# NOTES

## Refusals of Hazardous Work Assignments: A Proposal for a Uniform Standard

Occupational health and safety has long been an issue in the law governing the relations of employers and their employees. One of the areas of greatest concern has been the development of the right of employees to refuse hazardous work without fear of retaliation by their employers. Prior to 1970, specific federal regulation of safety and health in the industrial workplace was limited to a few industries.[1] The only universally available protection under federal law was that embodied in the more general laws governing labor-management relations.[2]

In response to inadequacies in this area, Congress enacted the Occupational Safety and Health Act (OSHAct) of 1970.[3] A regulation promulgated pursuant to this statute specifically guarantees to workers the right to refuse hazardous work under certain conditions.[4] This regulation was recently upheld by the Supreme Court.[5]

With the validation of the OSHAct regulation the nature of the right to refuse hazardous work has been left in a confused and uncertain state. Not only do certain critical issues under both the labor law and the OSHAct regulation remain unresolved, but the relationship between the sources of protection remains unclear. The developing and uncertain nature of the law in this area impairs the development of coherent, uniform policy. It also deprives both employers and their employees of the ability to act with certainty regarding the consequences of their actions.

This Note proposes a means for resolving these problems. First, it reviews the present state of the law affecting the right to refuse hazardous work under the federal labor laws and the OSHAct regulation. The Note then analyzes the problems that result from this multi-standard, multi-forum scheme, arguing that harmonization of statutory standards is required under the law and that one unified national standard should be adopted—the standard developing under the OSHAct regulation.

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1. See, e.g., Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801-960 (1976), as amended by Pub. L. No. 95-164, §§ 101-115, 303-307, 91 Stat. 1290 (1977); Act of Aug. 9, 1969, 40 U.S.C. § 333 (1976), as amended by Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 4(b)(2), 84 Stat. 1592 (1970) [hereinafter cited as the OSHAct]; Atomic Energy Act of 1954, 42 U.S.C. § 2021 (1976), as amended by Pub. L. No. 86-373, § 1, 73 Stat. 688 (1959); Walsh-Healey Act, 41 U.S.C. §§ 35, 38 (1976), as amended by the OSHAct, § 4(b)(2).

2. Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1976); § 502 of the Labor Management Relations Act, 29 U.S.C. § 143 (1976).

3. 29 U.S.C. §§ 651-678 (1976).

4. 29 C.F.R. § 1977.12 (1979).

5. Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980).

## I. Source of Protection for Employees Refusing Hazardous Work

### A. *Federal Labor Statutes*

Employees have successfully invoked provisions of two different federal labor laws for protection against retribution by employers for refusals to perform hazardous work: section 7 of the National Labor Relations Act,[6] which guarantees employees the right to engage in concerted activity for "mutual aid or protection," and section 502 of the Labor Management Relations Act,[7] which exempts work stoppages related to "abnormally dangerous conditions" from no-strike clauses in collective bargaining agreements. Although the substantive rights available under the two statutes are different, they must both be vindicated by recourse to the National Labor Relations Board (NLRB) and are therefore subject to similar jurisdictional and procedural restrictions.[8]

The labor laws apply to all enterprises "affecting commerce."[9] Therefore, they extend to the limit of congressional power under the commerce clause. The broad interpretation given this power in recent years likely means that almost all employers can be subject to the statutes.[10] However, the NLRB is empowered to decline to exercise jurisdiction over labor disputes that it believes do not have a significant impact upon commerce.[11] Exercising this power, the Board has specifically excluded smaller firms from the obligations imposed by the statutes.[12] In addition, the statutory definitions of "employer" and "employee" further curtail the laws' applicability. Federal, state, and local governments and employers subject to the Railway Labor Act are not "employers" for the purposes of these labor statutes.[13] Agricultural workers, domestic workers, supervisors, and independent contractors are excluded from the definition of employees and therefore are not entitled to the

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6. 29 U.S.C. § 157 (1976).

7. 29 U.S.C. § 143 (1976).

8. The LMRA adopted the definitions used in the NLRA. 29 U.S.C. § 142(3) (1976). Employees who are disciplined in violation of their § 502 rights must file an unfair labor practice charge against their employer claiming interference with their § 7 (NLRA) rights. As such, rights under § 502 actually make it legally impossible for a union to bargain away the § 7 right to act in this limited area; it preserves employee § 7 rights rather than confers added rights on employees.

9. See NLRA §§ 1, 10, 29 U.S.C. §§ 151, 161 (1976); LMRA §§ 1, 501, 29 U.S.C. §§ 141, 143 (1976).

10. See Daniel v. Paul, 395 U.S. 298 (1969); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

11. NLRA § 14(c)(1), 29 U.S.C. § 164(c)(1) (1976). The NLRA also gives the Board limited power to cede to an agency of a state or territory jurisdiction over certain industries, but only when the state or territorial statute is not inconsistent with the NLRA and has not received a construction inconsistent with that given to the NLRA. See the first proviso of NLRA § 10(a), 29 U.S.C. § 160(a) (1976).

12. The Board has established certain minimum dollar amounts for concerns subject to its jurisdiction. See A. Cox, D. Bok & R. Gorman, Labor Law 97-98 (8th ed. 1977).

13. 29 U.S.C. § 152(2) (1976). Railroad and airline employers are among those subject to the Railway Labor Act. See 45 U.S.C. § 151(1), (5) (1976).

rights granted employees under the statutes.[14] It has been estimated that only a little more than half of the American labor force is covered by these laws.[15]

Employees seeking protection under either of these provisions must follow the same procedure to assert their rights. They must allege that the employer committed an unfair labor practice by violating the statute.[16] A formal complaint must be filed with the NLRB Regional Director within six months of the employer's action.[17] The Regional Director, after an investigation, may at his discretion issue a complaint.[18] Upon issuance of the complaint, formal proceedings are commenced, culminating in an NLRB decision,[19] which is subject to review in the court of appeals.[20] If the NLRB finds that the employer improperly discharged or disciplined the employee for refusing to work, it can order reinstatement of the employee with or without back pay.[21]

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14. 29 U.S.C. § 152(3) (1976). See id. § 152(11) for definition of "supervisor."

The determination whether workers are employees or independent contractors within the meaning of the Act has provided a fertile field for litigation. The standard that has been applied was developed in NLRB v. United Insurance Co. of America, 390 U.S. 254 (1968), in which the Court applied a common law agency test in distinguishing an employee from an independent contractor.

15. A. Cox, D. Bok & R. Gorman, supra note 12, at 96.

16. 29 U.S.C. § 158(a)(1) (1976).

17. NLRA § 10(b), 29 U.S.C. § 160(b) (1976).

18. 29 U.S.C. § 153(d) (1976) vests the General Counsel with "final authority" to issue unfair labor practice complaints and thus the power to determine which cases will be litigated before the NLRB. The courts have uniformly held that the statute divests federal courts of jurisdiction to review the General Counsel's decisions. See Vaca v. Sipes, 386 U.S. 171, 182 (1967).

19. Initially, a hearing is held before an administrative law judge (ALJ), who drafts a recommended decision and files it with the NLRB. The parties may file exceptions to the recommended decision and petition for oral argument before the Board, but the Board normally adopts the decision of the ALJ. See F. McCulloch & T. Bornstein, The National Labor Relations Board 85-93 (1974); K. McGuiness, How to Take a Case Before the National Labor Relations Board (4th ed. 1976); Murphy, The National Labor Relations Board—An Appraisal, 52 Minn. L. Rev. 819 (1968).

20. Review is sought through a petition to have the Board's order set aside. NLRA § 10(f), 29 U.S.C. § 160(f) (1976). The Board may also petition the court of appeals for enforcement of its order. NLRA § 10(e), 29 U.S.C. § 160(e) (1976).

21. In the case of an employer's interference with the § 7 rights of its employees, the Board is empowered "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c) (1976). Generally, in cases of discharge or discipline for refusals to work, or for making safety complaints, the Board has ordered

> immediate and full reinstatement to [the employee's] former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to [the employee's] seniority or other rights and privileges, and to make [the employee] whole for any loss of pay suffered as a result of his unlawful discharge.

See Jim Causley Pontiac Inc., 232 N.L.R.B. 125, 131 (1977), remanded, 620 F.2d 122 (6th Cir. 1980); Roadway Express, Inc., 217 N.L.R.B. 278, 280 (1975).

The scope of the Board's remedial powers was outlined by the Supreme Court in Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941), in which the Court acknowledged the Board's wide discretion in formulating remedies subject to limited judicial review. But see Ex-Cell-O Corp., 185 N.L.R.B. 107, 108 (1970) (majority of the Board noted that its power is not so broad as to "permit the punishment of a particular respondent"). The court of appeals did not argue with the NLRB's view in that case, UAW v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971). However, the NLRB has not given any indication of a change in its position generally. The Board's power to order

1. *Section 7.* Section 7 of the National Labor Relations Act (NLRA)[22] is the basic source for federal protection of employees' rights.[23] It guarantees employees "[t]he right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."[24] In *NLRB v. Washington Aluminum Co.*,[25] the Supreme Court held that employees have a protected right to strike over health or safety threatening conditions.[26] The Court reasoned that the policy of the NLRA applies to workers who band together in an attempt to better their working conditions and that their actions therefore fall within the definition of activities covered by the NLRA.[27]

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compensation may be more limited where it is unable to calculate with any precision a make-whole remedy. See Tiidee Products, Inc., 194 N.L.R.B. 1234 (1972), enforced in part, 502 F.2d 349 (D.C. Cir. 1974), cert. denied, 421 U.S. 991 (1975). But see The Buncher Co., 164 N.L.R.B. 340, 341 (1967) (close approximation is permissible if calculated by a method with a "rational basis" rather than a method that is "arbitrary or unreasonable"), enforced, 405 F.2d 787 (3d Cir. 1968).

Employees who are disciplined or discharged and who successfully defend their actions on the basis of § 502 may be accorded the remedies available to strikers protesting unfair labor practices. See Philadelphia Marine Trade Ass'n, 138 N.L.R.B. 737, 739-40 (1962). Thus an employer need not pay an employee for the time he spends off the job even when this time off is due to protected § 502 activity. On the other hand, once an employer takes action against a complaining employee, the employer has committed an unfair practice and the employees affected can be treated as unfair labor practice strikers eligible for reinstatement and back pay. In this regard see generally Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

22. 29 U.S.C. § 157 (1976).

23. The National Labor Relations Act, as amended and expanded, is by no means Congress's only pronouncement in this field. Basic rights of workers are also defined, though less comprehensively, in, for example, the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§ 801-962 (1976) (amended 1977), the Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-3(a) (1976), and the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976) (amended 1978).

24. 29 U.S.C. § 147 (1976). Section 7 provides:

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

For a general discussion of § 7 see Cox, The Right to Engage in Concerted Activities, 26 Ind. L.J. 319 (1951).

25. 370 U.S. 9 (1962). In this case unorganized employees walked out on a bitterly cold day after repeated requests to get the heating system repaired failed.

26. Not all employee activity is protected by § 7. Section 7 limits the reach of its protection to activities for the purpose of collective bargaining or other mutual aid or protection. NLRA § 8(d), 29 U.S.C. § 158(d) (1976), defines the legal limits of the necessary elements of collective bargaining which are the mandatory subjects of collective bargaining. Employees may exert pressure over these. Employees, however, may not exert pressure with respect to other issues, generally considered to be management prerogatives and defined as "those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring). See also Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41, 62 Minn. L. Rev. 265, 320-21 (1977-1978).

The Supreme Court has recently demonstrated an inclination to follow Justice Stewart's approach. See Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 n.19 (1971).

27. The Court noted that the employees' activity was a labor dispute within the meaning of § 2(9) of the NLRA, 29 U.S.C. § 152(9) (1976), and that by implication the employees' actions did

To obtain protection under section 7, the employee must show that the activity that the employer sought to punish, the refusal to work in hazardous conditions, was a concerted activity.[28] Both the NLRB and the courts have had much difficulty in drawing the line between protected concerted activity and unprotected individual activity.[29] When more than one employee engage in activity to protest health or safety conditions or refuse to perform an assignment because they feel it is hazardous, there is generally no problem in demonstrating the requisite concert of action for "mutual aid or protection," whether[30] or not[31] their contract contains a clause regarding dangerous work

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not intrude into an area of managerial discretion. 370 U.S. at 15. See note 12, supra, on the limits of protected activity under § 7 of the NLRA.

*Washington Aluminum* has been interpreted by the NLRB to provide broad protection to workers in the health and safety context. See Empire Steel Mfg. Co., 234 N.L.R.B. 530 (1978).

28. See Jim Causley Pontiac Inc., 232 N.L.R.B. 125 (1977), remanded, 620 F.2d 122 (6th Cir. 1980).

29. Contrast for instance the broad definition of Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975) (when employee activity relates to health or safety issues concert of action emanates from the mere assertion of statutory health and safety rights), and NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 500 (2d Cir. 1967) (single employee activity concerted if purpose is to assert contractual rights; as such it is viewed as "constructive" concerted activity), with the much narrower definition accepted by various other courts of appeals, such as in ARO, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir. 1979) (for individual action to be deemed concerted it must be shown that the individual was in fact acting on behalf of his fellows, rather than activity for their benefit only in a theoretical sense), and NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971) (expressly rejecting *Interboro* on similar facts, holding single employee action cannot constitute concerted activity even if the activity was for the purpose of asserting contract rights). See also NLRB v. Bighorn Beverage, 614 F.2d 1238, 1242 (9th Cir. 1980) (explicitly rejecting the *Alleluia Cushion* rationale). These cases are discussed in greater detail in text accompanying notes 35-68 infra.

Even when the Board and the courts of appeals agree on the definition of concerted activity, they may not agree about whether a fact pattern falls into that category. When disagreement of this type occurs the courts of appeals generally prefer to remand the case to the Board for reconsideration in the light of the court's analysis of the facts. Because courts are relatively constrained in their power to review Board findings of fact, see Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951), the courts, in cases of this kind, will occasionally remand for reconsideration of the application of the law to the facts on issues the court feels the Board may not have studied sufficiently. E.g., Jim Causley Pontiac Inc., 620 F.2d 122, 125-26 (6th Cir. 1980). In this regard compare the opinion of the NLRB with that of the court of appeals in Jim Causley Pontiac Inc., 232 N.L.R.B. 125, 127-31 (1977), remanded, 620 F.2d 122, 125-27 (6th Cir. 1980).

30. Anheuser-Busch, Inc., 239 N.L.R.B. 207 (1978). In this case several employees were ordered to change filter bags on the pneumatic conveyer system in the employer's grain storage building. The employees refused to change the filters during the ten to fifteen minutes it took the other employees in the building to finish their welding operations, because floating grain dust presents a real danger of explosion. One employee was suspended for a week. The employee was working subject to a collective bargaining agreement with a safety clause. The NLRB found that § 7 barred the employer's disciplinary action.

31. In Modern Carpet Indus., 236 N.L.R.B. 1014 (1978), enforced, 611 F.2d 811 (10th Cir. 1979), unorganized maintenance employees had the task of melting lead and pouring it around machines to prevent vibration. The employer purchased from a hospital lead that had been used to store radioactive cobalt and radium. One of the employees was told by his wife, a nurse, that the lead was dangerous, and he and his co-workers told their supervisor they would not pour the lead. Though assured by company officials that the lead was safe, the employees were refused access to the company's sources of information. The employees left work rather than work with the lead and were fired. They had told their employer, however, that they would have worked with the lead had it been tested. The court of appeals enforced the NLRB order that the men be reinstated.

conditions.[32] The more difficult cases arise when only one employee actually engages in a protest or refuses to work and is disciplined by his employer. When a single employee engages in activity concerning safety matters covered by his collective bargaining agreement, the Board has repeatedly held that "he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract," and that such activity is "concerted and protected under the Act."[33] The Board has applied this rule when the employee did not invoke the contractual safety clause and may not even have known of its existence at the time he refused to perform his assignment.[34] However, not all courts of appeals have accepted the Board's conclusions.[35]

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32. Even if the activity is protected because of its objective, it may lose its protection because of the methods used, or because of a violation of another provision of the Act. Thus, if the employees refuse to work for safety reasons, but in doing so barricade themselves in the shop and refuse to allow others access to the plant, their activity will be held unprotected. See NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); NLRB v. Marshall Car Wheel & Foundry Co., 218 F.2d 409 (5th Cir. 1955) (plant walkout timed to cause maximum plant damage and financial loss to employer).

33. Roadway Express, Inc., 217 N.L.R.B. 278, 279 (1975). In *Roadway Express*, an employee of a trucking concern felt jerking and twisting in the cab of his truck and experienced trouble holding the truck on the road. He flagged down a fellow employee, who, after road-testing the truck, advised the employee to return the truck to the point of origin. This opinion was confirmed by a mechanic in a nearby truck stop. Both the employer's safety inspector and mechanic, however, found the truck roadworthy and the employee was fired. The employee's contract contained a clause giving him the right to refuse to operate equipment not in safe operating condition. The Board found that the lone driver's refusal was protected concerted activity.

34. In Woodings Verona Tool Works, [1979-1980] Lab. L. Rep. (243 NLRB Dec.) 41 16,010, at 29,969 (1979), the Board concluded that for purposes of invoking § 7, it was enough that "the nature of [the employee's] objection to performing the work [was] clearly related to his rights under the health and safety provisions of the contract." Cf. NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 979 (9th Cir. 1973) (no specific safety clause; concerted activity not found absent evidence that employee knew of collective bargaining agreement or was seeking to complement its terms).

35. Roadway Express, Inc., 217 N.L.R.B. 278 (1975), see note 33 supra, was a fusion of two theories. The first was the theory of constructive concerted activity, enunciated in NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967). This case held that individual action to enforce or implement the terms of a collective bargaining agreement would be deemed protected and concerted activity within the meaning of § 7. Fused to this theory was the Board's view that safety and health activities must be accorded special, broad protection. This view was based on the Board's interpretation of the "long-standing" principles of *Washington Aluminum*, 370 U.S. 9 (1962), and on the legislative emphasis on these health and safety concerns, as evidenced by the passage of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976). This second strand was first fully enunciated in Alleluia Cushion Co., 221 N.L.R.B. 999 (1975), decided in the same year as *Roadway Express*. The courts of appeals have not accepted the principles of *Interboro* or *Alleluia Cushion* when they are used independently. See, e.g., Jim Causley Pontiac Inc. v. NLRB, 620 F.2d 122 (6th Cir. 1980); NLRB v. Bighorn Beverage, 614 F.2d 1238 (9th Cir. 1980); ARO, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979); NLRB v. Dawson Cabinet Co., 566 F.2d 1079 (8th Cir. 1977); NLRB v. Buddies Supermkts., Inc., 481 F.2d 714 (5th Cir. 1973); NLRB v. Northern Metal Co. 440 F.2d 881 (3d Cir. 1971). Yet when the two are fused, as in *Roadway Express*, there seems to be greater acceptance of the result. See NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 979 (9th Cir. 1973). See discussion in NLRB v. Bighorn Beverage Co., 614 F.2d 1238, 1242 (9th Cir. 1980). There may be several reasons for court support of the *Roadway Express* rule. The nature of the safety clauses at issue may be more readily read as conferring individual rights, NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977 (9th Cir. 1973); NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967), and vindica-

Whether the activity of a single employee is concerted when it is not buttressed by a collective bargaining agreement safety clause is a more difficult question. In *Alleluia Cushion Co.*,[36] the NLRB held that when a single employee engages in activity related to health or safety concerns, the activity is deemed concerted, unless there is evidence that fellow employees disavow the activity.[37] Despite the Board's firm adherence to the *Alleluia Cushion* doctrine,[38] however, many courts of appeal have refused to accept its holding that an employee acting alone, without a clause regarding safety in the employment agreement, cannot obtain protection under section 7.[39] This disagree-

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tion of safety and contract rights together may be sufficient to overcome arguments against constructive concert of action in these situations.

However, the *Roadway Express* rule has not gone unquestioned. At least four circuits have rejected the *Interboro* rule with no exception for health and safety cases. See ARO, Inc. v. NLRB 596 F.2d 713 (6th Cir. 1979); NLRB v. Dawson Cabinet Co., 566 F.2d 1079 (8th Cir. 1977); NLRB v. Buddies Supermkts., Inc., 481 F.2d 714 (5th Cir. 1973); NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971). While it is possible that these courts follow the NLRB rule in cases coming under specific contract safety clauses capable of being read as conferring individual rights, there is every reason to believe these courts would reject the broad rule of *Roadway Express*. This is especially so in cases of reliance by individual workers on collective bargaining agreements, because most of these agreements contain grievance and arbitration procedures. In the light of the Supreme Court's development of a very broad policy favoring arbitration in the context of collective bargaining agreements, see text accompanying note 143 infra, the rejection of *Roadway Express* by the courts of appeals would probably rest upon the idea that the contract rights of individual workers are adequately protected by the grievance-arbitration procedures of their agreements.

36. 221 N.L.R.B. 999 (1975).

The Alleluia Cushion Company was an unorganized shop with no negotiated collective bargaining agreement. A maintenance employee complained to the employer about the overall safety program in the plant. Dissatisfied with the employer's response, the employee complained to the California OSHA office, and sent a copy of the complaint to the home office of the company. When the OSHA inspector came, the employee was asked to join him on a walkaround. The next day he was fired for failure to perform his work. There was no evidence presented that the employee had discussed this with any other employee. On these facts the Board concluded that the employee "was engaged in protected concerted activity when he filed the complaint with [OSHA]" and remanded the case to the administrative law judge for consideration of the merits of the § 8(a)(1) charge. 221 N.L.R.B. at 1001.

It should be noted that the employee might have sought protection under § 11(c) of the Occupational Safety and Health Act, 29 U.S.C. § 660(c) (1976), which is not burdened with a concert of action requirement. Alternatively, he might have been able to vindicate his rights under the California Occupational Safety statute. See Cal. Labor Code § 6399.7 (West Supp. 1981) (protecting worker's right to file complaints or pursue other statutory rights). The NLRB's concern was with the employee's rights under § 7, without regard to alternative remedies.

37. 221 N.L.R.B. at 1000.

The NLRB found that state and federal legislation aimed at promoting occupational safety supported this presumption of concerted action. Id. The Board emphasized that the law was created for the benefit of all employees, and that the employer was under a legal duty to comply with its requirements. To allow the employer to break the law, to the detriment of all employees, and at the same time allow him to discipline the one employee who does what others might have been thinking of doing, merely because the other employees were not vocal in the protection of their rights, would create a situation in which it would be in the employer's best interest to break the law.

38. See, e.g., Jim Causley Pontiac, 232 N.L.R.B. 125 (1977), remanded, 620 F.2d 122 (6th Cir. 1980); ARO, Inc., 227 N.L.R.B. 243 (1976), enforcement denied, 596 F.2d 713 (6th Cir. 1979); Du-Tri Displays, Inc., 231 N.L.R.B. 1261 (1977).

39. NLRB v. Bighorn Beverage, 614 F.2d 1238 (9th Cir. 1980); Jim Causley Pontiac v. NLRB, 620 F.2d 122 (6th Cir. 1980); ARO, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979).

ment between the courts and the NLRB has created much uncertainty as to the applicability of section 7.[40] If the employee meets this threshold requirement of concerted action the courts then apply a subjective good faith standard in determining whether section 7 protects an employee from retaliation by the employer for refusing to work out of fear of injury.[41] If the employee's fear that injury would result from performing the requested tasks was genuine, the employer is barred from taking any disciplinary action for the employee's refusal to work.[42] Because the standard is one of subjective good faith, the employees need not show the existence of any degree of danger.[43] A later investigation showing that the employee in fact had nothing to fear is irrelevant to the determination.[44]

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In *ARO*, a nonsafety case, the NLRB had grounded its finding that the employee's action was concerted on the theory of *Roadway Express:* the employee's activities were arguably based on a contract clause, so her actions were protected under § 7. ARO, Inc., 227 N.L.R.B. 243 (1976), enforcement denied, 596 F.2d 713 (6th Cir. 1979). See notes 33 and 35 supra for a discussion of *Roadway Express* and constructive concerted action. The court of appeals rejected the constructive concerted action doctrine, which the NLRB had applied, and denied enforcement. 596 F.2d at 716-17.

In Jim Causley Pontiac Inc. v. NLRB, 620 F.2d 122, 126 n.7 (6th Cir. 1980), the court relied upon *ARO* in rejecting the *Alleluia Cushion* rule.

40. Most commentators support the NLRB's position. See Ashford & Katz, Unsafe Working Conditions: Employee Rights Under the Labor Management Relations Act and the Occupational Safety & Health Act, 52 Notre Dame Law. 802 (1977); Kirschner, Workers in a *Whirlpool:* Employees' Statutory Rights to Refuse Hazardous Work, 31 Labor L.J. 283, 284 (1980).

41. NLRB v. Washington Aluminum Co., 370 U.S. 9, 16 (1962).

42. NLRB v. Modern Carpet Indus., Inc., 611 F.2d 811, 815 (10th Cir. 1979).

The employer is not helpless in this situation. He is free to replace the workers who refuse to perform their assigned task. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). See also Comment, A Right Under OSHA to Refuse Unsafe Work or a Hobson's Choice of Safety or Job?, 8 U. Balt. L. Rev. 519, 543 & nn.168-69 (1979) [hereinafter cited as Comment, Balt. L. Rev.]. However, if the employer also disciplines the protesting employees and the employees successfully invoke § 7, then they will be treated as unfair labor practice strikers who must be reinstated upon NLRB order. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

43. Lloyd A. Fry Roofing Co., 237 N.L.R.B. 1005, 1006 (1978).

In general, the employees need not present a specific grievance to the employer before engaging in their activity. NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962). However, where there exists an established grievance-type procedure but no collective bargaining agreement, the employees' duty to use this procedure before engaging in any protest or refusal will probably depend on several factors: the adequacy of the procedure, the nature of the condition being protested, and the immediacy of the danger as perceived by the affected employees. This seems to be the necessary implication of the Court's decisions in *Washington Aluminum* and the cases requiring a strong presumption of arbitrability over all issues not expressly excluded from an arbitration/no-strike clause. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) [hereinafter cited as Steelworkers Trilogy].

The policies sought to be promoted in these cases are the attainment and preservation of industrial peace and the protection of employee rights to band together for mutual aid and protection. Where a regular channel for settling employee grievances exists, one could argue that both policies would be furthered by a presumption that an issue should be brought *first* through the *established* procedure, even if the procedure is not one created as a result of collective bargaining. This would not run counter to the policy expressed in *Washington Aluminum* because in that case no established grievance procedure was available at all. This presumption could be overcome if it can be shown that it interferes impermissibly with the employee's § 7 rights.

44. Du-Tri Displays, Inc., 231 N.L.R.B. 1261, 1269 (1977). See also Woodings Verona Tool Works, [1979-1980] Lab. L. Rep. (243 NLRB Dec.) 16,010, at 29,969 (1979).

An employee seeking protection under section 7 need not show a proximate relation between himself and the danger that is the object of the concerted action. If his actions are undertaken in the good faith belief that there is a danger to fellow employees, then it will generally be found to be protected.[45] Thus, employees who join in a fellow employee's protest over the danger of his assigned task engage in protected concerted activity even though only the exposed employee has an immediate stake in the outcome.[46]

2. *Section 502.* Employees represented by a union may waive some of their section 7 rights.[47] Among the most important rights a union may waive on behalf of its members is the right to strike. If the contract negotiated by the union contains a no-strike clause,[48] employee conduct in violation of that clause is not protected by section 7 and the participating employees are subject to discharge.[49] Violation of the no-strike clause could also subject the union to an injunction ordering compliance with the no-strike clause and an action for damages by the employer for breach of this contractual provision.[50] Employees are therefore deemed to violate a no-strike clause if they engage in a concerted work stoppage to avoid the performance of hazardous work or to protest the existence of threats to health or safety.[51] They are, as a result, subject to discipline at the employer's will.

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45. Both the courts and the NLRB have interpreted the reach of mutuality of aid or protection broadly. See NLRB v. Peter Cailler Kohler Swiss Chocolates Co., Inc., 130 F.2d 503 (2d Cir. 1942) (employee activity arguably in support of others is mutual within the meaning of § 7 in that the activity of present employee represents a showing of support for others in the labor movement who may later be called upon to give comparable support).

46. See, e.g., Morrison-Knudsen Co., Inc. v. NLRB, 358 F.2d 411 (9th Cir. 1966) (father's refusal to work because of danger to son is protected concerted activity). See also Comment, U. Balt. L. Rev., supra note 42, at 541-42.

47. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). But a union may not waive all § 7 rights. See NLRB v. Magnavox Co., 415 U.S. 322 (1974).

48. No-strike clauses appear in a variety of forms. A no-strike clause may specifically exempt certain employee activities, such as safety or health actions. See the United Auto Workers' contract with Allis-Chalmers Mfg. Co. for an example of an agreement excluding safety and health actions, U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-16, Major Collective Bargaining Agreements: Safety and Health Provisions (1976). However, many no-strike clauses are unconditional. See, e.g., Agreement between the United Steel Workers of America and Bethlehem Steel Corp., art. XVII, Aug. 1, 1980. While no-strike clauses may be expressly included in the collective bargaining agreement, they may also be implied in such agreements. See note 145 and accompanying text infra. Unless otherwise stated, this Note refers to the common general nonconditional no-strike clause.

49. NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939).

50. See § 301 of the LMRA, 29 U.S.C. § 185 (1976).

In Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970), the Supreme Court held that courts may enjoin strikes in violation of a no-strike clause in cases where a collective bargaining agreement contains a mandatory arbitration procedure that covers the issue resulting in the strike, providing certain equitable considerations are met.

See also Ashford & Katz, supra note 68, at 665-75; Tobin, OSHA, Section 301 and the NLRB: Conflicts of Jurisdiction and Rights, 23 Am. U.L. Rev. 837, 841-45 (1974); Comment, Balt. L. Rev., supra note 42, at 543-44.

51. Section 501(2) of the LMRA, 29 U.S.C. § 142(2), provides:

> The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

Congress created an exception to this rule in section 502 of the Labor Management Relations Act (LMRA). Section 502 protects work stoppages related to "abnormally dangerous conditions for work," which would otherwise violate a no-strike clause.[52] Employees have no private right of action under section 502. Workers discharged for violation of their no-strike clause must allege a violation of their section 7 rights asserting that their conduct came within the section 502 exception to every no-strike clause. The provision operates both as a rule of construction of the collective bargaining agreement[53] and as a defense in an employer's action for an injunction against the work stoppage.

Two preliminary questions regarding the scope of protection provided by section 502 have generated much debate and remain unsettled. First, it is not clear whether the concerted action requirements of section 7 limit the applicability of section 502.[54] Workers claiming rights under section 502 must resort to the NLRB procedures designed to enforce section 7 rights,[55] but the actual text of section 502 makes no reference to section 7 or its requirements. Second, there is the question whether section 502 protects all workers who refuse to work because of the hazardous conditions or only those workers actually threatened by the dangerous condition. Three positions have emerged.

Several commentators have argued that section 502 does not incorporate the section 7 concerted action requirements and protects only employees actually threatened by a hazardous condition. It is argued that because section 502 is the basis of an affirmative right, the scope of its application cannot be dependent on other sections of the labor law, particularly section 7. Because section 502 covers "an employee or employees" but fails to mention unions or representative organizations, the section affords protection to those employees *actually* threatened by abnormally dangerous conditions, but not employees who engage in activity in sympathy with the directly affected

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52. Section 502 of the LMRA, 29 U.S.C. § 143 (1976), provides in part: "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter."

Section 502 has been fairly extensively explored by the commentators. See Ashford & Katz, supra note 40, at 805-18; Atleson, Threats to Health and Safety: Employee Self-Help Under the NLRA, 59 Minn. L. Rev. 647 (1975). See also Braid, OSHA and the NLRA: New Wrinkles on Old Issues, 29 Lab. L.J. 755, 765-67 (1978); Kirschner, supra note 40, at 285-87; Tobin, supra note 50, at 855-56; Comment, Balt. L. Rev., supra note 42, at 543-47.

53. Atleson, supra note 52, at 659. Section 502 does not provide a basis for suit by a wrongfully disciplined employee. Under § 301, however, a union may sue for damages if the discipline constitutes a breach of the agreement with the employer.

54. For a discussion of these requirements, see notes 28-44 and accompanying text supra.

55. An employee disciplined for violating a no-strike clause who claims his actions are protected by § 502 and who seeks to contest the discipline must file an unfair labor practice charge against his employer charging a violation of § 8(a)(1) of the NLRA. See NLRB v. Fruin-Colnon Constr. Co., 330 F.2d 885 (8th Cir. 1964). The protection offered by the unfair labor practice machinery is not exclusive. The employee may have explicit protection for his actions in the collective bargaining agreement itself. See, e.g., the August 1, 1980, agreement between the United Steel Workers of America and the Bethlehem Steel Corp., art. XIV.

employees.[56] Extending section 502 protection only to those employees directly threatened by abnormally dangerous conditions would protect the individual employees affected, while at the same time preserving the viability of negotiated no-strike and arbitration clauses.[57] This interpretation would also conform to the traditional labor law policy of narrowly construing exceptions to collective bargaining agreements.[58] Other commentators and, apparently, the NLRB,[59] have argued that section 502 incorporates section 7 requirements and is available only for concerted refusals to perform abnormally dangerous work.[60] Under this view, section 502 is not the basis of an affirmative right, as is section 7 of the NLRA. Instead, section 502 writes a limited exception into every general no-strike clause, making conduct that would otherwise be unprotected because it violates the no-strike clause eligible for protection. However, that the activity no longer violates the collective bargaining agreement does not automatically mean that it is protected by section 7. For the employee to be protected his actions must meet the prerequisites of section 7; sympathetic action by fellow employees would be protected, as under section 7.

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56. Ashford & Katz, supra note 40, at 807; Ferris, Resolving Safety Disputes: Work or Walk, 26 Lab. L.J. 695, 702 (1975).

57. See Braid, supra note 52, at 757-58; Kirschner, supra note 40, at 286.

Some commentators who argue that § 502 protects individual workers also argue that the protection of the § 502 exception is not limited to those employees immediately affected by the dangerous condition, but should be interpreted to protect even unauthorized walkouts. See Atleson, supra note 52, at 660. See also Craver, Minority Action versus Union Exclusivity: The Need to Harmonize NLRA and Title VII Policies, 26 Hastings L.J. 1, 33-39 (1974); Atleson, Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience, 34 Ohio St. L.J. 750, 773 (1973).

Thus § 502 would protect not only individual refusals to work at dangerous tasks but also actions in protest of abnormally dangerous conditions unauthorized by the union. These broader actions are not normally protected by § 7, see NLRB v. Draper Corp., 145 F.2d 199 (4th Cir. 1944); NLRB v. Sunbeam Lighting Co., 318 F.2d 661 (7th Cir. 1963).

58. As the overall goal of the NLRA is to promote industrial peace through the promotion of effective collective bargaining and the process of the peaceful and orderly settlement of industrial disputes, exceptions to the collective bargaining agreement should therefore be explicit and as narrowly construed as possible. Extending § 502 protection only to those employees directly threatened by abnormally dangerous conditions would serve the purpose of protecting the individual employee affected while at the same time preserving the viability of negotiated no-strike and arbitration clauses.

59. Alleluia Cushion Co., 221 N.L.R.B. 999 (1975); Roadway Express, Inc., 217 N.L.R.B. 278 (1975). In applying the requirements of § 7 to § 502, however, the Board has applied its very relaxed rule of implied concert of action. See notes 45-49, 51-61, and accompanying text supra. The courts of appeals that have imposed stricter concerted action requirements under § 7, see notes 35, 62, and accompanying text supra, would probably impose those strict requirements in the § 502 context. This question has not arisen often because the employee often cannot meet the substantive standard of § 502. See notes 117-140 and accompanying text infra.

The issue of concert of action, of course, is not the only one pertinent to a discussion of the applicability of § 7 protection to a § 502 activity. For instance, the employees may not invoke any improper means of protest if their activity is to come within the protection of § 7. See generally NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); Advance Indus. Division—Overhead Door Corp. v. NLRB, 540 F.2d 878 (7th Cir. 1976); NLRB v. Marshall Car Wheel & Foundry Co., 218 F.2d 409 (5th Cir. 1955). See generally Fluegel, The Right of an Employee Under OSHA to Refuse to Work in the Face of Imminent Danger, 64 Minn. L. Rev. 115 (1979).

60. See, e.g., Fluegel, supra note 59, at 141.

Some advocates of this last position have gone further and contend that only workers actually exposed to the dangerous condition and acting in concert under section 7 would be protected under the exception to the no-strike clause provided by section 502. Under this rule at least two workers who are themselves faced with an abnormally dangerous condition within the meaning of section 502 must engage in the activity, provided the substantive requirements of section 502 have been met, to gain the protection of section 7.[61] This interpretation, of course, would severely limit the availability of section 502 protection. The issue, though, remains unresolved for lack of a pronouncement by Congress or the Supreme Court.[62]

Once it is established that an employee's activity is protected under section 502, the level of substantive protection available to him is more clearly defined. The Board and courts apply an objective standard: "What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.' "[63] The test has two parts: the employee must have refused to work because of the existence of "abnormally dangerous" conditions and these conditions must be proven by objective evidence.[64] The commentators have been critical of this standard, on the ground that it presents threatened employees with a Hobson's choice.[65] An employee who refuses to work risks the loss of his job if a "later tribunal, not affected by the 'heat' of the situation or personally endangered by the peril, will find the danger only 'normal,' "[66] leaving the employer free to discipline the employee as he pleases. Alternatively, the employee may accept the work assignment and risk serious injury or death. The courts and the NLRB have required submission of "objective" evidence

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61. This seems to be the position of the Court of Appeals for the Sixth Circuit. In Clark Eng'r & Constr. Co. v. United Bhd. of Carpenters, 510 F.2d 1075, 1079 (6th Cir. 1975), the court stated, "When an employee is exposed to abnormally dangerous working conditions and quits work . . . [§ 502] protects him from employer retaliation." Thus it appears that the employee must actually be exposed to the abnormal conditions to be covered by § 502.

The Sixth Circuit's strict requirements for concerted action indicate that two employees must participate in the activity for the concerted action requirement to be satisfied. In Jim Causley Pontiac, Inc. v. NLRB, 620 F.2d 122, 126 n.7 (6th Cir. 1980), the court stated that the "employer must know that the complaining employee is actually representing the views of other employees." See also notes 35 & 62 supra. While these cases did not involve actions under § 502, their principles would probably be controlling.

62. The Supreme Court did not reach this issue in Gateway Coal Co. v. UMW, 414 U.S. 368 (1974).

63. Redwing Carriers, Inc., 130 N.L.R.B. 1208, 1209 (1961). This standard was approved in Gateway Coal Co. v. UMW, 414 U.S. 368, 386-87 (1974). See generally Ashford & Katz, supra note 40, at 805-06; Atleson, supra note 52, at 682-95; Kirschner, supra note 40, at 287-88; Tobin, supra note 50, at 855-56; Comment, Balt. L. Rev., supra note 42, at 544-45. See also NLRB v. Fruin-Colnon Constr. Co., 330 F.2d 885, 892 (8th Cir. 1964); Anaconda Aluminum Co., 197 N.L.R.B. 336, 344 (1972); Stop & Shop, Inc., 161 N.L.R.B. 75, 76 n.3 (1966); Curtis Mathes Mfg. Co., 145 N.L.R.B. 473, 475 (1963).

64. In addition, the employee must have left his work in good faith. See Marshall v. Daniel Constr. Co., 563 F.2d 707, 722 n. 16 (5th Cir. 1977) (Wisdom, J., dissenting). See also notes 66-76 and accompanying text infra.

65. Atleson, supra note 52, at 687-89.

66. Id. at 688.

sufficient to make it more probable than not that the dangerous condition existed.[67]

Objective proof of the existence of an "abnormally dangerous condition" involves demonstration of two separate elements: that a dangerous condition did exist, and that the danger was "abnormal." Two types of evidence seem to carry great weight in the proceedings: expert testimony and pictorial evidence. Employees seeking the protection of section 502 will usually prevail if both types of evidence are available.[68] An employee will generally fail if neither is available.[69]

When the employee is able to introduce neutral third party expert evidence that matches or surpasses that of his employer, the Board and courts tend to be much more receptive.[70] When pictorial evidence of the hazard is made available the decision is also much more likely to be in favor of the employee.[71] The major drawbacks of this element of the standard are that it inequitably makes protection heavily dependent on the financial ability of the employee to procure experts and that it depends too heavily on fortuitous circumstances, such as the presence of a television crew at the scene of the danger site.[72]

Even if the requisite testimony is available, still more formidable obstacles lie in proving that the danger shown to exist is "abnormal." The courts and the NLRB have not been consistent in their approach to this problem. They have fashioned a complex standard difficult to apply with any certainty to particular fact situations. As a result, a worker can never be reasonably certain that his refusal is protected. Criteria will differ depending on whether the danger arises in an occupation that is not normally dangerous or in one characterized as inherently dangerous. In the case of a nondangerous occupation, the test of abnormality is the unusualness of the protested condition.

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67. See Gateway Coal Co. v. UMW, 414 U.S. 368 (1974); Redwing Carriers, Inc., 130 N.L.R.B. 1208 (1961); NLRB v. Fruin-Colnon Constr. Co., 330 F.2d 885 (8th Cir. 1964).

68. See Philadelphia Marine Trade Ass'n, 138 N.L.R.B. 737 (1962), enforced, 330 F.2d 492 (3d Cir.), cert. denied, 379 U.S. 833 (1964).

69. In Stop & Shop, Inc., 161 N.L.R.B. 75 (1966), the employee sought to invoke § 502 after being discharged. Stop & Shop submitted evidence from a more or less neutral third-party expert, a safety engineer of the employer's insurance carrier, who had judged the equipment to be safe before the employer allowed his employees to work with it. The employee could offer no similar expert testimony and lost.

When the employee is able to introduce neutral third-party expert evidence that matches or surpasses that of his employer, the Board and courts are apt to be much more receptive. In Roadway Express, Inc., 217 N.L.R.B. 278 (1975), a truck driver refused to drive a truck he believed unsafe and was later fired.

70. See, e.g., Roadway Express, Inc., 217 N.L.R.B. 278 (1975), enforced mem., 532 F.2d 751 (4th Cir. 1976). *Roadway Express* is particularly interesting because the employer also introduced the testimony of his safety inspector and mechanic who had inspected the truck. The employee introduced the testimony of a fellow employee and of the mechanic of a truckstop both of whom had test-driven and inspected the truck, people certainly no more expert than the employer's witnesses. The NLRB, however, found the employee's refusal to work protected under § 502.

71. See, e.g., Philadelphia Marine Trade Ass'n, 138 N.L.R.B. 737 (1962), enforced, 330 F.2d 492 (3d Cir.), cert. denied, 379 U.S. 833 (1964).

72. Id.

Only if it is rarely encountered in the worker's occupation will section 502 be found to apply.[73] Implicit in this distinction is the assumption that "usual" dangers have been bargained for and that an employee's salary reflects added compensation for the expected dangers of the workplace.[74]

When the Board determines that an occupation or job is inherently dangerous, a different test of abnormality is applied. The employee must prove the existence of additional factors that change the character of the danger. The Board has asserted that "work which is recognized and accepted by employees as inherently dangerous does not become 'abnormally dangerous' merely because employee patience with prevailing conditions wears thin or their forbearance ceases."[75] In order to show that the character of the danger has changed, the employee must prove that he "was protesting against a work situation without precedent, or against work which harbored danger of an unexplored or unknown character."[76]

Neither of these tests applies if the employer can prove that the employees acquiesced to the existence of the danger. Under section 502, employees are deemed to waive their right to complain upon acceptance of any condition of employment, even conditions inherently dangerous. Once the employee has waived the right to complain, future refusals to work will be unprotected.[77]

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73. Curtis Mathes Mfg. Co., 145 N.L.R.B. 473 (1963).

The Board found that "there existed no reasonable basis for [the employees'] good-faith belief that working conditons were abnormally dangerous, in view of the fact that there were frequent breakdowns of the suction system." Id. at 475 n.4.

The Board has also refused to apply § 502 in cases of refusals to work for fear of violence or attack in the context of a strike because violence or "some disorder is not unusual in any extensive strike." Redwing Carriers, Inc., 130 N.L.R.B. 1208, 1211 (1961).

74. Moreover, these usual dangers, since they are expected to a certain degree, do not pose an imminent danger. The Board will extend protection only to danger that is imminent in the given situation. Though rarely mentioned, this underlying limitation does emerge from time to time. See Philadelphia Marine Trade Ass'n, 138 N.L.R.B. 737, 753 (1962), enforced, 330 F.2d 492 (3d Cir.), cert. denied, 379 U.S. 833 (1964). But cf. Marshall v. Daniel Constr. Co., 563 F.2d 707, 722 n.16 (5th Cir. 1977) (Wisdom, J., dissenting) (In contrasting 29 C.F.R. 1977.12 and § 502, Judge Wisdom concluded that unlike the OSHAct regulation, "§ 502 lacks an imminence requirement."). This underlying test of imminence, at least as used when considering the applicability of § 502 in situations where employment conditions are not inherently dangerous, is hard to harmonize with any literal construction of the statute. However, it could be argued that Gateway Coal Co. v. UMW, 414 U.S. 368 (1974), modified § 502 and narrowed the range of situations to which it is applicable. The *Gateway Coal* court concluded that only "a work stoppage called solely to protect employees from *immediate* danger is authorized by § 502." 414 U.S. at 385 (emphasis added). The Court thereby may have redefined abnormally dangerous conditions to mean only imminently dangerous conditions. An employee might have to prove not only the existence of circumstances that change the character of the normal workplace danger but also the imminence of the danger. This standard would increase the evidentiary burden of the employee as well as limit the types of dangerous conditions protected by § 502. Alternatively, an employee might have to prove that the threatened danger was *imminent* and unusual to satisfy the abnormality requirement. The ultimate meaning of *Gateway Coal* can only be ascertained through further judicial development.

75. Anaconda Aluminum Co., 197 N.L.R.B. 336, 344 (1972) (footnote omitted).

76. Id. See also NLRB v. Fruin-Colnon Constr. Co., 330 F.2d 885 (8th Cir. 1964), denying enforcement to 139 N.L.R.B. 894 (1962). This test has been criticized. See Atleson, supra note 52, at 696-97.

77. Thus the trial examiner in Philadelphia Marine Trade Ass'n, 138 N.L.R.B. 737 (1962), enforced, 330 F.2d 492 (3d Cir.), cert. denied, 379 U.S. 833 (1964), found it significant that the

This waiver exception to section 502 protection adds to the uncertainty concerning the circumstances under which this section is applicable.[78]

B. *Arbitration*

An employee disciplined for refusing to do hazardous work need not resort to the machinery of the NLRB.[79] If the employee's collective bargaining agreement contains an arbitration clause, he can file a grievance protesting the employer's disciplinary action. An impartial arbitrator will then determine whether the employee can be punished for refusing to work.

The Supreme Court has fashioned a broad policy favoring arbitration in the context of collective bargaining agreements.[80] It has determined that the quid pro quo of an arbitration clause is a no-strike clause and will imply either clause in a collective bargaining agreement that expressly includes the other.[81] Courts will in the face of an express or implied no-strike clause grant specific performance of a collective bargaining agreement, either to compel arbitration[82] or to enjoin a strike.[83]

In *Gateway Coal Co. v. UMW*,[84] the Supreme Court extended this policy favoring arbitration to situations in which employees refuse to work for safety-related reasons. Thus when a collective bargaining agreement contains an express or implied no-strike clause covering safety issues, an employee can avoid employer retaliation for a refusal to work if the refusal is protected by section 502 or if the arbitrator finds his action protected under the contract.

Arbitrators are generally bound to base their decisions strictly on the "essence [of] the collective bargaining agreement" that forms the basis of the relationship between the employer and the employee.[85] Despite this limita-

only other time the union had been requested to do the work in question, similar protests by employees had resulted. Conversely, in NLRB v. Fruin-Colnon Constr. Co., 330 F.2d 885 (8th Cir. 1964), denying enforcement to 139 N.L.R.B. 894 (1962), the court noted, to the detriment of the employees' case, that others had performed the job they had refused both before and after the refusal. See also Anaconda Aluminum Co., 197 N.L.R.B. 336, 345 (1972).

78. This waiver exception to § 502 protection reduces the availability of protection to employees in a way difficult to defend. A failure to assume any risk may be hard to prove, especially in cases where risk is defined broadly. Also, there is no support for the contention that by enacting § 502 Congress meant to extend health and safety protection only to those employees working in risk-free jobs. Congress meant to allow employees to prevent injury to themselves whenever faced with a threatening situation, no matter what the "normal" or "usual" potential for danger in a particular job. See Atleson, supra note 52, at 696-97. See also Philadelphia Marine Trade Ass'n, 138 N.L.R.B. 737, 752 (1962), enforced, 330 F.2d 492 (3d Cir.), cert. denied, 379 U.S. 833 (1964); NLRB v. Fruin-Colnon Constr. Co., 330 F.2d 885 (8th Cir. 1964).

79. See Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964).

80. See Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). The Court has limited the role of the judiciary in the arbitration process and has established rules creating a strong presumption of arbitrability, with doubts to be resolved in favor of arbitration. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

81. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

82. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

83. Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970).

84. 414 U.S. 368 (1974).

85. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). For a discussion of the basic elements of arbitration and the arbitral process, see E. Elkouri

tion, arbitrators have developed standards or rules of decision for cases involving employee refusals to perform work in the face of perceived threats to health or safety. As a general rule, employees ordered to perform certain tasks that may violate health or safety provisions must comply with the order and then file a grievance.[86] The general rule has two exceptions: the worker need not comply with the order if the task assigned involves committing an illegal act, or if he "reasonably believes" the order "will endanger his health or safety."[87] In contrast to section 502, this standard does not involve an objective showing of the danger associated with the refused task. Employees must prove only an honest and reasonable belief similar to the good faith showing required for section 7 protection.[88] The danger feared need not be abnormal; any danger suffices to bring the employee within the arbitral exception. The cases suggest that there must, however, be some imminence to the danger, "an actual hazard to life and limb," if the exception is to be successfully invoked.[89] If the danger is such that it is possible for the employee to perform first and then submit a grievance, the exception will not apply and the employer's action will be upheld.[90]

The protection offered employees by the arbitration system is relatively incomplete. Because arbitration is generally limited to the terms of the collective bargaining agreement, it is subject to the endless variations in contract terms possible in the formulation of individual agreements. In addition, while compliance with a reasonable belief and imminence standard will allow an employee to bring a grievance before an arbitrator, it may not be enough to allow him to prevail, and may even be irrelevant, on the merits. Finally, because of the private nature of the collective bargaining agreement, the individual arbitrator has much freedom in his choice of standard in this type of case. For example, the reasonableness standard may govern the procedural question of whether arbitration is available, but the arbitrator may impose the section 502 objective standard in determining the merits of the grievance.[91]

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& F. Elkouri, How Arbitration Works (3d ed. 1973). See also N. Ashford, Crisis in the Workplace: Occupational Disease and Injury: A Report to the Ford Foundation 186-87 (1976) [hereinafter cited as Ashford]; Atleson, supra note 52, at 711-13; Doppelt, OSHA: Impact on the NLRA and Arbitration, 20 Wayne L. Rev. 1015 (1974); Note, The Occupational Safety and Health Act of 1970: The Right to Refuse to Work Under Hazardous Conditions, 1979 Wash. U.L.Q. 571, 595-96.

86. FMC Corp., 45 Lab. Arb. 293 (1965) (McCoy, Arb.).

87. Id. at 295; Laclede Gas Co., 39 Lab. Arb. 833, 839 (1962) (Bothwell, Arb.).

88. FMC Corp., 45 Lab. Arb. 293 (1965) (McCoy, Arb.). See also Atleson, supra note 52, at 712.

89. Hegeler Zinc Co., 8 Lab. Arb. 826, 831 (1947) (Elson, Arb.).

90. The technical limits of arbitral power in cases of this type, as well as the range of situations covered by the arbitral exception, remain unexplored. "None of [the available] cases . . . have involved a walkout of more than a few employees, and in each case the employees involved were all directly confronted with the safety hazard." Atleson, supra note 52, at 713.

91. International Harvester and the Auto Workers, 6 A.L.A.A. ¶ 69.601, quoted in Ashford, supra note 85, at 187.

The question of the proper standard to apply is complicated by the controversy over the relationship between external statutory standards and the standards applied by arbitrators. And in this context, there are several different statutory standards to choose from. See generally Sovern,

The arbitrator is free to afford the employee some protection even when the standard is not met completely.[92] However, the protection remains ad hoc in character and there is no guarantee that similar refusals will be treated similarly by different arbitrators.[93]

### C. *Occupational Safety and Health Act*

The Occupational Safety and Health Act of 1970[94] was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[95] Towards that end it established the Occupational Safety and Health Administration (OSHA). The Act requires employers to provide their workers with a hazard-free workplace[96] and gives employees a broad range of rights, including involvement in the formulation of safety standards,[97] access to information about the safety of the workplace,[98] and the right to an OSHA inspection of work conditions they believe to be dangerous.[99]

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When Should Arbitrators Follow Federal Law, *in* Arbitration and the Expanding Role of Neutrals: Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators 29, 38-45 (1970), reprinted in 3 E. Teple, Arbitration and Conflict Resolution 387-88 (1979); Meltzer, Ruminations About Ideology, Law, and Labor Arbitration, *and* Howlett, The Arbitrator, the NLRB and the Courts *in* The Arbitrator, the NLRB, and the Courts: Proceedings of the 20th Annual Meeting, National Academy of Arbitrators 1 (1967), reprinted in E. Teple, supra, at 382-87.

92. Thus where the employee acted in good faith but failed to meet the standard of § 502, the arbitrator reduced the penalty imposed by the employer. International Harvester and the Auto Workers, 6 A.L.A.A. ¶ 69.601, quoted in Ashford, supra note 85, at 187.

93. Some commentators find the protection offered by the arbitration process to be insufficient in view of the risks the employees must take. See Ashford, supra note 85, at 187.

94. 29 U.S.C. §§ 651-678 (1976).

95. 29 U.S.C. § 651(b) (1976).

96. 29 U.S.C. § 654(a)(1)-(2) (1976).

97. Occupational Safety and Health Act of 1970 § 6(b)(1), 29 U.S.C. § 655(b)(1) (1976), gives employees the right to petition the Secretary of Labor for the promulgation of safety standards in particular areas. Section 6(b)(1), (2), 29 U.S.C. § 655(b)(1)-(2) (1976), also gives employees the right to participate in hearings on the matter of the promulgation of safety standards, and § 6(f), 29 U.S.C. § 655(f) (1976), gives employees the right to challenge standards producing adverse conditions for them.

98. Employees have the right to be kept informed by the employer of relevant OSHA standards under the Act, § 8(c)(1), 29 U.S.C. § 657(c)(1) (1976), and the right to observe any monitoring of the work environment by the employer as well as access to records of such monitoring and of employee exposure to toxic substances or harmful physical agents. § 8(c)(3), 29 U.S.C. § 657(c)(3) (1976). Employees have the right to be informed when their employer requests a variance from a safety standard and the right to contest the application for such a variance. Section 6(b)(6)(A), 29 U.S.C. § 655(b)(6)(A) (1976). See also § 6(b)(6)(B)(v), 29 U.S.C. § 655(b)(6)(B)(v) (1976). If an employer is cited for a violation of a safety standard, the employees affected may contest the abatement period imposed as unreasonable. Section 10(c), 29 U.S.C. § 659(c) (1976).

99. Section 8(f)(1), 29 U.S.C. § 657(f)(1) (1976). When an OSHA Compliance Safety and Health Officer arrives, an employee has a right to accompany him on his tour of the workplace and consult with him freely regarding health and safety matters. Section 8(e), 29 U.S.C. § 657(e) (1976).

If the Secretary of Labor, through OSHA, fails to act on a complaint, the individual employee may bring an action for a writ of mandamus to compel the Secretary to act. However, the employee must be able to show that the failure to act was either arbitrary or capricious. Section 13(d), 29 U.S.C. § 662(d) (1976). See also discussion in text accompanying note 78 supra.

The reach of the statute is extremely broad, utilizing the full scope of congressional power under the commerce clause.[100] The class of persons or groups who may not discriminate against employees asserting rights under the Act is defined to cover any conceivable type of combination or individual action.[101] "Employees" who may not be discriminated against include all persons involved in a colorably dependent employment relationship.[102]

The reach of the Occupational Safety and Health Act is not unlimited. Congress, in an ambiguous section, barred application of the Act "to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority" over occupational safety and health.[103] While it is clear that federal, state, and local government employees are not covered by the Occupational Safety and Health Act,[104] it is much less clear whether employees of industries regulated by federal agencies are covered or not.[105] The cases suggest, however, that most employees of otherwise regulated industries are covered by the Act.[106]

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100. While Congress's power under the commerce clause of the United States Constitution is not unlimited, see National League of Cities v. Usery, 426 U.S. 833 (1976), there are few practical limitations on it, especially in regard to broad remedial legislation such as the Occupational Safety and Health Act. See, e.g., Daniel v. Paul, 395 U.S. 298 (1969) (Civil Rights Act of 1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (same); Katzenbach v. McClung, 379 U.S. 294 (1964) (same).

101. The Act's prohibitions under § 11(c) are directed to "persons," rather than "employers." Section 3(4) of the Act defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any organized group of persons." 29 U.S.C. § 652(4) (1976). OSHA, in its regulations, has interpreted the statutory definitions broadly in keeping with what it sees to be the broad remedial nature of the Act. Thus, any third party employer who may discriminate against employees of another employer, labor unions, and even employment agencies, "or any other person in a position to discriminate against an employee" is a "person" within the meaning of § 3(4) of the Act. 29 C.F.R. § 1977.4 (1980). However, federal, state, and local governments and their instrumentalities are not "persons" under the Act. 29 C.F.R. § 1977.5(c) (1980).

102. 29 U.S.C. § 652(6) (1976) defines the term "employee" to mean "an employee of an employer who is employed in a business of his employer which affects commerce." This definition has been refined by regulation in an expansive manner. Basing its definition on the broad remedial purpose of the Act, OSHA has determined that the existence of an employment relationship "is to be based upon economic realities rather than upon common law doctrines and concepts." 29 C.F.R. § 1977.5(a) (1980). As such the term includes applicants for employment and former employees, id. § 1977.5(b), and supervisors. See Mangus Firearms, 3 O.S.H.C. 1214 (1975) (silent partner performing tasks is an employee); Hayden Elec. Servs., Inc., 2 O.S.H.C. 3069 (1974); Kensington Elec. Prods. Co., 1 O.S.H.C. 3095 (1973). However, federal, state, and local employees are not protected. 29 C.F.R. § 1977.5(c) (1980).

103. 29 U.S.C. § 653(b)(1) (1976).

104. 29 C.F.R. § 1977.5(c) (1980). See also Federal Employees for Non-Smokers' Rights v. United States, 446 F. Supp. 181 (D.D.C. 1978), aff'd mem., 598 F.2d 310 (D.C. Cir. 1979).

105. The courts have refused to extend § 653(b)(1) to cover employees of employers regulated by the Civil Aeronautics Board, Marshall v. Northwest Orient Airlines, Inc., 574 F.2d 119 (2d Cir. 1978), and of employees regulated by the Federal Railroad Administration, Southern Pac. Transp. Co. v. Usery, 539 F.2d 386 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977). These cases suggest that § 653(b)(1) will be narrowly construed.

But note that by reference to 42 U.S.C. § 2021 (1976), Congress clearly meant to bar the application of the Occupational Safety and Health Act to employees of employers regulated by the Nuclear Regulatory Commission. See Southern Pac. Transp. Co. v. Usery, 539 F.2d 386, 390 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977).

106. See discussion at note 105 supra.

The Occupational Safety and Health Act was drafted so as to protect action by the individual employee. Union action or concerted action is not a prerequisite for protection as under the NLRA.[107] Given the protection of individual activity and the broad reach of the Act, it has been estimated that it covers 20 million more workers than the other labor statutes discussed above.[108]

To protect employees who exercise their rights under the statute, Congress included section 11(c), which forbids discrimination[109] against any employee who has filed a complaint under the Act or taken any action relating to the safety of his working conditions.[110] Finding that this statutory authority indicated the existence under the Act of a limited right to refuse hazardous work without retaliation by employers, the Secretary of Labor in 1973 issued a regulation establishing the employee's right to refuse to work in certain situations.[111]

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107. Occupational Safety and Health Act § 11(c), 29 U.S.C. § 660(c) (1976); 29 C.F.R. § 1977.5 (1980) (refining the definition of employee in 29 U.S.C. § 652(6) (1976)).

108. The court of appeals in Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979), aff'd, 445 U.S. 1 (1980), noted the difference in the extent of protection offered by the National Labor Relations Act (NLRA) and the Occupational Safety and Health Act (OSHA) in terms of the numbers of workers covered by each act: The NLRA "has gaps, however, which OSHA does not have . . . . The Secretary's well-drafted supplemental brief cites estimates that the N.L.R.A. covers 44 million employees and OSHA 64 million." Id. at 726 n.23.

109. The provision prohibits discrimination by "persons." As such it extends protection more broadly than the NLRA since discrimination need not come at the hands of an employee's employer, or even any employer. Section 11(c) is triggered by discrimination even by unrelated third parties to an employment relationship.

110. The statute states, in pertinent part:

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

Occupational Safety and Health Act § 11(c)(1), 29 U.S.C. § 660(c)(1) (1976). The "under or related to this Act" language of § 11(c) has been interpreted to include complaints made to state, local, or other national agencies, or even to the employer himself. See 29 C.F.R. § 1977.9 (1980).

An employee seeking the protection of § 11(c) must prove that he was engaged in a protected activity, that the employer had reason to know that the employee had exercised his rights under the Act, and that he would not have been disciplined but for his involvement in the protected activity. See 29 C.F.R. § 1977.6(b) (1980). The courts have been very willing to find that protest activity is a "but for" cause of disciplinary action. An often cited case in this regard is Dunlop v. Trumbull Asphalt Co., 4 O.S.H.C. 1847 (E.D. Mo. 1976), in which an employee was found to have been discharged for participation in the filing of an OSHA complaint, and not for a two-day absence that had followed the filing of the complaint.

Once a violation has been found, the court may order reinstatement of the employee and/or back pay. 29 U.S.C. § 660(c)(2) (1976).

111. 29 C.F.R. § 1977.12(b)(1)–(2) (1980). The regulation, in pertinent part, provides that:

> (b)(1) . . . [R]eview of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. . . .
>
> (2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination.

Recently, in *Whirlpool Corp. v. Marshall,*[112] the Supreme Court unanimously upheld this regulation as a valid exercise of the Secretary's regulatory authority. The Court found that the regulation was a rational complement to the remedial scheme of the Act and was consistent with the intent of Congress as evidenced by the legislative history of the Act.[113] In addition, the Court read the Act as imposing on employers a general duty to preserve the health and safety of employees. This general duty gave employees a right that the Secretary could embody in the regulation.[114] The Court was careful to emphasize the limitations of the regulation, noting that the regulation was enacted to cover situations that "will probably not often occur," and that "few employees . . . have to face [the] dilemma" of risk of injury or loss of job the regulation was meant to prevent.[115] The Court did not, however, discuss the substantive standard established by the regulation.[116] The application of this regulation in the lower courts indicates that the scope of protection it provides may be wider than was anticipated by the Supreme Court.

The regulation requires an employee to show four elements in order to be protected from action by the employer in retaliation for a refusal to work.[117] First, the condition under which the employee has refused to work "must be of such a nature that a reasonable person . . . would conclude that there is a real danger of death or serious injury."[118] Second, there must have been insufficient time to eliminate the danger through the Act's regular enforcement mechanism.[119] Third, "where possible," the employee must have sought from his employer a correction of the dangerous condition. Finally, the employee's refusal to work must have been in good faith.[120]

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112. 445 U.S. 1 (1980).

113. Id. at 13-21.

114. Id. at 11-13.

115. Id. at 10-11. In the amicus curiae briefs in support of the regulation, the likelihood of infrequent use was stressed. See Brief of the American Public Health Association as Amicus Curiae 8.

116. *Whirlpool,* 445 U.S. at 8 n.10.

117. Id.

118. 29 C.F.R. § 1977.12(b)(2) (1980).

119. These first two requirements may embody the OSHA imminent danger standard—a danger "which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by [the] Act," Occupational Safety and Health Act § 13(a), 29 U.S.C. § 662(a) (1976)—although § 13(a) does not cover hazardous work refusal actions.

120. The employee must show that he would not have been disciplined but for his protected conduct. 29 C.F.R. § 1977.6(a) (1980).

In cases where reasons other than the protected conduct are given for discipline, the employee will be protected if he is able to show that the "protected activity was a substantial reason for the action, or if the . . . adverse action would not have taken place 'but for' engagement in protected activity." 29 C.F.R. § 1977.6(b) (1980). The Secretary, in the regulations, cites old NLRA cases such as NLRB v. Dixie Motor Coach Corp., 128 F.2d 201 (5th Cir. 1942). This may be an explicit recognition of the use of the NLRA discrimination standard in OSHA discrimination cases under § 11(c) and the regulations promulgated thereunder. See Whirlpool Marshall v. P. & Z. Co., 7 O.S.H.C. 1633 (D.C. Cir. 1979); Marshall v. Klug & Smith Co., 7 O.S.H.C. 1162 (D.C. N.D. 1979); Marshall v. Montgomery Ward & Co., 7 O.S.H.C. 1049 (D.C. Fla. 1978).

The limitation expressed by § 1977.6(b) does not seem to be a serious barrier to the assertion of § 1977.12 rights. Courts have interpreted this provision broadly. See, e.g., Dunlop v. Trumbull Asphalt Co., 4 O.S.H.C. 1847 (E.D. Mo. 1976).

This regulation protects action by individual employees: there is no requirement of concerted action as under the labor statutes.[121] An employee who believes he has been the victim of illegal retaliation by his employer for a refusal to work under hazardous conditions must file a complaint with OSHA within thirty days.[122] OSHA then investigates the complaint and may file suit in district court against the employer.[123] The employee has no private right of action if OSHA decides not to sue.[124]

The courts have not explicitly developed a test to determine the scope of protection provided by the regulation. Rather, an attempt has been made to base decisions on the particular facts of cases. If the facts can be fit into a literal reading of the requirements of the regulation, then the conduct is protected. The result of this process is the creation of implicit tests, less objective than the test used in section 502 cases, but more objective than the good-faith test used in section 7 cases. An examination of the facts of several cases supports this conclusion.

*Whirlpool* involved overhead conveyors used to transport appliance components from one part of the plant to the other. The company installed a wire mesh guard screen to protect employees from the occasionally falling components. The employees involved in the action were maintenance workers whose duties included work on the screen mesh. After complaints by employees and several incidents in which men fell partially through the screen, the company began to install a heavier wire screen. In June of 1974 an employee fell to his death through a section of the old screen. The company thereafter issued orders forbidding maintenance employees from stepping on the structure, and an alternative routine was imposed. Within two weeks of the fatal accident two maintenance employees were ordered by their foreman to climb on a section of the old screen. Claiming that the screen was unsafe, they refused to obey, and were disciplined.

The district court found that the threat of injury was real in light of the past fatality and Whirlpool's failure to complete replacement of the screen.[125] The court, however, declared the regulation inapplicable as

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121. Section 11(c), 29 U.S.C. § 660(c) (1976), refers only to individual action by an employee or employees. There is no limiting language such as that in National Labor Relations Act § 7, 29 U.S.C. § 157 (1976).

122. Occupational Safety and Health Act § 11(c), 29 U.S.C. § 660(c). See also 29 C.F.R. § 1977.15(d) (1980).

123. 29 C.F.R. § 1977.15(a), (c), (d) (1980). Failure to file a complaint within the 30-day period will generally bar the employee's claim. See Usery v. Certified Welding Corp., 6 O.S.H.C. 1142 D. Wyo. (1977), aff'd sub. nom. Marshall v. Certified Welding Corp., 7 O.S.H.C. 1069 (10th Cir. 1978). See also Marshall v. Lummus Co., 8 O.S.H.C. 1358, 1360 (N.D. Ohio 1980).

However, a state statute of limitations will not bar suit by the Secretary. Marshall v. Intermountain Elec. Co., 614 F.2d 260 (10th Cir. 1980); Marshall v. American Atomics, Inc., 8 O.S.H.C. 1243 (D. Ariz. 1980).

124. Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980). However, if an employee can prove the Secretary acted capriciously or arbitrarily in failing to prosecute his complaint, he can seek a writ of mandamus to compel the Secretary to act on the case. 29 U.S.C. § 662(d) (1976).

125. Usery v. Whirlpool Corp., 416 F. Supp. 30, 31 (N.D. Ohio 1976), rev'd sub nom. Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979), aff'd, 445 U.S. 1 (1980).

inconsistent with the statute. In affirming the findings of fact of the district court, the court of appeals noted that the refusal of the employees took place at 11 p.m., a time when, the court of appeals assumed, the district court found that OSHA inspectors were unavailable.[126]

Three other cases in which the regulation was applied are also instructive regarding the creation of implicit standards by the courts. In *Marshall v. National Industrial Constructors, Inc.*[127] the court found that the employees were not protected. An employee, assigned to work on high crossbeams, walked part way out onto one of the larger horizontal beams with a regular length lanyard, which was dangerously inappropriate for the job, unaware that a longer one had been brought to the workplace. Instead of walking out onto one of the crossbeams on which he would be working, he merely surveyed the area and came back off the beam.[128] He was fired along with two fellow employees who also refused to work. The employer offered evidence to prove that the reason the men refused to work was that they wanted more money for the work.

The court found the regulation's requirements were not met. The employee had never mentioned to the employer that he thought the work was unsafe nor did he bring up any question concerning corrective measures; he did nothing but walk out. The two fellow employees did not refuse in good faith to work as they had never been asked to perform the work. Fatal to their case was what the court termed the "overwhelming evidence to the effect that the real reason these men refused to do the work was . . . because they wanted more money."[129] Objective evidence thus brought into question the reasonableness of the employee's refusal.

Employees seeking the regulation's protection were more successful in *Marshall v. Firestone Tire & Rubber Co.*[130] and *Marshall v. N.L. Industries, Inc.*[131] In *Firestone Tire* the employee and others were ordered to install a roto-vane on a tower at a time when the ladder, catwalk, and catwalk rail were covered with ice and snow, and there was no light. The employee refused and was suspended without pay for two weeks. The court found that the employee's actions were protected under the regulation, noting that working conditions were slippery and that the lighting was so poor that employees had to hold flashlights in their teeth to be able to see.[132] The court noted that the two other employees who continued to work did so out of fear of being laid off or fired, despite their fear that conditions were unsafe.[133] The court, in

126. Marshall v. Whirlpool Corp., 593 F.2d 715, 720 (6th Cir. 1979), aff'd, 445 U.S. 1 (1980). "Under the Secretary's regulation the question as to whether an OSHA inspector was readily available at that hour would become an issue of fact for the District Judge." Id.

127. 8 O.S.H.C. 1117 (D. Neb. 1980).

128. Id. at 1124.

129. Id.

130. 8 O.S.H.C. 1637 (C.D. Ill. 1980).

131. 618 F.2d 1220 (7th Cir. 1980).

132. 8 O.S.H.C. 1637, at Findings of Fact Nos. 11 & 12.

133. Id. at Findings of Fact Nos. 6 & 19.

concluding that the requirements of the regulation had been met, noted that the employee had given the employer sufficient notice through his words and actions "and the employer did nothing to correct the hazardous conditions."[134]

In *Marshall v. N.L. Industries* an employee was assigned to load lead scrap into a melting kettle, using a payloader without a windshield or enclosed cab. The employee noticed that the dross covering the molten lead had separated, showing the molten metal. Similar conditions a week earlier had resulted in an explosion, with the employee involved escaping injury because his payloader had a windshield and an enclosed cab. Fearing injury, the employee stopped work and, when ordered to continue in the unprotected payloader, he refused. He was suspended and then fired. In remanding the case, the court of appeals concluded that to meet the requirements of the Occupational Safety and Health Act regulation the Secretary must prove that the employee had a "reasonable and good faith belief that the conditions leading to his refusal . . . were dangerous and that defendant discharged him for that refusal."[135]

From the cases it is possible to begin to construct emerging standards that courts will apply in determining whether an employee has met the four requirements for protection under the OSHA regulation. In meeting the first requirement, the cases suggest that an employee will have to produce evidence of one of two kinds, both objective in nature, to prove that a reasonable person under the circumstances would conclude that the hazard presents a real danger of death or serious injury. He will have to produce some kind of factual determination of the existence of a real and imminent danger, as in *National Industrial Constructors*[136] and *Firestone Tire & Rubber Co.*[137] On the other hand, in lieu of some kind of independent showing of danger, the employee can produce evidence that the danger complained of, or a similar one, had caused death or serious injury in the recent past under similar circumstances, as in *Whirlpool*[138] and *N.L. Industries.*[139] This, of course, would serve as a prima facie showing of the requisite danger and of the prior notice to the employer of the existence of the danger.

The cases also suggest that some kind of proof of urgency will have to be offered to meet the second requirement of the regulation—that there was insufficient time to eliminate the danger through regular channels. The employee must be able to show the unusualness or lateness of the hour as in

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134. Id. at Conclusions of Law Nos. 7, 8 & 9.

135. 618 F.2d at 1224. The employee filed a complaint with OSHA and a grievance under his contract. The arbitrator awarded the employee reinstatement but no back pay, and the employee returned to work. The Secretary filed suit seeking a variety of remedies including back pay. The district court granted the employer's motion for summary judgment on the ground that the employee had waived his statutory rights by accepting the arbitration award. The court of appeals reversed.

136. 8 O.S.H.C. 1117 (D. Neb. 1980).

137. 8 O.S.H.C. 1637 (C.D. Ill. 1980).

138. Usery v. Whirlpool Corp., 416 F. Supp. 30 (N.D. Ohio 1976), rev'd on other grounds sub nom. Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979), aff'd, 445 U.S. 1 (1980).

139. 618 F.2d 1220 (7th Cir. 1980).

*Whirlpool,*[140] or the impossibility, given the quickly moving situation, of contacting anyone as in *N.L. Industries.*[141] Moreover, the cases suggest that good faith, the third requirement for protection under the regulation, remains a relatively subjective component of the standard and is established as in section 7 proceedings.[142] There exists a presumption of good faith, which can be overcome by a sufficient *factual* presentation by the employer that the *primary* motivation of employee action was something other than the dangerous condition, as in *National Industrial Constructors.*[143]

Generally, if the situation is sufficiently urgent it will be unnecessary to prove that the dangerous condition was brought to the attention of the employer by the refusing employee prior to the refusal. Otherwise, the "where possible" language of the regulation has led to the imposition of only a minimal notice and opportunity for correction requirement in cases where employer notice of the condition cannot be inferred from the existence of the condition itself as in *Firestone Tire & Rubber.*[144] Note, moreover, that in cases where the prior notice section of 1977.12(b) was not at issue, the danger was already known to the employer by prior death or injury, or by the demonstration of the existence of that possibility by other workers in similar circumstances, as in *Whirlpool*[145] and *N.L. Industries.*[146]

The courts have been fairly liberal in construing the requirements of the regulation. They have avoided the strict requirements that have made it difficult for employees to obtain protection under the labor statutes, while at the same time they have protected employers against frivolous refusals. However, there is still a risk for an employee who refuses to work in reliance upon the regulation: a court may find his action unprotected. Even if he is eventually vindicated, he faces a period of uncertainty while the litigation is underway.

If an employee succeeds in winning protection under the regulation, a wide range of remedies appear to be available. Although the Supreme Court in *Whirlpool* did not discuss the remedies available under this provision,[147] lower courts, since that decision, have intimated that the Secretary's power to

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140. Usery v. Whirlpool Corp., 416 F. Supp. 30 (N.D. Ohio 1976), rev'd on other grounds sub nom. Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979), aff'd, 445 U.S. 1 (1980).

141. 618 F.2d 1220 (7th Cir. 1980). Kirschner, supra note 68, at 291 n.48, contends that it will be harder to prove the urgency of a given situation as OSHA extends the availability of its inspectors. For instance, OSHA's Region II has established a 24-hour emergency hotline for health and safety complaints. An answering service takes the call and forwards the message to an official in the regional office, who then contacts the caller if he deems it necessary. But it can be argued that in the majority of cases where § 1977.12 is invoked, the situation resulting in the refusal to work was so fast moving that the call to an answering service would not have provided the requisite relief to the employee.

142. See text accompanying notes 42-46 supra.

143. Marshall v. National Indus. Constructors, Inc., 8 O.S.H.C. 1117 (D. Neb. 1980).

144. 8 O.S.H.C. 1637 (C.D. Ill. 1980).

145. Usery v. Whirlpool Corp., 416 F. Supp. 30 (N.D. Ohio 1976), rev'd on other grounds sub nom. Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979), aff'd, 445 U.S. 1 (1980).

146. 618 F.2d 1220 (7th Cir. 1980).

147. Whirlpool Corp. v. Marshall, 445 U.S. 1, 19 n.31 (1980).

seek relief may be as great as the NLRB's remedial power under section 10(c) of the NLRA "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]."[148]

In *Marshall v. N.L. Industries,* the court determined that back pay could be granted to the employee if appropriate in the opinion of the district court.[149] In *Marshall v. Firestone Tire & Rubber Co.* the district court granted a far more extensive array of remedies.[150] It ordered back pay with interest from the time the employee was docked, including any time docked during which the employee had absented himself from work in justifiable reliance on the protection of the OSHA regulation. The court also ordered the employee restored to full seniority and his record expunged of all mention of his suspension. This remedy is almost identical to the relief generally ordered by the NLRB.[151]

These decisions are consistent with the Act and the general patterns of relief available through federal labor legislation. A narrow reading of the remedies available to the Secretary would undercut the broad remedial purpose of the statute.[152]

## II. A Single Standard for Evaluating Refusals to Work

An employee seeking to avoid employer retaliation for a refusal to perform hazardous work has four separate bases of protection: section 7 of the NLRA, section 502 of the LMRA, arbitration under his collective bargaining agreement, and the OSHA regulation. The existence of these different avenues of recourse creates several problems. Employers and employees may be uncertain of their rights and obligations when confronting a potentially hazardous work assignment. The present administrative scheme produces governmental overlap and inefficiency. There is a great potential for forum-shopping abuses and duplication of effort, given the simultaneous availability of three different forums.[153] In addition, the variety of standards is contrary to judicial and

148. 29 U.S.C. § 160(c) (1976). See text accompanying notes 149-52 infra.

149. 618 F.2d 1220, 1224 (7th Cir. 1980).

150. 8 O.S.H.C. 1637 (C.D. Ill. 1980).

151. See note 21 and accompanying text supra.

152. Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 n.16 (1980). Under the regulation the employee has a protected right to act in preservation of life and limb in circumstances where his preservation interest outweighs his employer's interest in directing production of work, that is, when that preservation interest is reasonably real and immediate. In order to be real and valid, however, the balancing must be made objectively, in a context free of coercive influences, such as fear of loss of pay. To narrow the range of remedies would inhibit employee exercise of their Occupational Safety and Health Act rights by shifting the balance in favor of the employer's interest. As a result the employee could not make a decision to assert his rights in a coercion-free environment. An employee who must consider the monetary or other job-related consequences of his action, even if his action is later held to be protected, can no longer objectively weigh the real risk of danger. Employees will continue to bear too great a risk of job-related injury and the objectives of the Occupational Safety and Health Act will not be achieved.

153. See, e.g., Braid, supra note 180, at 765, 769.

legislative mandates to harmonize federal statutes governing the rights of employer and employees.[154]

One coherent national labor policy is needed in the area of refusals by employees to do hazardous work. In enacting the Occupational Safety and Health Act, the Congress sought to create a uniform national policy regarding workplace safety and health. Since the OSHA regulation is an offshoot of this statute, the pre-existing labor law standards should be modified to conform to the standard established in the OSHA regulation.[155] In addition, the OSHA regulation should prevail because it most clearly resolves the conflicting interests of employees and employers.

### A. *Problems of the Multistandard System*

1. *Uncertainty.* The uncertainty of the law governing an employee's right to refuse hazardous work is evident from the preceding discussion.[156] While the OSHA regulation will apply to most workers, the uncertainties associated with the other provisions make it unclear to employers and employees whether the worker will be able to obtain their additional protection.[157] Thus neither employers nor employees can be sure of their rights in a refusal-to-work situation.

The threshold requirement of concerted activity under section 7 and, possibly, section 502 is a significant source of uncertainty for employees confronted by hazardous conditions. Because of this requirement, an employee must consider more than the level of danger in determining whether he may refuse to work without fear of reprisal. If he acts alone, he must consider

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154. See text accompanying notes 186-95 infra.

155. While it is true that the proposed modifications involve changes in the interpretation of statutes not a part of the OSHAct, modification in the way proposed would not constitute an impermissible interpretation of those sections of the general labor law involved. Moreover, it would not affect the way the NLRB interprets its statutes in other situations.

156. This uncertainty has been present in other situations when different standards have governed the same conduct. For example, discrimination in employment is governed by arbitration, the NLRA, and title VII of the Civil Rights Act of 1964. See Note, Title VII, the NLRB, and Arbitration: Conflicts in National Labor Policy, 5 Ga. L. Rev. 313 (1971). Failure to alleviate the overlap in that context led to an extremely confused situation. See note 164 and accompanying text infra.

157. Employee protection is far more limited under the OSHA regulation than under § 7 of the NLRA. Under § 7, neither the reasonableness of an employee's action nor any objective assessment of the seriousness of the health or safety issues involved is relevant to the determination of whether a controversy exists over conditions of employment. Individual employee self-help under § 1977.12, 29 C.F.R. § 1977.12(b)(2) (1980), is protected only in the face of danger of death or serious bodily harm. See Marshall v. N.L. Indus., Inc., 618 F.2d 1220 (7th Cir. 1980); Marshall v. National Indus. Constructors, Inc., 8 O.S.H.C. 1117 (D. Neb. 1980). Moreover, under § 7 there need be no nexus between the protesting employee and the dangerous condition. Under § 1977.12 only employees actually threatened will be protected. Under § 7 the protesting employees need not notify an employer prior to walking off the job. However, employees engaged in an economic strike are subject to replacement, but any employer action against the striking employees may convert his activity into an unfair labor practice strike. In such circumstances the employer would lose his right to replace the employees. On the other hand, under § 1977.12, an employee is subject to a series of procedural obligations. See notes 65-69 and accompanying text supra.

whether the liberal NLRB rule will apply. In addition, he must weigh the possibility that a favorable Board decision will be rejected by a more conservative court of appeals. Because uncertainty is likely to discourage employees from asserting their rights, the concerted action requirement renders the rights afforded by sections 7 and 502 of little practical value to the single employee faced with a job hazard, even if he could otherwise bring his actions within the section 7 or section 502 standard. As a consequence, the right of workers to protect themselves from injury is inhibited. The section 502 standard itself produces much uncertainty. Under section 502, protection from employer discipline is extended only when the employee is able to prove, by objective factual evidence, that the existence of the danger motivated his action. An employee who contemplates refusing a hazardous job must consider his ability to gather the evidence he will need to prevail. An employee cannot easily determine before he acts whether the danger he perceives will be accepted as real by the Board or the courts months later. In contrast, the evidentiary requirements under OSHA are far less burdensome to workers.

Worker and employer uncertainty is also increased by the limited type of danger protection under section 502. The provision protects worker actions in the face of "abnormally dangerous conditions." Before a worker can invoke section 502 protection he therefore must be certain that the particular danger is neither usual nor normal in his workplace, and must also determine whether his occupation is inherently dangerous. The ambiguities inherent in these distinctions greatly inhibit exercise of the right of workers to protect themselves from death or injury. In addition, these statutes do not apply to all workers.[158] An employee may have some difficulty determining whether he is covered by the federal labor statute.

Arbitration rules in the area of refusals of hazardous work are marred by even more uncertainty of application than section 7 and section 502. Arbitration is a creature of the particular collective bargaining agreement, which establishes a grievance-arbitration system. Arbitrators are bound by the terms of the collective bargaining agreement in which the scope of their powers is defined. No two collective bargaining agreements are identical. Arbitrators are not bound by arbitral precedents or the reasoning of past decisions, although many decisions do carry some degree of precedential value.[159] Thus a worker cannot be at all certain of the protection he will receive in arbitration.

The result of the potential applicability of these protections is that neither the worker nor the employer can be certain as to whether a refusal to work for safety reasons is protected from retaliation or can serve as a grounds for disciplinary action. In an area where clear guidelines are essential because of the possibility of serious injury and the need for quick decisions, this uncertainty reduces the protection available to the employee. If an employee cannot

158. See text accompanying notes 100-08 supra.

159. See text accompanying notes 85-86 supra. See generally E. Elkouri & F. Elkouri, How Arbitration Works (3d ed. 1973).

be sure what hazards may be avoided without reprisal, he will have to gamble every time he is confronted with a dangerous situation. If he refuses to work and is wrong, he may be fired; if he does work and the condition is truly hazardous, the employee may be injured and the congressional purpose will be thwarted. Similarly, an employer can never be sure when a given assignment is hazardous. If he is wrong and disciplines an employee for refusing to work, he may face a long legal battle. Also, worker morale and relations with his employees will suffer. This system does little to further the basic aim of the labor law to promote industrial peace.[160]

2. *Duplicative Forums.* The present scheme for the vindication of these various workers' rights results in overlap and inefficiency. Claims based upon rights guaranteed in the federal labor laws must be brought to the NLRB,[161] claims based upon the contract are heard by an arbitrator,[162] and the OSHA regulation can be invoked only by filing a complaint with the agency which must sue in federal court.[163] Under this scheme employees may not be certain which forum is the appropriate one to invalidate an employer's disciplinary action. Alternatively, the availability of different remedial systems may result in forum shopping. In addition, the system leads to uncertainty as to the finality of decisions. Employers and employees cannot be sure that a determination of their rights is final until all possible avenues of relief have been pursued. Also, they may be faced with inconsistent decisions in the different forums.

This concurrent jurisdiction is likely to preclude development of a uniform national policy in this area. The confusion as to the applicability of standards, available forums for relief, and extent of coverage is reminiscent of the conflict between the NLRB and the courts in suits involving rights under Title VII of the Civil Rights Act of 1964. It has been suggested that if some coherent national policy exists in the area of racial discrimination in employment situations, "it has become lost in the maze of procedural problems created by conflicts between the competing forums for providing relief."[164] This overlap also reduces the ability of both employer and employee to assert their rights effectively. An employee remains uncertain as to the authority of pronouncements of the various tribunals. A district court decision under the OSHA regulation ordering the employee rehired may provide little comfort if soon thereafter the NLRB upholds his employer's decision to fire him under the NLRA. The employee must choose where to seek vindication of his rights or bear the burden of litigating in three forums. In fact, commentators have

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160. See 29 U.S.C. § 151 (1976) (findings and declaration of policy of the NLRA).

161. See 29 U.S.C. § 160 (1976) (NLRB empowered to prevent unfair labor practices, i.e., violations of rights guaranteed by the labor law).

162. See Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964). See generally Gateway Coal Co. v. UMW, 414 U.S. 368 (1974).

163. See 29 C.F.R. § 1977.15 (1980). See also Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980) OSHAct § 11(c) provides no private right of action).

164. Note, supra note 156, at 313 (footnotes omitted).

developed strategies to take advantage of the situation to the disadvantage of legitimate worker rights.[165]

Judicial interpretations of the OSHA remedy have exacerbated this problem. In *N.L. Industries*[166] an employee was allowed to seek back pay for an illegal discharge for a refusal to work a hazardous assignment through OSHA proceedings, although back pay had previously been denied in arbitration proceedings. The system encourages the employee who fails to secure the desired relief in one forum to move on to the next one. This constitutes a grossly inefficient use of precious court and Board resources and does not further the goals and purposes of the applicable statutes. Substituting one standard for the many now in existence would discourage this practice.

The greatest problem posed by the present system is one of finality. If the NLRB and the district court should reach inconsistent resolutions in the same fact situation based on the different statutes they administer, it is unclear whether one decision or order should take precedence over the other. The problem arises primarily because it is unclear which body has primary jurisdiction[167] over reprisals for refusals to do hazardous work. It may be that each agency has a partial primary jurisdiction, limited to the statute it administers. The NLRB's jurisdiction derives from the NLRA, the district court's from the OSHAct. Each has authority over the same event (a work refusal that results in disciplining of the employee) but the authority derives from different sources.

The problems posed by parallel and overlapping mechanisms for the vindication of worker rights in the hazardous work area have not gone unnoticed by OSHA and the NLRB. The agencies have tried to reduce the jurisdictional and procedural problems of concurrent jurisdiction through policies of deferral. In 1975 OSHA and the NLRB entered into a memorandum of understanding to eliminate duplicate litigation and to "insure that employee rights in the area of safety and health will be protected."[168] The memorandum provides that where a charge involving issues covered by section 11(c) of the OSHAct has been filed with the NLRB and a complaint has also been filed with OSHA as to the same factual matters, the NLRB will, absent withdrawal of the matter, defer or dismiss the charge.[169] Where the complaining employee has filed only with the Board, he will be informed of the right to

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165. See, e.g., Braid, supra note 40, at 765.

166. Note 131 supra. The facts of the case are recounted in the text accompanying note 135 supra. See also text accompanying notes 180-81 infra.

167. The doctrine of primary jurisdiction was developed to provide guidelines of procedure in situations where courts and administrative agencies appear to have jurisdiction over a particular controversy. In situations where the doctrine is invoked, the courts will usually defer action until they can have the benefit of an agency's views on issues within the competence of the agency. To determine which forum should defer to the other a variety of factors must be weighed, and the facts of each case carefully analyzed. See United States v. Western Pac. R.R., 352 U.S. 59, 64-65 (1956); Far Eastern Conf. v. United States, 342 U.S. 570, 574-75 (1952); note 203 infra. See also B. Mezines, J. Stein, J. Gruff, Administrative Law § 47 (1980).

168. Memorandum of Understanding Between OSHA and NLRB, 40 Fed. Reg. 26,083 (1975) [hereinafter cited as *Memorandum*].

169. Id. at 26,084 (para. B(1)).

litigate under section 11(c) of the OSHAct.[170] The NLRB will process the complaint only where "the charging party has not filed or, having filed, has withdrawn a complaint with OSHA."[171] Where a charge is filed that includes section 11(c) issues and matters within the exclusive jurisdiction of the NLRB, the agreement calls for consultations between the two agencies "to determine the appropriate handling of the matter."[172]

OSHA has adopted, by regulation, a policy of deferral to other agencies and to arbitration procedures to parallel the memorandum.[173] Decisions to defer will not be made automatically, but only after review of all the facts on a case-by-case basis. If the other proceedings dealt adequately with all factual issues, and were fair, regular, and free of procedural infirmities, and "the outcome . . . was not repugnant to the purpose and policy of the Act," then OSHA will dismiss the complaint, reserving the right to entertain future action on the same complaint.[174]

The NLRB has developed broad policies of deferral to arbitration. In *Spielberg Manufacturing Co.*[175] the Board stated that it would recognize and defer to an arbitration award already rendered if "the proceedings appear to have been fair and regular, all parties had agreed to be bound and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the [NLRA]."[176] The Board also extended its policy of deferral to cases where the collective bargaining agreement called for arbitration but the parties complained first to the Board.[177]

The agreements worked out between the agencies, however, are in jeopardy because of court attitudes and changes in NLRB rulings. The courts have begun to limit OSHA's ability to defer to arbitration. In *Marshall v. Firestone Tire & Rubber Co.*[178] the court concluded that the existence of an arbitrator's award did not in any way preclude the Secretary of Labor from seeking relief under the OSHA regulation.[179] In *Marshall v. N.L. Industries*[180] the court of

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170. Id. (para. B(2)).
171. Id. (para. B(3)).
172. Id. (para. B(4)).
173. 29 C.F.R. § 1977.18(c) (1980).
174. Id.
175. 112 N.L.R.B. 1080 (1955). See also International Harvester Co., 138 N.L.R.B. 923, 927 (1962) (Deferral will be made unless "the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or . . . the award was clearly repugnant to the purposes and policies of the Act."), enforced sub. nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964).
176. 112 N.L.R.B. at 1082.
177. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). The Board will defer to a future arbitration decision where (1) the contract clearly provides for grievance and arbitration machinery; (2) unilateral action taken is not designed to undermine the union and is not patently erroneous, but rather is based on a substantial claim of contractual privilege; (3) it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act. If these conditions are met, the Board "should defer to the arbitration clause conceived by the parties." 192 N.L.R.B. at 841-42 (quoting Jos. Schlitz Brewing Co., 175 N.L.R.B. 141, 142 (1969)).
178. 8 O.S.H.C. 1637 (C.D. Ill. 1980).
179. Id.
180. 618 F.2d 1220 (7th Cir. 1980). See text accompanying note 135 for the facts of this case.

appeals rejected OSHA deferral and waiver policies as inconsistent with the purpose of the statute.[181]

The courts have also begun to limit OSHA's ability to defer to the NLRB in cases involving violations of the OSHA regulation. In *Newport News Shipbuilding and Drydock Co. v. Marshall*[182] the district court granted an employer's motion for summary judgment seeking to compel OSHA to bring an action against him or dimiss the employee complaint. The employer brought this action after OSHA decided to defer until the NLRB reached a decision in the same case. The court based its decision on the finding that nothing in the statute indicates that OSHA may defer to another agency. This decision, if generally accepted, will probably sound the death knell of the Memorandum of Understanding since OSHA will no longer be able to defer to the NLRB.

The NLRB has also begun to cut back on its deferral rules. In *General American Transportation Corp.*[183] the Board, in a plurality opinion, gave notice of an intent to narrow its doctrine of deferral to arbitration. In casting the deciding vote granting deferral the concurring member made clear that the Board would no longer defer to arbitration where the case involved alleged violations of sections 8(a)(1) and (3) of the NLRA.[184] Although the case involved deferral to private dispute settlement procedures, the rationale underlying the change of position with regard to deferral is equally applicable to deferrals to OSHA, since complaints seeking protection for refusals to work on safety grounds would arise under the same statutory provision. Therefore, the extent of the NLRB's power to defer in this area remains clouded by uncertainty. This uncertainty can only increase the jurisdictional friction between OSHA, the NLRB, and arbitration.[185]

3. *Lack of Harmony.* The existence of multiple standards violates legislative and judicial pronouncements mandating the harmonization of federal labor laws to prevent inconsistent application. In *Southern Steamship Co. v.*

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181. Id. See also the highly influential discussion of deferral to arbitration in title VII cases in *Gardner-Denver*, 415 U.S. 36, 56-60 (1973).

182. 8 O.S.H.C. 1393 (E.D. Va. 1980). In this case seven employees filed a complaint with OSHA charging discriminatory retaliation for their having complained about unsafe conditions on the job. OSHA made an investigation, but though the employer requested OSHA to institute proceedings against it, or make a no-violation finding, OSHA took no action. This was in November, 1979. In January, 1980, the NLRB filed unfair labor practice charges against the employer, and later that month the employer was informed that OSHA action would be deferred until the NLRB decided the issue. However, in December, 1979, the employer filed suit seeking to determine its rights and obligations under the Occupational Safety and Health Act. The court granted the employer's motion for summary judgment despite a vigorous defense of the deferral policy by OSHA.

183. 228 N.L.R.B. 808 (1977).

184. Id. at 810-11.

Some courts of appeal reject the narrowing of *Collyer* and still hold the NLRB to its stated deferral doctrine. See NLRB v. Pincus Bros.—Maxwell, 620 F.2d 367 (3d Cir. 1980). But others have accepted *General American*. See NLRB v. Max Factor & Co., 89 Lab. Cas. (CCH) ¶ 12,232 (9th Cir. 1980).

185. For some tactical variations on the deferral and concurrent jurisdiction game for employers and employees, see Braid, supra note 52, at 765-66.

*NLRB*[186] the Court imposed upon the NLRB a duty to harmonize the labor law with other federal laws, finding that administrative agencies may not pursue their statute-based goals so "single-mindedly" as to ignore other equally important Congressional objectives.[187] In particular, NLRB remedies may not work directly to weaken these other congressionally mandated statutory goals.[188] The OSHAct, including the hazardous work refusal regulation, is designed to further congressional objectives as important as those furthered by the NLRA, and remedies that chill resort to these laws work directly to weaken them.[189]

Moreover, the Court has consistently maintained that the subject matter of federal labor law is peculiarly one that calls for uniform law.[190] Congress has spoken quite specifically in this area of the labor law. By explicitly creating new standards in this area Congress implicitly overrode the primacy of all past formulations. For the NLRB to continue to single-mindly preserve its own standards in the face of this specific congressional action would create the very disparities and inconsistencies that the Court sought to eliminate by fashioning a uniform federal labor law.

Analogous cases in other fields suggest that the NLRB has not only the power but also the duty to harmonize its administration of the NLRA with the mandates of the OSHAct. These cases imply that to the extent that other statutes complement the regulatory goals of an administrative agency, it is incumbent upon that agency to preserve the policies embodied in the complementary statute, absent congressional intent to the contrary.[191] The policies embodied in the NLRA and the OSHAct satisfy the complementary test, and the duty to harmonize has been recognized by the NLRA and OSHA.[192] The NLRB has itself recognized both the need to harmonize its administration of the law and the primacy of the OSHAct in interpreting the concert of action

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186. 316 U.S. 31 (1942).

187. 316 U.S. at 47.

188. Local 1976, United Bhd. of Carpenters and Joiners v. NLRB, 357 U.S. 93, 111 (1958) (explaining *Southern Steamship).* See also Note, Retaliatory Reporting of Illegal Alien Employees: Remedying the Labor-Immigration Conflict, 80 Colum. L. Rev. 1296, 1305 (1980).

189. On the importance that Congress attaches to the OSHAct see the statement of the broad remedial purpose of the Act, 29 U.S.C. § 651(b) (1976). The Supreme Court has recognized the importance that Congress has attached to the attainment of OSHAct objectives. See Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 n.16 (1980).

190. See Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102-04 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957). These cases deal with the need for uniformity between federal and state labor laws. They require state law conformity to federal labor law standards.

191. See Note, supra note 188, at 1302-04. See also Municipal Intervenors Group v. FPC, 473 F.2d 84, 90 (D.C. Cir. 1972) (dictum); Northern Natural Gas Co. v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968).

192. Recognizing this need in part the two agencies fashioned a Memorandum of Understanding between OSHA and NLRB, 40 Fed. Reg. 26,083 (1975). "[I]t appears that many employee safety activities may be protected under both Acts. However, since an employee's right to engage in safety and health activity is specifically protected by the OSHAct and is only generally included in the broader right to engage in concerted activities under the NLRA, it is appropriate that enforcement actions to protect such safety and health activities should primarily be taken under the OSHAct rather than the NLRA." Id. at 26,083 (1975) (para. A(3)).

requirements of section 7 when health and safety protests are at issue.[193] Similarly, the NLRB should invoke its duty to harmonize its administration of sections 7 and 502 in this context, where a single standard will better promote the goals of the labor law with respect to refusals to do hazardous work.[194]

OSHA is also under a mandate to reduce inefficiency, duplication and overlap, especially if OSHAct provisions conflict with other federal laws.[195] Adoption of a uniform standard coupled with workable rules of procedure for vindicating legitimate worker rights will go far in meeting congressional objectives in this regard.

### B. *The Single Standard*

The OSHA regulation is the logical choice for a uniform standard to govern the rights of individual workers confronted with a hazardous work assignment.[196] It provides the most unambiguous guide for employers and employees regarding their rights and obligations. It extends protection to workers actually threatened by the workplace hazard without imposing burdensome or complex problems of proof. It also has no concerted action requirement and is not constrained by the NLRB's jurisdictional limits.

The OSHAct standard fairly balances the interests of employers in maintaining work discipline and getting work done against the interest of employees in preserving their health and safety. Neither section 502 nor section 7 accomplishes this goal. The subjective standard of section 7 is weighted too heavily on the employee's side, resulting in too much deference to employee action in questionable situations. Section 502 weighs the interests of the employer too heavily, making it almost impossible for an employee to prevail, resulting in an imbalance in which employees must risk death or injury in situations where the employer could relatively easily correct the condition. The OSHA standard focuses on both the employee's perceptions and behavior and the physical environment at the time the refusal actually occurred. It more carefully protects employers' rights and interests by ensuring that the employee's interest in health and safety is substantial enough to warrant setting aside an employer's power to direct his employees.

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193. See Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975).

194. The Board has recently made a tentative move in this direction. In E.R. Carpenter Co., 252 N.L.R.B. No. 5, [1980-1981] 5 Lab. L. Rep. (CCH) ¶ 17,610 (1980), three employees were fired for refusing to wear severely defective protective suits. While their reinstatement was ordered on the basis of § 7 and there was no concert-of-action problem, the NLRB noted that its decision was warranted also under the OSHAct regulation as well. Id. at n.5.

195. See OSHAct § 4(b)(3), 29 U.S.C. § 653(b)(3) (1976).

196. It is not argued that the present §§ 502 and 7 standards be abandoned entirely, even in the context of health or safety protests. Certainly § 502 should continue to apply, for instance, in cases where an entire union calls a walkout to protest the existence of abnormally dangerous conditions somewhere in the plant. The same would apply for § 7 if the employees were unorganized. Thus group activity would still be governed by § 7. Concert-of-action requirements should be imposed in cases where employees other than those threatened engage in protest activity. This is precisely the type of situation for which the group-oriented system of protection of the NLRA is best suited. However, in dealing with refusals to work for fear of injury or death by employees directly affected by the danger, the developing OSHA standards should be adopted by the Board and the courts.

At the same time, the test best recognizes those situations in which employees can be expected to use self-help. It is unfair to condemn an employee's reasonable conduct based on circumstances that present real danger unless the opposing interests are overpowering. The standard requires an employee to demonstrate the weight of his interest. Once his interest is demonstrated, however, it will outweigh the interest of the employer.

Finally, the balancing approach implicit in the OSHAct standard is consistent with approaches to other issues in the labor law. The Board and the courts balance the competing interests of employees and employers in determining the extent of employee rights to organize,[197] the protection afforded picketting,[198] and in determining the applicability of section 7 to employee activity.[199] Employing the same type of standard implicitly in the health and safety area is consistent with the present pattern of enforcing federal labor rights and duties. Just as the NLRB through the labor act attempts to ensure employee organizational choice in an atmosphere free of coercive influence, so the OSHA regulation attempts to preserve objective employee choice for the exercise of protected rights in a context free of the coercive influence of penalties.

There are other important and principled reasons why the protections afforded workers under the OSHA regulation should be incorporated in interpreting the labor law and collective bargaining agreements. The NLRA and LMRA are general labor acts. They were intended to deal with specific problems that arise between employers and labor that is either organized or organizing for collective bargaining purposes. Their primary focus is on employees as a group, and employers. Seen in this light, the requirement of concert of action, written into the labor law, becomes understandable.

Congress over the years has continuously sought to fill in gaps in the general labor laws in areas where it felt the thrust and focus of the general provisions were ill-suited to the proper resolution of particular problems arising between employees and their employers. The Federal Coal Mine Health and Safety Act of 1969[200] was enacted to meet the specific health and safety problems in the coal industry. Similarly Congress enacted Title VII of the Civil Rights Act of 1964[201] to ensure that the federal laws protected the rights of groups of workers needing the special protection of government. To the extent that each act operated in the labor sphere it modified and supplemented pre-existing general labor law.

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197. See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

198. See, e.g., Local 761, Int'l Union of Elec., Radio & Machine Workers v. NLRB, 366 U.S. 667 (1961); NLRB v. Thayer Co., 213 F.2d 748 (1st Cir. 1954); Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950).

199. See, e.g., NLRB v. Local 1229, IBEW (Jefferson Standard Broadcasting Co.), 346 U.S. 464, 474-75 (1953); Advance Indus. Div.—Overhead Door Corp., 220 N.L.R.B. 431 (1975), enforced in part, 540 F.2d 878 (7th Cir. 1976).

200. Section 110(b)(1), 30 U.S.C. § 820(b)(1) (1976) (amended 1977).

201. Civil Rights Act of 1964, § 704(a), 42 U.S.C. § 2000e-3(a) (1976).

The enactment of the OSHAct, and the regulation promulgated under its authority, also fill a gap left in general labor law. In enacting the statute, Congress focused on rights of employers and employees in this area. As the Federal Coal Mine Health and Safety Act and Title VII of the Civil Rights Act of 1964 define the rights and duties of employers and employees in certain specific areas, so the OSHAct regulation defines the acceptable basis of employer-employee relations in this specific area of the labor law.[202]

A simple procedure can be used to adopt the OSHA rule as the uniform standard in hazardous work refusal situations. All complaints related to work refusal must be channeled to OSHA. Whenever a complaint of this type is brought to the NLRB, the NLRB should stay its proceedings and forward the complaint to OSHA. Under this system OSHA would be vested with primary jurisdiction over refusals to do hazardous work because it is the body with the greatest expertise in the area, and because the district courts are accorded power to vindicate the specific rights Congress conferred on workers through the OSHAct.[203] Once the matter has been resolved, the NLRB can dismiss

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202. Congressional intent in this area of the labor law must be the specific objective formulated by Congress in enacting the Occupational Safety and Health Act—assuring every working man and woman a safe place to work—rather than merely the general objectives embodied in the NLRA. Subsumed under this general objective is the goal of minimizing injury and death in the workplace. Because this labor law must be harmonized with other federal law, Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942), the health and safety goals of the OSHAct must be achieved in a way that also furthers the goals of the general labor law—promoting industrial peace and preserving the balance between employee and employer interests. The OSHAct standard best achieves specific congressional labor law goals in this area as formulated in the OSHAct while optimally furthering the other goals of the general labor law.

203. The theory of primary jurisdiction as recently developed by the Supreme Court could be used to support this action. In Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973), the plaintiff charged that the defendant Exchange violated the Sherman Act as well as the rules of the Exchange and the Commodity Exchange Act by transferring his membership in the Exchange to another and excluding him from trading. The Commodity Exchange Act provided that allegations of one objecting to violations should be filed with the Commodity Exchange Commission. The Court held that the proceedings under the Sherman Act be stayed "until the administrative officials have had opportunity to act," 409 U.S. at 302, because facets of the dispute were within the Commission's jurisidiction and its "adjudication . . . promises to be of material aid in resolving the immunity question." 409 U.S. at 302 (The immunity question involved the issue of whether the Commodity Exchange Act granted a specific exemption (immunity) from the Sherman Act.).

Moreover, the Court has stated that "[d]ismissal rather than a stay has been approved where there is assurance that no party is prejudiced thereby." United States v. Michigan Nat'l Corp., 419 U.S. 1, 5 (1974) (per curiam). The Court also stated that stays have been granted "when the resolution of a claim cognizable in a federal court must await a determination by an administrative agency having primary jurisdiction." Id. at 4-5. In the case of refusal to do hazardous work the Secretary of Labor, through OSHA, the administrator of the Occupational Safety and Health Act, is the most expert and familiar with the rules, customs, and standards. The NLRB, as it has recognized since *Alleluia Cushion*, 221 N.L.R.B. at 1000, must rely on the expertise of OSHA in the area of safety and health. As such, OSHA-instituted proceedings are related to NLRB proceedings in the same way as Commission proceedings in *Ricci* were related to court antitrust proceedings. The possibility that the NLRB will rely on the findings of OSHAct proceedings recommends that the NLRB stay proceedings in cases involving refusals to do hazardous work. Moreover, if a uniform standard is adopted, as is urged, then it can be argued that under the standards of *Michigan National Corp.*, the dismissal of NLRB proceedings upon completion of OSHA-initiated court proceedings is required. In this case there is more than adequate "assurance that no party is prejudiced thereby, "*Michigan National Corp.*, 419 U.S. at 5, "judicial [and administrative] resources are conserved and both parties [are] fully protected." Id. at 6.

the complaint before it on claim or issue preclusion grounds.[204] The rules required for implementation of this scheme can be adopted and formalized through the rule-making proceedings available to both the Board and OSHA. In this manner uncertainty surrounding employer and employee rights and obligations will be minimized and damaged parties will be assured more certain legal recourse. Implementation of the plan suggested will also minimize the potential problems and uncertainties of a multiple-forum scheme for the vindication of statutory rights in this area in a manner consistent with prior general labor law and the specific objectives of the OSHAct.

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204. The principles and application of claim and issue preclusion in this area are seldom litigated and unclear. It is an area unilluminated by Supreme Court guidelines. However, the Second Circuit has recently held that in cases of this kind the principles of res judicata could be applied to bar relitigation in a different forum invoking a different statutory right but basing the claim on the same facts. Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977). Mitchell involved a black woman dismissed by NBC after being placed on probation for poor work performance. She first filed a complaint with the New York State Division of Human Rights charging discriminatory practices. The agency dismissed the complaint for lack of probable cause. This decision was affirmed by the State Appeal Board, and, unanimously, by the Appellate Division. Prior to action by the State Appeal Board, the plaintiff filed a charge with the Equal Employment Opportunity Commission, which also dismissed for lack of probable cause. The plaintiff then commenced an action in federal court under 42 U.S.C. § 1981 (1976) alleging that her dismissal was racially motiviated. The Second Circuit Court of Appeals affirmed the finding of the district court that the complaint was barred by the res judicata effect of the prior proceedings. It should be noted that this decision was the object of a strong dissent, which relied on the language of Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48 (1974), to the effect that in this area Congress intended to "accord parallel or overlapping remedies against discrimination . . . [such that,] in general, submission of a claim to one forum does not preclude a later submission to another." 553 F.2d at 277. It should also be noted that some courts have intimated disagreement with the Second Circuit. See Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978); Cunegin v. Zayre Dep't Store, 437 F. Supp. 100 (E.D. Wis. 1977) (initial agency determinations that have not been subject to judicial review not res judicata).

In *Gardner-Denver* the Court held that an employee's statutory right to trial de novo under the Equal Employment provisions of the Civil Rights Act was not foreclosed by prior submission of the claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement. The *Mitchell* dissent's reliance on *Gardner-Denver* was apparently misplaced. *Gardner-Denver* dealt specifically with the res judicata effects of arbitration on the later assertion of statutory rights. Arbitration vindicates contract rights rather than statutory rights. Individuals are free within the confines of the law generally to define their rights and responsibilities as they see fit. Thus, the relationship between the arbitral forum and the statutorily designated forum for the vindication of Title VII rights is "complementary since consideration of the claim by both forums may promote the policies underlying each." *Gardner-Denver*, 415 U.S. at 50-51. On the other hand the relationship between forums ceases to be complementary when the policies underlying each in the context of a particular type of case are identical. In cases such as these, res judicata principles must be used to prevent relitigation which serves no purpose. This could explain the majority's decision to preclude the claim in *Mitchell*.

This distinction should also carry over to the context of hazardous-work refusals as well. In vindicating the right of workers to refuse hazardous work both the NLRB and the district courts, as administrators of the OSHAct through the regulation, promote identical policies within each of the acts. These policies are embodied in the principles of the general labor law and have been made specific in the OSHAct: promoting industrial peace; balancing an employee's self-preservation interest against an employer's interest in most efficiently running his business; minimizing death and injury on the job. Given the adoption of the OSHAct standard universally it could truly be said that a refusal-to-work claim in one forum would be identical to the same claim in the other forum. As such *Mitchell* should apply and the principles of res judicata should be invoked. The draft of the Restatement (Second) of Judgments attempts to bring some order to this very complicated area of the law. See Restatement (Second) of Judgments, § 131 & comments a-i (Tent. Draft No. 7, 1980) (Adjudication by Administrative Tribunal).

## CONCLUSION

The scope and coverage of section 7 of the NLRA, section 502 of the Labor Management Relations Act, and the OSHAct regulation create a tangled web through which employees who refuse hazardous work assignments must carefully proceed. The existence of these separate standards will not lead to the reduction of industrial strife, but rather will increase it because of the uncertainty and confusion it creates.

A uniform standard is needed. To this end the purposes of and protections afforded workers under the OSHAct regulation should be the basis for interpreting the labor law and collective bargaining agreements in situations where workers would otherwise come under the protection of the regulation. By enacting the OSHAct Congress sought to fill a "safety" gap in the general labor law. Therefore, to the extent that the OSHAct operates in the labor sphere, it modifies and supplants pre-existing general labor law.

The OSHAct regulation is best suited to eliminate uncertainty as to the duties and obligations of employees who seek to assert the right to refuse hazardous work. The standard is simple, clear and precise. It best balances the interests of employers and employees and prevents inconsistent application of federal labor law. It also eliminates the problems of duplicative forums and finality of case disposition, which present great potential dangers if no uniform standard is adopted. Finally, by adopting this standard the NLRB can successfully discharge its duty to harmonize the part of the labor law it administers with those parts of federal laws administered by other bodies.

*Larry C. Backer*