiguous and prohibits "any strike, slowdown, stoppage, or any other interference with the employer's operation. Not even the most tortuous distortion of the English language would define [such a] provision to be anything but an all-inclusive agreement not to refuse to work, regardless of the circumstances."); Note, Coterminous Interpretation: Limiting the Express No-Strike Clause, 67 Va. L. Rev. 729, 729-30 (1981) (Third Circuit's application of coterminous interpretation to express no-strike clause represents illogical extension of Supreme Court precedent and is unsupported by significant labor law policy); see also Delaware Coca-Cola, 624 F.2d at 1191-97 (Rosenn, J., concurring) (coterminous interpretation not applicable to functionally independent no-strike clause; waiver of right to strike over unfair labor practices must be explicitly stated); International Union of Operating Eng'rs, Local Union 18 (Davis-McKee), 238 N.L.R.B. 652, 655-61 (1978) (Penello, Member, concurring) ("no strikes" in collective bargaining agreement means no strikes; yet unrestricted no-strike clause does not waive right to strike over unfair labor practice).

Several circuit courts have also concluded that broad, generally worded no-strike clauses constitute a waiver of the right to sympathy strike. See, e.g., Ryder Truck Lines v. Teamsters Freight Local Union No. 480, 727 F.2d 594, 599 (6th Cir.) ("[C]oterminous interpretation . . . applies only to determining the permissibility of enjoining strikes and not to determining the scope of an explicit no-strike clause. . . . "), cert. denied, 469 U.S. 825 (1984); United States Steel Corp. v. NLRB, 711 F.2d 772, 777 (7th Cir. 1983) (doctrine of coterminous interpretation is applicable only in situations where contract does not contain express no-strike clause or where employer seeks injunctive relief); Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters & Butcher Workmen, 597 F.2d 1138, 1141 (8th Cir.) (affirming district court holding that no-strike clause prohibited sympathy strikes—no-strike obligation reached beyond arbitration provisions), cert. denied, 444 U.S. 840 (1979); News Union v. NLRB, 393 F.2d 673, 677 (D.C. Cir. 1968) ("[A] clause of this kind using only the word 'strike' includes . . . refusals to report for work across picket lines."); see also Indianapolis Power & Light Co., 273 N.L.R.B. 1715, 1715 (1985) ("If a collective-bargaining agreement prohibits strikes, we shall read the prohibition plainly and literally as prohibiting all strikes, including sympathy strikes.")}, remanded sub nom. Local Union 1395, Int'l Bhd. of Elec. Workers v. NLRB, 797 F.2d 1027 (D.C. Cir. 1986).

In contrast, several other circuit courts have held that a broad, generally worded no-strike clause does not waive employees' right to sympathy strike. See, e.g., NLRB v. Southern Cal. Edison Co., 646 F.2d 1352, 1367 (9th Cir. 1981) ("Absent explicit expression to the contrary, the agreement to arbitrate and the obligation not to strike are coterminous."") (citations omitted)); NLRB v. Gould, Inc., 638 F.2d 159, 164 (10th Cir. 1980) ("[I]f the dispute underlying a strike is not subject to the grievance-arbitration machinery of contract, the strike is not prohibited by the no-strike clause."); cert. denied, 452 U.S. 930 (1981); NLRB v.
With respect to collective bargaining agreements that do not contain an express no-strike clause, it is suggested that the no-strike obligation must be inferred from and limited to the arbitration agreement.\(^8^7\) If such an obligation were not inferred, the employer would be saddled with both the obligation to arbitrate and the threat of strike, when the purpose of the clause was presumably to avoid potential strikes. In addition, "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare."\(^8^8\) Given the purpose of the arbitration clause and the fact that a union does not explicitly agree not to strike in such agreements, it seems equitable to limit the implied obligation to the scope of the arbitration provisions.

It is submitted that the inference that a no-strike obligation is limited only to arbitrable disputes should not be as readily inferred from an express no-strike clause. With an express no-strike clause, the union unambiguously waives its right to strike. Thus, absent express contractual language specifically excluding sympathy strikes or specifically limiting the no-strike obligation to arbitrable disputes, such a limitation should not be inferred.\(^8^9\) As Member Penello stated in his concurrence

C.K. Smith & Co., 569 F.2d 162, 168 (1st Cir. 1977) ("[A] no-strike provision is ordinarily coterminous with the duty to arbitrate"), cert. denied, 436 U.S. 957 (1978).

Several student authors have also taken the position that there should be a presumption that coterminous interpretation applies absent evidence demonstrating a contrary intent. See, e.g., Note, Express No-Strike Clauses and the Requirement of Clear and Unmistakable Waiver: A Short Analysis, 70 CORNELL L. REV. 272 (1985); Comment, supra note 8.

87. See Gateway Coal Co. v. UMW, 414 U.S. 368, 382 (1974) (absent explicit expression of intent to negate implied no-strike obligation, agreement to arbitrate and duty not to strike should be applied coterminously); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 105 (1962) ("[A] strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement.").

88. Lucas Flour, 369 U.S. at 105.

89. See O'Connor & Dorsey, supra note 86, at 171. These authors argue that permitting such strikes when the employer has committed no wrong is contrary to the policy of the N.L.R.A. to prevent industrial disharmony. Id. Section 1 of the Labor Management Relations Act contains a policy statement which provides:

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate right of both employers and employees in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other... . .


O'Connor and Dorsey also state that "logic dictates that any organization which has given up the right to act on its own behalf must surely have given up the lesser right of acting on the behalf of others." O'Connor & Dorsey, supra note 86, at 171; accord Delaware Coca-Cola Bottling Co. v. General Teamsters Local Union 326, 624 F.2d 1182, 1191 (3d Cir. 1980) (Rosenn, J., concurring) ("I also except to the rule laid down by the majority that the employer necessar-
in the Board's decision in *International Union of Operating Engineers, Local Union 18 (Davis-McKee, Inc.)*:

Where the parties to a collective-bargaining contract embody in the agreement a clause stating essentially that there shall be no strikes during the term of the agreement, it means that there shall be no strikes during the term of the agreement — unless extrinsic evidence indicates that the parties intended otherwise.90

Unless the no-strike clause is part of, or specifically refers to, the arbitration agreement, it is by no means certain that the arbitration agreement was exchanged for the promise not to strike. It is equally reasonable to infer that the no-strike clause was given as a quid pro quo for some other economic or working condition concession, or that the parties recognized the need to provide continuous, uninterrupted service.91

When, however, the no-strike clause is part of, or refers to, the arbitration clause, the language of the contract, read as a whole, is generally sufficient to rebut the presumption that the no-strike clause encompasses all strikes, including those over non-arbitrable disputes.92

Likewise, there are special circumstances surrounding injunctive actions that are not present in money damages actions and Board proceedings. As previously discussed, section 4 of the Norris-LaGuardia Act prohibits district courts from issuing injunctions in cases involving labor disputes.93 Section 301 of the Labor Management Relations Act, however, gives district courts jurisdiction to hear suits initiated by parties injured by violations of a labor contract.94 The Supreme Court, in cre-

90. *International Union of Operating Eng’rs, Local Union 18 (Davis-McKee)*, 273 N.L.R.B. 652, 661 (1978) (Penello, Member, concurring).

91. See *Ryder Truck Lines v. Teamsters* Freight Local Union No. 480, 727 F.2d 594 (6th Cir. 1984). The *Ryder* court stated:

"[T]o hold that no-strike clauses must be construed as prohibiting only strikes over arbitrable issues would undermine the fundamental premise of freedom of contract on which federal labor policy is based by undercutting management's ability to obtain 'an across-the-board no-strike clause and labor's ability to gain concessions in return for such a pledge.'"

*Id.* at 601 (quoting *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 460 (3d Cir. 1981)).

92. This view is supported in *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 458-59 (3d Cir. 1981). In that case the collective bargaining agreement contained two no-strike clauses. *Id.* at 458. With respect to the first clause, which was contained within the grievance procedures, the court found that it was meant to prohibit strikes over arbitrable disputes. *Id.* at 458-59.

93. For the text of section 4 of the Norris-LaGuardia Act, see *supra* note 76.

94. For a general discussion of section 301 of the Labor Management Relations Act, see *supra* note 77.
ating its Boys Markets exception to section 4 of the Norris-LaGuardia Act, recognized that while injunctive relief was not available in such cases in federal court, it was an available remedy in state court. As a result, any actions brought in state court by employers could simply be removed to federal court by unions in an effort to avoid the issuance of an injunction. To remedy this inconsistency and prevent forum shopping, the Court determined that "[t]he literal terms of section 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of section 301(a) of the Labor Management Relations Act and the purposes of arbitration." Accordingly, the Court held that injunctive relief may be granted in the narrow situation where the strike is over an arbitrable dispute. Because of the countervailing force of section 4 of the Norris-LaGuardia Act, the Court limited its exception based on arbitrability. In contrast, actions for money damages and Labor Board proceedings are not restricted by countervailing statutory provisions. Therefore, Delaware Coca-Cola, Pacemaker Yacht and IBEW, Local 803 are not strictly analogous to Boys Markets and Buffalo Forge and do not require similarly narrow holdings.


96. Id. at 245. The opportunity to remove an action to federal court for the purpose of avoiding the issuance of an injunction promoted forum shopping and prohibited uniformity in the enforcement of arbitration obligations. Id. at 246.

97. Id. at 250. The Norris-LaGuardia Act was enacted at a time when courts were viewed as allies of management and the injunction was a device used to frustrate the activities of labor organizations. Id. To eliminate the abuses that arose from the involvement of the judiciary in labor disputes, Congress enacted the Norris-LaGuardia Act to restrict the issuance of injunctions by federal courts. Id. at 251.

Congress also expressed its policy regarding labor matters in section 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102 (1982). This section recognizes the rights of employees to freely associate, self-organize and select representatives free from employer restraint or coercion. Id. To protect these rights the Norris-LaGuardia Act limits jurisdiction and authority of the federal courts over labor matters. Id.

98. Boys Markets, 398 U.S. at 253-54. The Court was careful to note that the contract must contain a mandatory grievance or arbitration clause before injunctive relief will be available. Id. at 253. The Court also noted that it was appropriate to consider equitable principles when deciding whether to issue the injunction, i.e., "whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from denial of an injunction than will the union from its issuance." Id. at 254 (quoting Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 228 (Brennan, J., dissenting)).

99. Id. at 253. This limitation was necessary to ensure that "the core purpose of the Norris-LaGuardia Act" to prevent abusive use of federal courts in labor disputes would not be undermined. Id.

100. See Delaware Coca-Cola Bottling Co. v. General Teamster Local Union
Under *Mastro Plastics Corp. v. NLRB*, 101 it would seem that the right to sympathy strike over unfair labor practices committed by the sympathy strikers' employer must be waived explicitly. In that case, the Supreme Court stated that the collective bargaining agreement governed the economic relationship between the parties and that it "assume[d] the existence of a lawfully designated bargaining representative." 102 Therefore, the employer's interference with its employees' right to select their own representative constituted an unfair labor practice, giving rise to the right to strike. 103 The Court held that absent a compelling expression, the right to engage in such a strike is not waived. 104

Under the analytical framework suggested in this Casebrief, there is a presumption that a general no-strike clause waives the employees' 326, 624 F.2d 1182, 1193 (3d Cir. 1980) (Rosenn, J., concurring). Judge Rosenn stated in his concurrence:

*I see nothing in Buffalo Forge to indicate that in a suit for damages, the relationship between the arbitration and no-strike clause is in any way germane to whether the strike is in violation of the no-strike clause. Indeed, a remedy in damages for the violation of an express no-strike clause becomes all the more necessary in light of the general unavailability of injunctive relief under the Norris-LaGuardia Act. Id. (Rosenn, J., concurring) (emphasis in original).*

The view that coterminous interpretation should be used in deciding whether an injunction should issue but not in determining the scope of a no-strike clause was also supported by the United States Court of Appeals for the Sixth Circuit in *Ryder Truck Lines v. Teamsters Freight Local Union No. 480*, 727 F.2d 594, 599 (6th Cir. 1984), and by Board Member Penello in *International Union of Operating Engineers, Local Union 18 (Davis-McKee)*, 298 N.L.R.B. 652, 660 (1978) (Penello, Member, concurring).

101. 350 U.S. 270 (1956). In *Mastro*, the employer attempted to organize its employees into one of several competing labor organizations. *Id.* at 272-73. After several months, the employer terminated one of its employees for refusing to support the preferred union. *Id.* The employees struck to protest the termination and one of the labor organizations filed an unfair labor practice charge with the NLRB. *Id.* at 273, 276. The employer's defense was that the strike violated the general no-strike clause in the employees' contract. *Id.* at 277. The Board adopted the A.L.J.'s findings in favor of the employees, and the court of appeals enforced the Board's order that the employer reinstate the employees and cease and desist its interference with the employees' representation. *Id.*

102. *Id.* at 281-82. The Court noted that the contract governed such things as wages, working hours and other working conditions. *Id.* at 281 n.12. It further stated that the strike and lockout clauses were designed to avoid interruptions in operations due to "efforts to change existing economic relationships." *Id.* at 282.

103. *Id.* at 278. The Court stated that the employer's conduct was a "flagrant example of interference . . . with the expressly protected right of employees to select their own bargaining representative," and that the employer made "vigorous efforts . . . to influence and even coerce [its] employees." *Id.*

104. *Id.* at 283. The Court noted that waivers of the right to strike and the right to lock-out are common features in collective bargaining agreements. *Id.* at 280. However, such waivers assume that employees have the freedom to select their bargaining representatives. *Id.* For this reason, waiver of this basic right cannot be inferred "without a more compelling expression." *Id.* at 283.
right to sympathy strike.105 Based on Mastro Plastics, however, such a presumption should not attach to strikes over unfair labor practices committed by the strikers' own employer.106 Because the National Labor Relations Act is based on employees' rights of freedom of association and fair representation, negotiations of economic conditions cannot effectively take place unless such rights are assured. In most cases, "national labor policy favoring the stability of employer-employee relationships requires that broad no-strike language be construed in its plain, unequivocal terms."107 However, where an unfair labor practice is involved, the protections of freedom of association and fair representation are overriding, leading to a stricter requirement of explicit waiver.108

Finally, the suggestion that a general no-strike clause should create a presumption that the right to sympathy strike has been waived is supported by an historical analysis of no-strike clauses.109 Following the Supreme Court's Rockaway News lead, the Board traditionally interpreted broad no-strike clauses as prohibiting sympathy strikes.110 Through 1969, the Board maintained the position that no-strike language precluded both primary and sympathy strikes.111 An exception to this general rule was that the right to strike over unfair labor practices had to be

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105. For a discussion of the presumption created under the suggested analytical framework, see supra notes 83-86 and accompanying text.

106. This exception for unfair labor practices refers to flagrant violations such as interference or coercion in the selection of a bargaining representative, failure to bargain in good faith, improperly withdrawing recognition of the selected bargaining representative and other similarly egregious conduct.


108. Id. (Rosenn, J., concurring). This theory, based on the underlying interest of protecting employees' right to self-organize and choose their bargaining representative, led Judge Rosenn to conclude that "a relevant inquiry in the application of a no-strike clause in a labor contract is whether the employer has precipitated the strike by a serious unfair labor practice in violation of national labor policy." Id. (Rosenn, J., concurring).

109. See generally, O'Connor & Dorsey, supra note 86. The authors state that for 21 years the Board "interpreted broad no-strike language to include a prohibition of sympathy strikes. It was not until the mid-1970s that the Board began to adopt a more restrictive interpretation of broad no-strike language. . . . At this point, the Board's interpretation seems to have gone astray." Id. at 168-69 (footnotes omitted).

110. Id. In NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953), the Supreme Court upheld the dismissal of an employee for refusing to cross a stranger picket line because the collective-bargaining agreement contained a no-strike clause which was held to have waived the employee's right to sympathy strike. Id. at 81. For a discussion of Rockaway News, see supra notes 43-45 and accompanying text.

111. See O'Connor & Dorsey, supra note 86, at 157; see, e.g., Local 12419, UMW (National Grinding Wheel), 176 N.L.R.B. 628 (1969). In National Grinding Wheel, the union fined 16 employees for crossing a sister union's picket line. Id. at 629. The Board held that the no-strike clause in the employees' contract prohibited sympathy striking. Id. at 629-30. Therefore, the union's disciplinary action was a violation of section 8(b)(1)(A) of the N.L.R.A. Id.
waived explicitly to be effective.\textsuperscript{112} In 1962, the Supreme Court adopted the coterminous interpretation doctrine with respect to a contract that did not contain an express no-strike clause.\textsuperscript{113} In the mid-1970s, the Board began to move away from its traditional position when it also adopted the coterminous interpretation doctrine and applied it in cases where the contract contained an express no-strike clause that was integrated with or closely related to the arbitration clause.\textsuperscript{114}

By 1978, the Board further expanded its use of the coterminous interpretation doctrine and expressly overruled and reversed its previous view that general no-strike clauses waived the right to sympathy strike.\textsuperscript{115} The new standard announced by the Board was that, absent evidence to the contrary, a waiver of the right to sympathy strike would not be inferred from a no-strike clause.\textsuperscript{116} Member Penello disagreed with the Board’s new standard.\textsuperscript{117}

\textsuperscript{112} See O’Connor & Dorsey, supra note 86, at 157; see, e.g., Mastro Plastics Corp., 103 N.L.R.B. 511 (1953), aff’d, 214 F.2d 462 (2d Cir. 1954), aff’d, 350 U.S. 270 (1956). In that case the Board held that strikes in protest of serious unfair labor practices were not precluded by the no-strike language. 103 N.L.R.B. at 515.

\textsuperscript{113} See Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) (inferred no-strike obligation from existence of arbitration clause). For a discussion of Lucas Flour, see supra notes 87-88 and accompanying text.

\textsuperscript{114} See O’Connor & Dorsey, supra note 86, at 158-59; see also Keller-Crescent Co., 217 N.L.R.B. 685, 692 (1975) (no extrinsic evidence warranted inference of intent to waive right to sympathy strike), enforcement denied, 538 F.2d 1291 (7th Cir. 1976); Gary-Hobart Water Corp., 210 N.L.R.B. 742, 745 (1974) ("[N]o-strike provisions will not be enforced where the subject of the dispute is not covered by the grievance-arbitration procedure."). aff’d, 511 F.2d 284 (7th Cir. 1975).

\textsuperscript{115} See O’Connor & Dorsey, supra note 86, at 158-59. See also International Union of Operating Eng’rs, Local Union 18 (Davis-McKee), 238 N.L.R.B. 652, 653-54 (1978) ("[T]o the extent that National Grinding Wheel stood for the proposition that the right to engage in sympathy strikes is waived by a union’s agreement to a broad no-strike clause, without more, it has been overruled, sub silentio, by Keller-Crescent and Gary-Hobart.").

\textsuperscript{116} Davis-McKee, 238 N.L.R.B. at 652-53. The Board required at a minimum that the parties specifically have discussed whether the waiver was meant to encompass sympathy strikes. Id. at 653. It preferred that the agreement explicitly address sympathy strikes. Id.

\textsuperscript{117} Id. at 655 (Penello, Member, concurring). Member Penello relied on the Supreme Court’s Rockaway News decision in concluding that a broad no-strike clause "suffices to waive the employees’ right to engage in sympathy strikes—unless, of course, other relevant evidence, such as bargaining history, reveals a contrary intent by the parties.” Id. at 657 (Penello, Member, concurring). In NLRB v. Rockaway News the Supreme Court concluded that a deliveryman’s refusal to cross a picket line violated the no-strike clause. 345 U.S. 71, 79-81 (1953). The significance of Rockaway News is that the Court apparently did not rely on the parties’ bargaining history in reaching its decision. Davis-McKee, 238 N.L.R.B. at 656 (Penello, Member, concurring). The Court did review evidence of an arbitration award but did so mainly to confirm, rather than determine, its holding. Id. at 657 (Penello, Member, concurring).
In 1985, Member Penello’s position was adopted by the majority in *Indianapolis Power*. In that decision the Board essentially reverted to its traditional view that a no-strike clause in a collective bargaining agreement would prohibit all strikes, including sympathy strikes, unless extrinsic evidence demonstrated that the parties intended otherwise. Viewed in this way, it appears that *Indianapolis Power* is consistent with the traditional Board approach and that the years from 1978-1985, when the Board strayed from this approach, may best be described as aberrational.

Interestingly, application of the analytical framework suggested herein to the facts of *Delaware Coca-Cola*, *Pacemaker Yacht* and *IBEW, Local 803* would produce holdings identical to those reached by the Third Circuit in those cases. However, it is submitted that these results would have been more easily predicted under the suggested framework than under the framework the Third Circuit presently uses when deciding whether to apply the coterminous interpretation doctrine. Application of the coterminous interpretation doctrine requires an initial determination by the court as to which contractual provisions were given as quid pro quo for each other. In contrast, the suggested analysis does not require such a fact-sensitive and difficult inquiry, and thus is likely to produce more predictable outcomes.

In *Delaware Coca-Cola*, Coca-Cola arguably violated section 8(a)(5) of the N.L.R.A. by refusing to bargain fairly with its drivers’ bargaining representative. The drivers were represented by the same local and

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Member Penello also felt that the Board’s expansion of *Lucas Flour, Gateway Coal*, and *Buffalo Forge* was misplaced. *Id.* at 658-60 (Penello, Member, concurring). Penello stated that *Lucas Flour* and *Gateway Coal* could not be read to mean that, “where a union has consented to an express contract provision purporting to ban strikes without limitation, sympathy work stoppages are implicitly exempted from such a clause.” *Id.* at 659 (Penello, Member, concurring). In fact, he found his “colleagues’ interpretation of *Lucas Flour* and *Gateway Coal* nearly incomprehensible.” *Id.* (Penello, Member, concurring).

118. *Indianapolis Power & Light Co.*, 273 N.L.R.B. 1715, 1715 (1985) ("We agree with former Member Penello . . . that a broad no-strike prohibition encompasses direct and indirect work stoppages, including sympathy strikes . . . .")

119. *Id.*

120. For a discussion of the suggested analytical framework as applied to the facts of *Delaware Coca-Cola*, *Pacemaker Yacht* and *IBEW, Local 803*, see infra notes 122-32 and accompanying text.

121. *See International Bhd. of Elec. Workers, Local 803 v. NLRB*, 826 F.2d 1283, 1295 (3d Cir. 1987) (under first step in analysis, determined that no-strike pledge was quid pro quo for no-lockout pledge); *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 458-59 (3d Cir. 1987) (court first determined that no-strike pledge was exchanged for no-lockout pledge).

122. 29 U.S.C. § 158(a)(5) (1982). Section 158(a)(5) provides: "(a) It shall be an unfair labor practice for any employer— . . . (5) to refuse to bargain collectively with the representatives of his employees. . . . ." *Id.*

123. *Delaware Coca-Cola Bottling Co. v. General Teamster Local Union 326, 624 F.2d 1182, 1197 (3d Cir. 1980) (Rosenn, J., concurring).* In November,
worked at the same plant as the sympathy strikers. Therefore, Coca-Cola's refusal to bargain in good faith "disrupted the labor-management relation at the plant." This situation arguably falls within the Mastro Plastics rule, which would direct that the right to sympathy strike against such an unfair labor practice was not waived through the general no-strike language in the contract.

While Pacemaker Yacht did not involve a sympathy strike, it did involve a strike that was not the result of a dispute with the employer. In fact, the employer had complied with all contractual provisions and the employees were essentially striking in a dispute with the union. Because this case was not an action for injunction, and there was an express no-strike clause which was independent of the arbitration clause, under the suggested analytical framework coterminous interpretation would not be applicable.

Finally, IBEW, Local 803 involved a refusal of employees to cross a stranger picket line. The case did not involve an action for injunction.

1975, the union was certified to represent the drivers. Id. at 1183. The union and Coca-Cola negotiated unsuccessfully for one month, after which talks broke off and Coca-Cola subcontracted out its driving work. Id. Some time later Coca-Cola reemployed the drivers and negotiated unsuccessfully with the union for another four months, after which the drivers went on strike. Id.

It should be noted that the above facts were presented by the majority. Judge Rosenn, in his concurring opinion, felt it necessary to rehighlight some of the important facts. Id. at 1191 (Rosenn, J., concurring). In his narrative, Judge Rosenn indicated that Coca-Cola refused to bargain with the union on behalf of the drivers after they were reemployed. Id. (Rosenn, J., concurring).

For a discussion of Delaware Coca-Cola, see supra notes 33-35 and accompanying text.

124. Id. at 1183.

125. Id. at 1197 (Rosenn, J., concurring). This was an important factor even though Coca-Cola had not committed any unfair labor practices against production and maintenance employees (the sympathy strikers). Id. (Rosenn, J., concurring).

126. Id. (Rosenn, J., concurring). Judge Rosenn stated:
It would ill serve [national labor] policy if an employer, who has unfairly refused to bargain with a certified bargaining agent representing his employees and is thereby precipitating a strike, could sue the bargaining agent for damages because members of a related bargaining unit employed by the common employer at a common work site but with whom the employer has a contract honor the picket line and also strike.

Id. (Rosenn, J., concurring).

127. Pacemaker Yacht Co. v. NLRB, 663 F.2d 455, 456 (3d Cir. 1981). The employees struck to protest their union's handling of its health and welfare fund. Id.

128. Id.

129. Therefore, the strike would have been in violation of the contract and the employer would not have been prohibited from disciplining the employees. Under this analysis the outcome of the litigation would have been the same as the outcome reached by the Third Circuit. For a further discussion of Pacemaker Yacht, see supra notes 36-38 and accompanying text.

130. International Blvd. of Elec. Workers, Local 803 v. NLRB, 826 F.2d
tion, and the no-strike clause was physically separated in the contract from the arbitration clause and made no reference to it.\textsuperscript{131} In addition, the employer had not engaged in unfair labor practices.\textsuperscript{132} Therefore, coterminous interpretation would not be applicable to the facts of the case under the suggested framework, and the union would be deemed to have waived the right to sympathy strike in the no-strike clause. Thus, the outcome of the case would be the same under the analytical framework as it was under current Third Circuit law.

Under current Third Circuit precedent it is difficult to predict with certainty whether a general no-strike clause constitutes a waiver of the right to sympathy strike. However, the court has concentrated on several factors in making the waiver determination. Both management and labor can take advantage of these factors when drafting collective bargaining agreements in an effort to reach their desired outcomes on the waiver issue.

From management’s perspective, the first and most obvious technique is to include a specific reference to sympathy strikes in the no-strike clause. Assuming the union’s representative will not agree to that, management might employ one of several other techniques which a court may view as weighing more heavily in favor of finding a waiver. For example, it may be beneficial to include two no-strike clauses in the contract: one that is part of the arbitration clause and one that is separate and distinct from the arbitration clause.\textsuperscript{135} The first no-strike provision will be held to waive the right to strike over arbitrable disputes. The second may be interpreted more broadly and thus deemed to encompass sympathy strikes or other strikes over non-arbitrable disputes.

Another suggestion is to include a no-lockout clause, preferably within the no-strike clause in the contract. In both \textit{Pacemaker Yacht} and \textit{IBEW, Local 803}, for example, the no-lockout agreement, rather than the arbitration clause, was viewed as a quid pro quo for the no-strike provision.\textsuperscript{134} As a result, the no-strike clause was not limited in scope by the

\textsuperscript{1283, 1285} (3d Cir. 1987). Construction workers erected the picket line at the work site of a Met. Ed. customer. \textit{Id.} For a discussion of the facts of \textit{IBEW, Local 803}, see supra notes 12-22 and accompanying text.

\textsuperscript{131} \textit{Id.} at 1284-85.

\textsuperscript{132} In other words, the employer had not refused to recognize or bargain with the employees’ chosen representative. There was a valid collective bargaining agreement in place when the dispute arose and both parties had abided by its terms prior to the dispute. \textit{See generally id.}

\textsuperscript{133} This technique was employed by the parties in \textit{Pacemaker Yacht Co. v. NLRB}, 663 F.2d 455, 458 (3d Cir. 1981). This structure persuaded the court to conclude that the first clause, which was within the arbitration clause, necessarily barred strikes over arbitrable disputes. \textit{Id.} at 459. Based on this interpretation, the Board had concluded, and the court agreed, that the second clause was meant to be more comprehensive than the scope of the arbitration clause. \textit{Id.} at 458-59.

\textsuperscript{134} \textit{IBEW, Local 803}, 826 F.2d at 1295; \textit{Pacemaker Yacht}, 663 F.2d at 458-59. This is significant because if the no-strike clause were not a quid pro quo for
arbitration clause.\textsuperscript{135}

A final suggestion is to explicitly refer to the need to provide continuous, uninterrupted service.\textsuperscript{136} While this might be difficult to achieve in some industries, such a reference will generally be viewed as inconsistent with the right to sympathy strike.\textsuperscript{137} This is especially true when the primary strikers and the sympathy strikers do not have the same employer.

In contrast, a union attorney who must concede a no-strike clause, but would like to have it narrowly construed to create only a limited obligation not to strike, should consider the same factors from the opposite perspective. First, and most importantly, the union should not agree to use the words "sympathy strike" in the no-strike clause. If those words are in the no-strike clause, the clause will be unambiguous and constitute a clear and unmistakable waiver of the right to sympathy strike.\textsuperscript{138}

In addition, the union should insist that the contract contain only one no-strike clause. Preferably, it should be a part of the grievance/arbitration procedures or, at least, it should refer to the grievance/arbitration clause. This will enable the court to find that the agreement not to strike was a quid pro quo for management's promise to arbitrate and, therefore, was intended to be limited in scope to the terms of the arbitration clause.\textsuperscript{139} In conjunction with this the union

the arbitration clause, there would be no basis from which a court could infer a no-strike agreement limited to the scope of the arbitration clause. See \textit{IBEW, Local 803}, 826 F.2d at 1295 (no-strike clause exchanged for no-lockout pledge, therefore, coterminous interpretation does not limit no-strike obligation to arbitrable disputes).

\textsuperscript{135} \textit{IBEW, Local 803}, 826 F.2d at 1295; \textit{Pacemaker Yacht}, 663 F.2d at 459.

\textsuperscript{136} See \textit{IBEW, Local 803}, 826 F.2d at 1295-96. This technique helped persuade the \textit{IBEW, Local 803} court that coterminous interpretation did not serve to limit the scope of the no-strike clause, in part because of "[t]he parties' repeated expression of their mutual purposes to maintain service without interruption . . . ." Id. at 1296.

\textsuperscript{137} See, e.g., \textit{United States Steel Corp. v. NLRB}, 711 F.2d 772 (7th Cir. 1983). There the court stated:

With a collective bargaining agreement structured to meet the challenge of foreign competition and a goal of 'uninterrupted operations' stated and reiterated in clear and unmistakable terms, it is sheer naivete to maintain, as the Board does here, that the broad no-strike clause did not clearly and unmistakably waive the right to honor a stranger picket line with whom neither the Company nor the Union had any dispute. \textit{Id.} at 778-79.

\textsuperscript{138} See \textit{Delaware Coca-Cola Bottling Co. v. General Teamster Local Union 326}, 624 F.2d 1182, 1185 (3d Cir. 1980). In construing a no-strike clause, the court will begin with the language of the clause. \textit{Id.} The clause at issue in \textit{Delaware Coca-Cola} did not refer explicitly to sympathy strikes. \textit{Id.} The court suggested, however, that if it had, such language would be sufficient to waive the right to sympathy strike. \textit{Id.}

\textsuperscript{139} One of the factors that a court will consider is whether the no-strike
must ensure that the arbitration clause is not overly broad so as to preclude sympathy strikes by its very terms.

Finally, because the right to strike is inconsistent with an agreement to provide uninterrupted service, the union should seek to avoid specific references in the contract to a mutual desire to provide continuous, uninterrupted service. Omission of this language will enable the court to reach its decision without being concerned with inconsistent objectives expressed in the contract.\textsuperscript{140}

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\textsuperscript{140} See \textit{IBEW, Local 803}, 826 F.2d at 1295-96; \textit{Delaware Coca-Cola}, 624 F.2d at 1188. The \textit{Delaware Coca-Cola} court noted that "[p]hysical separation or lack of cross-reference in the contract cannot constitute clear waiver of the right to sympathy strike." 624 F.2d at 1188. Carrying this analysis one step further, it would seem that specific cross-reference and physical integration with the arbitration clause would virtually preclude a finding of waiver.

By necessary implication, the absence of such language would, at a minimum, have a neutral effect on the union's desired construction of the no-strike clause; more favorably, it may weigh against finding a waiver of the right to sympathy strike.