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Labor Law: The Duty to Arbitrate Matters of Life and Limb—The United States Supreme Court Confronts the Safety Strike [Gateway Coal Co. v. UMW, 414 U.S. 368 (1974), rev'd 466 F.2d 1157 (3d Cir. 1972)]

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LABOR LAW: THE DUTY TO ARBITRATE MATTERS OF LIFE AND LIMB—THE UNITED STATES SUPREME COURT CONFRONTS THE SAFETY STRIKE
[Gateway Coal Co. v. UMW, 414 U.S. 368 (1974), rev'g 466 F.2d 1157 (1972)].

I. INTRODUCTION

The United States has entered the post-industrial age. For the economic planners, as well as for the men and women who make up the nation's work force, the most salient fact of the new age is the domination of economic life by automation. Yet, paradoxically, the working environment of the American laborer continues to reflect all of the discomforts and dangers of the industrial age. The confrontation between the safety-minded workers at Gateway Coal Mine #127 and the production-minded management of the Gateway Coal Company illustrates the moral, economic, and legal dislocations caused by the transition to a post-industrial economy. The as-yet-unresolved legal issues, however, derive not from one private lawsuit between workers imbued with the new consciousness and management bound up in the old, but rather in a public decision to alter the ecology of the workplace.

Prompted by a congressional investigation which statistically demonstrated the unsafe working conditions daily confronting the American worker, comprehensive federal legislation was enacted in 1969 and 1970, acknowledging and establishing as a Congressional and public policy the

2. This phrase, as well as the ideas expressed in this introduction, is loosely based upon Marshall McLuhan's theories regarding the consequences of technological change. Cf. M. McLuhan & Q. Fiore, War and Peace in the Global Village (1968).
4. Federal Coal Mine Health & Safety Act, 30 U.S.C. §§ 801 et seq. (1970) as amended 30 U.S.C. §§ 901 et seq. (Supp. 1972). Special legislation was necessary for the coal mining industry because it is so hazardous. See United States Bureau of the Census, Statistical Abstract of the United States 239 (1972), which reports that injuries suffered by workers in the coal mining industry result in the highest average number of days of disability per case of all industrial injuries. The average in 1969 was 174, and in 1970 it increased to 187. The metal milling and mining industry, which includes the operation of Hanna Mining Company in Minnesota's iron range, had the second highest average of days of disability per case.
importance of on-the-job safety. While these were positive steps, their initial impact was diminished by the fact that they were taken only in the wake of a coal mining disaster of unprecedented dimensions. Additionally, the hopes which were sparked among workers by the enactment of safety legislation have so far been frustrated by a lack of vigorous enforcement by those agencies entrusted with its administration. The history of legislative unresponsiveness and the current executive apathy have caused the American worker, and the coal miner in particular, to suspect the government's sincerity when it purports to protect his health and safety on the job and, as workers continue to be killed and maimed on the job, has forced him to conclude that only he is primarily concerned with his on-the-job safety. The resultant bargaining demands and strikes, organized both by unions enlightened as to their members' desire and need for on-the-job safety and by isolated groups of workers, involved not only coal miners, but also the highly paid and highly skilled technicians of the petroleum and automobile


Congressional response to a problem is not enough; the federal administrative agencies responsible for enforcing particular laws must also act.


11. In the coal mining industry, the extreme hazards faced by miners make wildcat strikes an everyday occurrence. *See, e.g.*, Witt, *Wildcat Strikes*, United Mine Worker's Journal, August 1-15, 1973, at 13, col. 1:

Nineteen year old UMWA miner David White wasn't trying to trigger one of more than a hundred wildcat strikes which occur every month. He wasn't trying to add to the loss of thousands of dollars in wages and profits and UMWA Welfare and Retirement Fund royalties. He wasn't trying to upset the UMWA's drive to make the grievance machinery work. David White was just trying to stay alive. *Id.*

12. The Oil, Chemical, and Atomic Workers International recently struck Shell Oil Company. The refinery workers sought contract guarantees that they would be protected from the danger of fumes at company refineries, and union demands also called for union members on plant safety committees. These health and safety negotiation issues, not wages, caused the walk-out.
industries, and Minnesota's taconite industry.

The worker's response to the lack of effective enforcement—strikes over unsafe working conditions—has given rise to a new problem in labor law: whether labor-management disputes concerning unsafe working conditions are subject to the broad arbitration and no-strike clauses commonly found in labor contracts, and whether strikes over unsafe and abnormally dangerous working conditions may be enjoined in federal court. These issues were recently considered and decided by the United States Supreme Court, although the solution it posited in Gateway Coal Co. v. United Mine-workers of America may have raised more questions than it answered.

The litigation arose out of a safety strike at a coal mine owned by the Gateway Coal Company. Three company foremen had falsified records of an "air check" to determine the air flow in the underground mine. Work at

Ironically, Shell already has plant workers on safety committees in their European plants. Wall Street Journal, Jan. 5, 1973, at 13, col. 5: "Oil, Chemical and Atomic Workers International Union said its demands that employees be allowed to help determine whether their working conditions are healthful appears to be a major obstacle in concluding labor agreements with many companies in the petroleum industry." See generally New Allies Among Environmentalists, SCIENCE, April 13, 1973, at 180; Shell Strike, Ecologists Refine Relations with Labor. BUSINESS WEEK, February 24, 1973, at 86.

13. Car makers in Detroit also discovered that health and safety was important to their employees. The United Auto Workers (UAW) in 1973 contract negotiations made mandatory overtime the key issue, contending that overtime causes fatigue and thereby increases the danger of injuries. The auto makers wished to retain the right to contract with their employees for mandatory overtime. See St. Paul Sunday Pioneer Press, Aug. 12, 1973, at 11, col. 1. Chrysler employees recently showed dissatisfaction with safety conditions after two employees were injured, by taking over one of that car manufacturer's stamping plants in Detroit. Minneapolis Tribune, Aug. 20, 1973, at 7A, col. 2; see Wall Street Journal, March 6, 1973, at 1, col. 5.

14. A wildcat strike over on-the-job safety was faced in Minnesota in 1972, by the Hanna Mining Company. The factors that led to the walkout were similar to those that led to unrest and revolt in other mines, plants, and mills: the willingness of management to ignore dangerous conditions and to sacrifice safety for increased production and profit. Numerous safety violations were complained of by the workers prior to the walkout, but management did not respond. Employees became more restless as accidents and injuries increased until finally, a series of incidents ignited the walkout. Management sued to enjoin the strike, and the case was brought to the Court of Appeals for the Eighth Circuit. Hanna Mining Co. v. United Steelworkers, Civil No. 5-72-59 (D. Minn., June 26, 1972), aff'd, 464 F.2d 565 (8th Cir. 1972).


Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons . . . shall . . . test by means of an anemometer . . . to determine whether the air in each split is traveling its proper course and in normal volume and velocity. . . .

The Supreme Court noted that although the actual air flow level, 11,000 cubic feet per minute, was less than half of the normal 28,000 cubic feet per minute, it still exceeded the 9,000 cubic feet per minute required by federal law and the 6,000 cubic feet per minute required by state law. 414 U.S. at 370-71 n.1. The difference between the air flow required by law and the air flow pres-
the mine was temporarily halted and repairs to the ventilation system were made when the reduced air flow was discovered. Subsequently, state and federal inspectors, at the union's request, inspected the mine, impounded the records which revealed the falsification, and notified the company that criminal charges would be brought against the three foremen. One day after the falsification of the records was discovered, a special union meeting was held, and the coal miners voted unanimously not to return to work unless all three foremen were suspended. Gateway acquiesced. The union believed that the continued employment of the foremen presented a hazard at the mine because of their demonstrated neglect in enforcing federal and state safety rules. While the criminal charges were pending, the Pennsylvania Department of Environmental Resources notified Gateway it was at liberty to reinstate the three foremen, and two of the three were rehired. Eventually, the foremen pleaded nolo contendere to the criminal charges and were fined 200 dollars each.

Upon the return of the two foremen, the miners struck as they had voted to do a month and a half earlier. A week after the strike began, the company offered to arbitrate the dispute, but the union refused, claiming that the collective bargaining agreement did not require it to arbitrate safety disputes. Gateway then brought an action in federal district court seeking to enjoin the strike, alleging that the union was required to submit the dispute to arbitration and was prohibited from striking. The district court found for the company, 

17. The miners initially walked out over an economic issue, but when the low air flow halted work they were ordered to stand by. Management refused to pay those who left the mine in contradiction of their orders, and the miners voted to walk out until they received their pay for that day and refused to arbitrate. When, on June 1, 1971, the foremen who falsified the records returned to work, the economic walkout became a safety strike. 414 U.S. at 371-72.


19. Two of the three foremen were suspended immediately by Gateway, but until the miners demanded the suspension of all three at their April 18, 1971, meeting, the foreman who reported the violation was still on the job. 414 U.S. at 371.

20. On several occasions prior to April 15, 1971, the striking coal miners, Local 6330, had complained that the safety regulations were being disregarded by the foremen. Brief for Respondent at 5 n.2, Gateway Coal Co. v. UMW, 414 U.S. 368 (1974).

21. The Gateway Coal Company applied to the Department of Environmental Resources to allow the three assistant foremen to return to work because the Pennsylvania Legislature had recently transferred to that Department the power to regulate the coal mining industry in Pennsylvania, a power which had previously been conferred upon the Department of Mines and Mineral Industries, the Secretary of Mines and Mineral Industries, the Oil and Gas Conservation Commission, the Mine Inspectors' Examining Board for the Bituminous Coal Mines of Pennsylvania, and the Anthracite Mine Inspectors' Board. See PA. STAT. ANN. tit. 71, § 510-1(2) (Supp. 1974).

22. Prior to the reinstatement on June 1, 1971, the third foreman had retired. 414 U.S. at 372.
ordering arbitration of the dispute and enjoining the strike on the condition that the two foremen be suspended pending the arbitrator's decision. The union appealed to the Third Circuit Court of Appeals which reversed the decision of the district court holding that because of the public policy favoring workers' safety, safety disputes were sui generis and not subject to arbitration except where specifically provided for in the labor contract. Finding no such express provision, and instead, finding a clause which it construed to except safety disputes from the general arbitration procedure, the court ruled that no injunction should issue because the union's good faith work stoppage over an abnormally dangerous working condition was not a breach of the contract, and, thus, there was no wrong to enjoin. The injunction was dissolved and the order to arbitrate dismissed.

The United States Supreme Court granted certiorari and framed the three issues presented to it thus:

First, did the collective-bargaining agreement then in force between these parties impose on them a compulsory duty to submit safety disputes to arbitration by an impartial umpire? Second, if so, did that duty to arbitrate give rise to an implied no-strike obligation supporting issuance of a Boys Markets injunction? Third, did the circumstances of this case satisfy the traditional equitable considerations controlling the availability of injunctive relief?

The court held that the answer to all three questions was yes, thereby reversing the Third Circuit Court of Appeals and reinstating the relief granted by the district court.

II. GATEWAY IN HISTORICAL CONTEXT—THE ISSUES RESOLVED

An analysis of the Gateway decision must be grounded upon an understanding of the federal judiciary's role in shaping the rights and remedies of the parties to labor disputes. Congress granted the federal courts jurisdiction over all labor disputes, without regard to the ordinary jurisdictional requirements, in 1947. That jurisdiction was soon held to include the power to formulate a body of substantive labor law, based upon the policies expressed in congressional legislation. Two major and seemingly inconsistent con-
gressional policies—protection of the worker's right to strike and encouragement of the arbitration of all labor disputes—have largely determined the course of judge-made labor law.

Congress first recognized the right of employees "to engage in concerted activities for the purpose of . . . mutual aid or protection." These words were intended to protect the right to strike, a right which forms the backbone of employees pursuing collective goals in the face of management opposition, and lends credibility to the employees' bargaining position in negotiation sessions. Recognizing that management would attempt to undercut the impact of the right to strike by seeking injunctive relief against unions, Congress further protected the workers' rights by denying the federal courts the power to enjoin strikes. The legal and psychological impact of these provisions of the Norris-LaGuardia Act were enormous. Not only were employers forced to recognize unions as the bargaining representatives of employees and to carry on negotiations through them, but also employers and workers were made forcefully aware of a national policy of protecting unions and their right to strike.

The second relevant congressional labor policy is to encourage collective-bargaining agreements which require that all grievances be submitted to binding arbitration. The United States Supreme Court, in a series of decisions, gave effect to that policy by creating a nearly conclusive presumption of arbitrability. Each case raised the issue of whether a particular

31. F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 201 (1930):
   In labor cases . . . complicating factors enter. The injunction cannot preserve the so-called status quo; the situation does not remain in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences. Moreover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is lifted. Choice is not between irreparable damage to one side and compensable damage to the other. The law's conundrum is which side should bear the risk of unavoidable irreparable damage. Improvident denial of the injunction may be irreparable to the complainant; improvident issue of the injunction may be irreparable to the defendant. For this situation the ordinary mechanics of the provisional injunction proceeding are plainly inadequate.

The power and importance of a strike to any labor group can never be fully estimated. As Frankfurter and Greene indicate, an injunction may have a chilling effect upon a union which might be irreparable. This observation has as much validity in 1974 as it did in 1930.
33. In the 4 years after passage of the Norris-LaGuardia Act and the Wagner Act union membership doubled. See B. MELTZER, LABOR LAW 9-10 (1970).
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grievance was included in the general arbitration clause of the applicable collective-bargaining agreement. Refusing to apply to labor contracts the rules of construction applicable to contracts generally, the Court determined that congressional policy could best be effectuated by resolving questions of whether the contracting parties intended to arbitrate a particular grievance in favor of arbitration. Since the Steelworkers Trilogy, the federal courts have consistently presumed that the parties intend to include all disputes within a general arbitration clause.

Since it avoids the ugly specter of a strike, while at the same time allowing each side to present its case and retain the economic benefits that accrue when the work force remains on the job, arbitration has become the accepted manner of settling labor disputes. Yet, for all of its advantages, arbitration remains fundamentally inconsistent with the right to strike. It can only work if strikes are somehow limited.

The federal courts were forced to face this inconsistency and to integrate the two congressional policies of favoring arbitration and protecting the right to strike into a cohesive body of national labor law. Granting injunctive relief at the urging of management denied unions their most effective weapon for economic gains, the strike. Allowing unions to strike at will rendered arbitration clauses meaningless and defeated management’s reasons for entering into arbitration agreements. The right to strike emerged as the prevailing policy in 1962, when the United States Supreme Court in Sinclair Refining Co. v. Atkinson upheld Norris-LaGuardia’s prohibition against the enjoining of union strikes despite contractual arbitration provisions and no-strike obligations. Sinclair did not attempt to reconcile the two national labor policies, but rather chose the policy of Norris-LaGuardia. Only 8 years later, Sinclair was reversed in Boys Markets, Inc. v. Retail Clerks Union Local 177, and the federal courts were reinvested with the power to enjoin union strikes. Observing that the anti-injunctive relief provisions of Norris-LaGuardia, enacted in 1932, arose out of a different labor relations environment

38. Gateway Coal Co. v. UMW, 466 F.2d 1157, 1159 (3d Cir. 1972).
41. Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968), came after Sinclair and gave unions the right to remove actions for injunctive relief by employers to federal court, thus making state-level injunctive relief unavailable, and any form of injunctive relief rare.
than the Labor-Management Relations Act, enacted in 1947, the Court reasoned that congressional intent to encourage arbitration would be defeated unless unions were obligated to abide by their contracts with management, particularly binding arbitration provisions and no-strike obligations. Management would have no incentive to contract to arbitrate grievances if unions could strike at will. The Court rejected *Sinclair* as an aberration which undermined the well-established presumption that the parties to a labor contract intended to settle all disputes through the binding arbitration mechanism provided by the contract's general arbitration clause.

Viewed as a resolution of apparently inconsistent congressional policies, the holding of *Boys Markets* is more of an exception to the Norris-LaGuardia Act's prohibition against enjoining strikes, rather than an all-out affirmation of the Labor-Management Act's choice of arbitration as the favored means of resolving labor-management disputes. The decision narrowly defines the elements that management must prove and the findings that the trial court must make before an injunction may issue. First, the district court must determine that an injunction is appropriate despite the prohibitions of Norris-LaGuardia; second, the contract must bind both parties to arbitrate the particular grievance in dispute; third, the contract must contain an express or implied no-strike clause; and finally, the ordinary principles of equity must warrant the issuance of an injunction. Clearly, the burden of proof is on the party seeking the injunction, and its failure to establish any of the elements should result in the denial of injunctive relief.

The United States Supreme Court framed the issues it was to decide in *Gateway* in terms of the *Boys Markets* formulation, attempting, as courts in these cases must always do, to strike a balance between the union's right to strike and its duty to arbitrate. *Gateway*, however, was unique, for it injected into the usual equation a third element, the workers' right to safe working

43. *Id.* at 250-51.
44. *Id.* at 247-49.
45. *Id.* at 241.
46. *Id.* at 254.

"A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract does have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." *Id.* (emphasis in original).

The source of these principles was the dissenting opinion of Justice Brennan in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 228 (1962). Justice Brennan was also the author of the majority opinion in *Boys Markets*. 
conditions. Apparently bypassing the initial inquiry of whether injunctive relief could be appropriate, or assuming that management had met its burden of establishing that point, the Court focused on whether the union had a duty to arbitrate a safety dispute, whether the union was under a contractual obligation not to strike, and whether the equitable considerations supported the issuance of an injunction.

Turning first to the question of whether there was a duty to arbitrate safety disputes under the collective bargaining agreement, the Court relied on the national labor policy which favors arbitration and ruled that the broad arbitration clause of the National Bituminous Coal Wage Agreement of 1968, which governed the contractual relations of the parties, was intended to include safety disputes. The Court reached that result by broadly construing, in accordance with the “presumption of arbitrability,” language in the arbitration clause which purported to include “any local trouble of any kind.”

The court of appeals had refused to apply the presumption at all, holding on the contrary, that unless the contract expressly provides otherwise, safety disputes are presumed not to be subject to arbitration. This determination that safety disputes are sui generis was, of course, partially based on the policies expressed in congressional safety legislation, but also, and perhaps more importantly, on the recognition that safety issues are not normally among those matters which men will submit to arbitration. The Supreme Court rejected this view for two reasons. First, it observed that the reasons for favoring arbitration—prevention of industrial strife and its “unhappy consequences of lost pay, curtailed production and economic instability”—were as applicable to safety disputes as to economic ones. Second, like economic disputes, safety disputes can be better resolved by the arbitrator because of his special expertise and understanding of labor-management problems.

By applying the presumption of arbitrability, the Court was able to reject the court of appeals’ further finding that safety disputes had been expressly excepted from the broad arbitration clause. A mine safety clause, which

47. 414 U.S. at 374-80.
48. Id. at 374-75 n.6.
49. Id. at 379-80.
50. Id. at 374-80.
51. 466 F.2d at 1159-60.
52. Id.
53. 414 U.S. at 379.
54. Id.
55. (e) Mine Safety Committee

At each mine there shall be a mine safety committee selected by the local union. . . . The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the committee believes an immediate danger
provided for a mine safety committee to inform management of any conditions that endangered the lives of the miners and gave the committee the power to clear the mine in case of an immediate danger, served as a partial basis of the appeals court's holding that arbitration of safety disputes was not required under the collective bargaining agreement. This construction was buttressed by testimony in the district court and by the history of the contract, which revealed that the machinery of the broad arbitration clause had never been used, nor intended for use, in settling safety disputes.

The Supreme Court dismissed this interpretation of the contract in a footnote. Arguing that the court of appeals had merely found that the arbitration clause was ambiguous in light of the mine-safety clause, and not that the latter constituted an express exception to the former, the Supreme Court determined that the mine safety clause did not expressly except safety disputes from the arbitration provisions, and that any and all ambiguities in the arbitration clause were, because of the presumption, to be resolved in favor of arbitration.

The policies on which the Supreme Court relied in deciding to apply the presumption in favor of arbitration—avoiding economic dislocations and utilizing the most expert decision maker—may be worthy of advancement, but there are other, perhaps higher, values to be preserved. The Court failed to explain how matters of life and death can be arbitrated, how they can be weighed and measured by an impartial umpire. Further, arbitration, instead of easing industrial strife and tension, may, through an erroneous decision by the arbitrator, accelerate it, since mistakes in resolving safety disputes cannot be corrected at the next bargaining session as can mistakes in resolving economic disagreements. Hands, legs, and lives cannot be renegotiated.

Perhaps the advantages of economic stability and decision-making expertise also implicitly resolved for the Court the Boys Markets threshold inquiry of whether an injunction would be appropriate despite the ban imposed
on such relief by Norris-LaGuardia,60 but in embracing those advantages, the Court failed to address itself to the narrow scope of the Boys Markets injunction61 and the Boys Markets caveat that an injunction should not issue in every case even if the prerequisites are met.62 Yet, because of the Supreme Court's finding that the remaining two issues were moot, the eventual outcome of Gateway rested almost entirely upon the presumption favoring arbitration.

Since the district court's authority to enjoin the work stoppage depended upon whether the union was under a contractual obligation not to strike, the Supreme Court next addressed itself to that issue.63 Because the agreement did not contain an express no-strike clause,64 the Court was required to deter-

60. The reason for the Court's failure to answer specifically the question of why an injunction should issue in spite of Norris-LaGuardia, may, perhaps, be found in its initial determination that safety strikes are not sui generis. If that is the case, then injunctive relief may be as appropriate as it is in economic strikes. The circuit court did not apply the Boys Markets test because it felt that Boys Markets was not applicable to safety strikes. The Supreme Court in holding that the Gateway strike was subject to the considerations of Boys Markets impliedly found that Norris-LaGuardia did not apply for the reasons that it gave in Boys Markets, i.e., Norris-LaGuardia was not intended to protect unions who were in violation of collectively bargained anti-strike agreements.


Heretofore, this Court has recognized implicit exceptions to the anti-injunction provisions of the Norris-LaGuardia Act only when there was an unavoidable clash with other labor legislation. We have stated before that "the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, nonlabor statute." The unmistakable mandate of the Norris-LaGuardia Act is to preclude the federal courts from interfering with peaceful disputes by resorting to "objective tests." Although the Economic Stabilization Act affects wages, it is clear to me that it falls within the area of general economic legislation rather than the narrow scope of "labor legislation" as that concept is used in prior decisions.

Moreover, even when we have carved out an exception to the Norris-LaGuardia Act to accommodate it with later, more specific labor legislation, we have circumscribed the courts' discretion to award injunctive relief. In International Association of Machinists v. Street, 367 U.S. 740, 772-73 we stated:

"The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions. . . . [T]he policy of the Act suggests that Courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right." Id. (citations omitted).

62. 398 U.S. at 253-54: "Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance."

63. 414 U.S. at 380. "The second question is whether the District Court had authority to enjoin the work stoppage. The answer depends on whether the union was under a contractual duty not to strike." Id.

64. Although it is not stated by the Court, the absence of a no-strike clause is implicit in their finding of an implied no-strike obligation. See Brief for Respondent at 20 n.34, Gateway Coal Co. v. UMW, 414 U.S. 368 (1974). In 1947, the agreement between the coal miners and operators contained a clause rescinding all no-strike agreements and specifically protecting the right of workers to strike over safety issues. The rescission clause of the 1947 agreement was repeated verbatim in the 1968 agreement. See also UMW v. NLRB, 257 F.2d 211, 216 (D.C. Cir. 1958):

The "legislative history" of the [rescission clause] is interesting and enlightening. The 1941 Appalachian Joint Wage Agreement plainly and expressly contained agreements
mine whether the duty to arbitrate, which it had previously found, gave rise to an implied obligation not to strike which would support a *Boys Markets* injunction.\(^\text{65}\) The Court observed that the right to strike and the duty to arbitrate are "analytically distinct" issues and that, conceptually at least, collective bargaining agreements could contain a broad, mandatory arbitration clause and yet preserve the right to strike over arbitrable matters.\(^\text{66}\) The efficacy of this distinction, however, is clearly impaired by the narrow scope of its operation as defined by the Court. Relying on *Lucas Flour*,\(^\text{67}\) the Court found an implied obligation not to strike over arbitrable issues,\(^\text{68}\) again rejecting the suggestion that the mine-safety clause expressed a different general intention with respect to safety disputes.\(^\text{69}\) The Court held that, unless the agreement expressly reserves the right to strike over an arbitrable matter, the duty to arbitrate and the duty not to strike should be construed as having "coterminous application."\(^\text{70}\)

While not giving the mine-safety clause the effect of a general exception of safety disputes from the no-strike obligation, the Court did impliedly\(^\text{71}\) recognize that the clause provided the apparatus for a work-stoppage in the face of an immediate danger.\(^\text{72}\) Continuing its narrow construction of the

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65. 414 U.S. at 380-82.
66. Id. at 382.
67. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962). This case involved an employer who brought an action in state court for money damages against a union which refused to bargain in accordance with the arbitration clause in their collective bargaining agreement. The Supreme Court held that the employer had a cause of action for damages on the theory that an implied obligation not to strike was the quid pro quo of an arbitration clause. The quid pro quo analysis was extended in *Boys Markets* to support the issuance of injunctive relief. The precedent for that application of the doctrine is unclear, since *Sinclair*, decided in the same year as *Lucas Flour*, denied injunctive relief even though the contract contained an express no-strike clause. Nevertheless, courts continue to hold that the union's obligation not to strike over an issue, the implied quid pro quo of management's obligation to arbitrate, will support a *Boys Markets* injunction.
68. While the Court does not explicitly so find, it is evident from the Court's reading of *Lucas Flour* and the result reached in the case.
69. Similarly rejected was another provision of the agreement which, according to the union, evidenced the intent to disavow any no-strike obligation. *Id.* at 384-85 n.15.
70. *Id.* at 382. The application of the *Lucas Flour* rule to cases of this genre raises an interesting conceptual difficulty not discussed by the *Gateway* Court. Where a duty to arbitrate arises as the result of a presumption, the further finding of an implied no-strike obligation clause is obvious bootstrapping. Applying a presumption on a presumption in this manner may usurp the right to strike and produce a result which the parties did not intend.
71. *Id.* at 382-84. The district court first rejected the application of the mine safety section (e) to these specific facts.
72. *Id.* The Court refused to delimit the scope of the mine safety section but did recognize

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clause, however, the Court observed that the union had failed to comply strictly with the mechanism for invoking its provisions. 73 With Lucas Flour’s quid pro quo analysis at hand, the Court analogized that because the clause invested the union with such a powerful weapon, management, as part of its bargain, certainly intended the procedure to be strictly complied with. 74 Thus, by holding that the work stoppage provisions of the mine safety clause had not been properly invoked, the Court avoided the issue of whether the language of the provision was adequate to constitute an exception to the conterminous application rule and permit the union to strike despite its duty to arbitrate.

Another potential exception to the implied obligation not to strike considered by the Court was Section 502 of the Labor-Management Relations Act, 75 which provides that a good faith work-stoppage occasioned by abnormally dangerous working conditions shall not be deemed a strike. The Court neatly avoided confronting and resolving the question of whether that statutory provision would permit a work stoppage in the face of a duty to arbitrate the dispute, by ruling that the district court had mooted the safety issue when it conditioned the injunction upon the suspension of the two foremen. 76 Nevertheless, the Court recognized the validity of Section 502 and gratuitously defined its proper application in cases of this nature. It implied that the union must invoke Section 502 as a defense to management’s allegations of its breach of its contractual obligations not to strike, and come forward with evidence that an “abnormally dangerous condition” exists which has resulted in the work stoppage. 77 The nature of the evidence required, as defined by the Court, is particularly significant. A finding by the Court that the employees stopped their work in the good faith belief that an abnormally dangerous condition existed, will not suffice. 78 Rather, the union must present ascertainable, objective evidence in support of that belief. 79

This evidentiary burden seems unduly harsh in light of the statute’s remedial purpose. The question of whether an abnormally dangerous working condition exists within the meaning of the statute should be determined with reference to all applicable federal and state health and safety standards and
laws and, seemingly,\(^8\) the congressional policy of protecting the worker from unsafe working conditions. Since Section 502 complements those provisions of safety legislation which aim at protecting employees who discover that unsafe conditions exist or that safety standards are not being enforced,\(^9\) proof of a violation of a state or federal health and safety law or standard should be prima facie evidence that an abnormally dangerous condition exists.\(^10\) Death or serious injury should not be required to satisfy the union's burden of proof. The congressional intent is self-evident. Employees may leave their jobs to preserve life and limb without breaching their collective bargaining agreements or suffering loss of their jobs. If ascertainable, objective evidence should come to mean actual harm that has resulted from an on-the-job hazard, that intent would be defeated. The protection of Section 502 should attach upon a prima facie showing of an abnormally dangerous condition, and only proof of correction of the specific complaint and compliance with all applicable federal health and safety standards and laws should be sufficient to rebut such a prima facie case.

Had the Supreme Court construed Section 502 in this more liberal manner, the district court's action in conditioning the injunction upon the suspension of the foremen would not necessarily have foreclosed further consideration of the safety question. Upon the union's showing of the foremen's violation of a safety law, the burden of going forward with the evidence would have shifted to management, requiring them to establish not that the danger had temporarily been ameliorated by the district court's action, but rather that a permanent solution had been found, and that they were now in compliance with all safety laws and regulations.\(^11\)

80. The intent of Congress to protect employees from dangerous working conditions at their places of employment under Section 502 and the policies of the Federal Coal Mine Health & Safety Act, and OSHA are identical. All three place the safety and health of the employees foremost. It seems, therefore, that a violation of the national safety laws should give rise to the right to stop work under Section 502. See Textile Workers v. Lincoln Mills, 353 U.S. 448, 456 (1957). The safety laws for the coal miners and all employees should form a partial basis of the national labor law. See Gateway Coal Co. v. UMW, 414 U.S. at 388, 389 (Douglas J., dissenting); Hanna Mining Co. v. United Steelworkers, Civil No. 5-72-59 (D. Minn., June 26, 1972).

81. The Occupational Health & Safety Act of 1970, 29 U.S.C. § 660(c)(1) (1970) protects employees from discharge or discrimination for the exercise of their rights under the Act, including seeking the abatement of unsafe or unhealthy conditions at their place of employment.

82. This rule would create certainty. The employer would be encouraged to conform to the health and safety laws, the unions would be discouraged from bringing frivolous claims, and a court faced with determining if an "abnormally dangerous condition" existed would have a starting point for its analysis.

83. The application of the temporary-permanent dichotomy to the facts of Gateway may be the question. Where the alleged unsafe working condition consists of the presence of foremen who have been shown to have negligently endangered the workers once and only once, the appropriate action for insuring the future safety of the workers is not necessarily obvious. Arguably, the foremen had been sufficiently punished to deter future negligent acts. Moreover, new foremen chosen by management might be no more conscientious. Perhaps procedural safe-
Finally, the Court ruled that injunctive relief was appropriate under traditional equitable principles, a finding that is a condition precedent to the issuance of a *Boys Markets* injunction. The Court relied in part on the district court finding that Gateway would suffer irreparable harm by the continued breach of the union's no-strike obligation, but, as with its discussion of Section 502, relied primarily on the fact that the injunction was conditioned on the suspension of the two foremen thereby remedying, at least temporarily, the dangerous conditions. In so avoiding the necessity of weighing the respective equities of Gateway and the union, the Court failed to rule on what certainly is one of the most difficult problems encountered in the application of *Boys Markets* principles to *Gateway* strikes—whether the economic interests of management can be matched, measure for measure, against the safety interests of the workers.

III. The Future of Safety Strikes—The Issues Left Unresolved

Although the Supreme Court in *Gateway* may have erred in its attempt to strike a balance between the favored position of arbitration and the protected status of the right to strike, the most telling criticism that can be leveled against the decision is not that the Court construed one contract in a manner apparently inconsistent with congressional intent and the intent of the parties, but rather that the Court refused to reach and resolve the questions of broader significance. The action of the district court requiring Gateway to suspend the foremen pending the arbitrator's decision was the key to the Court's avoidance of two of the more difficult issues arising out of the safety strike: the application of Section 502 of the Labor-Management Relations Act, and the weighing of the equities required by *Boys Markets*.

Moreover, by basing its decision on such narrow grounds, the Court deferred a decision of the ultimate question lurking behind those two issues and every other issue in *Gateway*, whether the fact that a strike is prompted by unsafe working conditions has any legal significance.

All three courts which ruled on the facts of *Gateway* recognized it to be a safety dispute, but only the circuit court of appeals viewed this as a basis for distinguishing its legal status from that of a strike arising solely for economic reasons. The Supreme Court, in what was undoubtedly the most significant aspect of its decision, disapproved the appellate court's view, thereby declining to integrate a potential third factor—the public and congressional policy

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84. 414 U.S. at 387-88.
85. *Id.*
86. *Id.*
to protect the American worker on the job from unsafe working conditions—into the body of developing national labor law. On the other hand, the Supreme Court's finding that safety disputes are not sui generis would appear to be limited to the issue of whether the presumption of arbitrability attaches to them under a collective bargaining agreement containing a broad arbitration clause.

In ruling that the district court had resolved the safety issues by conditioning the injunction on the suspension of the foremen, the Court remained locked into economic considerations. It never reached the safety considerations that the third circuit, and arguably Congress, found to be distinct, nor ultimately the question whether safety strikes are sui generis. Without question, the foremen's suspension resolves the safety issue, but only temporarily. If the arbitrator's decision is favorable to the company, the foremen will be returned to the job, as in fact occurred in Gateway, and the injunction will continue, all without a judicial determination of the issues raised by Section 502 or a weighing of the equities. The result is that the Court apparently invests the arbitrator with the power, or assumes he inherently has the power, to make determinations with respect to these issues. This result gives rise to several apparently unanswered questions.

First, is an arbitrator the appropriate decision-maker to determine whether alleged violations of federal and state safety laws in fact exist? Second, can an arbitrator determine the contractual rights and duties of the parties to a safety dispute without usurping the federal courts' power to weigh the equities? Third, can the protections of Section 502 be asserted by the union upon the return of the foremen to the job to remove the resultant strike from the scope of the injunction? Finally, will a weighing of the equities ever permit the issuance of an injunction against a strike in response to abnormally dangerous working conditions?

Perhaps the extra-contractual remedy provided by Section 502 to workers faced with abnormally dangerous working conditions should be viewed as an adjunct of federal health and safety legislation and not as labor-management relations legislation. The broad remedial purpose of this provision, and of the safety laws themselves, raises serious doubts about whether arbitrators should be permitted to resolve the threshold questions of violation of health and safety standards even where the alleged existence of unsafe working

87. Id. There may be some reason to believe, however, that because of the district court's conditioning of its injunction on the suspension of the foremen, the Supreme Court found the Gateway strike to be a safety dispute without safety issues, thus leaving open the question of whether safety strikes are to be treated differently from economic strikes.

88. Gateway Coal Co. v. UMW, 466 F.2d 1157, 1159 (3d Cir. 1972). The district court required the suspension of the foremen, pending the decision of the arbitrator. This decision found that the dispute was arbitrable, that the contention of the miners that the retention of the foremen with safety responsibilities would be dangerous was without merit, and that the foremen should be allowed to perform their assigned tasks without interference.

89. 414 U.S. at 385.
conditions gives rise to contractual grievances. The majority in *Gateway*
never squarely addressed the question of how the contractual rights and
remedies of the parties may be sufficiently separated from their rights and
duties under federal health and safety laws so that an arbitrator may deter-
mine the former without exceeding his authority and resolving the latter as
well. Indeed, the majority may have tacitly assumed that the arbitrator’s
power legitimately extends to interpreting federal health and safety laws.

A more convincing view, as suggested by the dissent in *Gateway*,\(^90\) and by
a Minnesota federal district court,\(^91\) is that in matters of life and death,
Congress did not intend the arbitrators to make the final decision. Perhaps
similar reasoning formed a partial basis for the court of appeals’ determina-
tion in *Gateway* that safety grievances should not be subject to the decision of
an arbitrator.\(^92\) Dissenting in *Gateway*, Justice Douglas would have ruled that
the field of coal mine health and safety had been pre-empted by congressional
enactment of the Federal Coal Mine Health and Safety Act.\(^93\) Congress, he
observed, intended its administration, construction, and enforcement be
delegated to the administrative and judicial branches of government, where
these functions are traditionally found.\(^94\) In *Hanna Mining Co. v. United
States Steelworkers of America*,\(^95\) one federal district court, recognizing
that the arbitrator’s function is to determine the rights and remedies afforded
the parties by the contract and not their legal rights under federal health and
safety laws, observed that it may be beyond an arbitrator’s power to consider
alleged violations of federal and state laws irrespective of whether these
violations serve as the basis of contractual breaches.

The role of the State of Pennsylvania in determining whether the Gateway
foremen had violated state safety laws offers an instructive example. The
foremen were suspended only after criminal charges had been brought against
them in state court, and they were reinstated only after the criminal cases
had been resolved with the appropriate state regulatory agencies. The federal
government played no similar role with respect to the alleged violations of
federal safety laws. A parallel procedure, and better distribution of decision
making powers, could be achieved in such cases if the Federal Bureau of
Mines under the Secretary of the Interior\(^96\) or other appropriate federal
agency were to determine if management had violated the specific provisions
of federal law alleged. In light of that factual determination the arbitrator
could by reference to the terms of the collective bargaining agreement and by

\(^{90}\) *Id.* at 394 (Douglas, J., dissenting).

\(^{91}\) *Hanna Mining Co. v. United Steelworkers*, Civil No. 5-72-59 (D. Minn., June 26, 1972).

\(^{92}\) 466 F.2d at 1160.

\(^{93}\) 414 U.S. at 394 (Douglas, J., dissenting).

\(^{94}\) *Id.*

\(^{95}\) *Hanna Mining Co. v. United Steelworkers*, Civil No. 5-72-59 (D. Minn., June 26, 1972).


\(§ 811.\)
adjusting the interests of the parties resolve the safety dispute without resorting to an interpretation of federal safety laws.

Even the power to determine contractual remedies upon an administrative determination of the facts, however, gives the arbitrator ultimate control over the health and safety of the workers. In adjusting the interests of labor and management, and so resolving their dispute, the arbitrator must take into account the equities in much the same manner as a federal district court attempting to determine whether a *Boys Markets* injunction should issue.

*Boys Markets*, in enumerating the findings that the trial court must make before granting injunctive relief, makes no reference to the questions reserved for decision by the arbitrator.97 Perhaps the possible overlap between the equitable issues to be decided by the court and those to be decided by the arbitrator in conciliating the underlying dispute was considered irrelevant because the strike in that case arose out of economic rather than safety disputes.

Although economic disputes may present the arbitrator with difficult equitable issues, safety disputes require the balancing of the most significant of all interests. To the extent that *Gateway* implies that the arbitrator’s decision regarding the reinstatement of the foremen would be final, it imbues him with apparent authority to determine whether management’s interests in efficient operation outweigh the workers’ interests in protecting their physical safety. That, of course, is an aspect of the underlying policy issue that the Supreme Court was asked to resolve. Its refusal to do so, and its holding that the district court’s injunction had “eliminated any safety issue”98 from the case, leaves arbitrators in such cases with no judicial guidance as to whether Congress intended that safety disputes be resolved in a manner distinct from that in which purely economic issues are arbitrated.

The ultimate irony is that the Supreme Court, despite its abdication of judicial authority in *Gateway*, did not truly avoid, but merely deferred, judicial consideration of the equitable issues presented by safety strikes. The Court’s assumption that an abnormally dangerous working condition could no longer exist in light of the temporary suspension of the foremen virtually assured the return of safety strike cases to the federal courts. While stating that the duty to arbitrate does not always give rise to the obligation not to strike,99 and implicitly recognizing that a work stoppage under Section 502 of the Labor-Management Relations Act may constitute an exception to the coterminous application rule, the Supreme Court stopped short of holding that only a federal court may determine the validity of a Section 502 work stoppage, and thus may have created the inaccurate impression that the arbitrator’s decision could somehow determine the existence of an abnormally dangerous working condition within the meaning of that section.

97. 398 U.S. at 254.
98. 414 U.S. at 387.
99. Id. at 382.
The injunctive relief granted by the district court and reinstated by the Supreme Court would remain in effect even after the arbitrator's decision. Thus, if the arbitrator were to return the foremen to the job the union would undoubtedly stop work and attempt to raise Section 502 in defense to the allegation that it was in violation of the Boys Markets injunction. At that point, the federal district court would be squarely faced with the question of whether the presence of the foremen constituted such an abnormally dangerous working condition that the work stoppage was outside the scope of the injunction. The trial court could not evade that issue by finding that the union was collaterally estopped by the arbitrator's decision from raising the defense of abnormally dangerous working conditions, for, by the Supreme Court's own admission, Section 502 in excepting certain work stoppages from the definition of a strike also removes the disputes that give rise to them from the scope of the arbitration clause of the collective bargaining agreement. Thus, the issue of abnormally dangerous working conditions, for purposes of Section 502 at least, is outside of the jurisdiction of the arbitrator and must in the end be resolved by a federal district court, and the very safety issue supposedly eliminated by the terms of the district court's injunction must again arise. The federal courts will again be urged to issue Boys Markets injunctions against safety strikes and will then be required to address themselves to the equitable issues left unanswered in Gateway.

Boys Markets requires a three-fold consideration of traditional equitable principles: 1) is the breach of the contract continuous in nature, 2) will the breach cause irreparable harm to the employer, and 3) will the employer suffer more from the refusal to grant the injunction than the union will if the injunction is granted? The first two tests present little difficulty, even with respect to safety strikes. The third, however, involves some difficult conceptual and practical problems, and Gateway offers little guidance in how they are to be resolved.

What is clear is that the courts must turn to Congress for guidance and integrate the emerging public policy of protecting the American worker from unsafe working conditions with the established policies of protecting the right to strike and encouraging the arbitration of disputes. Because of its relevance to the equitable issues the language chosen by Congress to express its decision to protect the workers' safety bears repeating.

The Federal Coal Health and Safety Act states "Congress declares that the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner." Although this

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100. In Gateway the foremen were permitted to return to work pursuant to a decision of a state regulatory agency even before the arbitrator had rendered his decision. Id. at 372.
101. Id. at 385.
102. Language quoted at note 46 supra.
104. Id. § 801(a).
act applies only to the coal mining industry, which is especially hazardous, the Occupational Health and Safety Act of 1970 contains parallel language:

The Congress declares it to be its purpose and policy . . . 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.

—(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment . . . ."106

This legislation imposes upon employers an affirmative duty to provide their employees with safe working conditions. Further, by specifically protecting workers who seek federal inspections or report violations of health and safety standards, Congress has encouraged the American worker to take affirmative action to make his place of employment safe. If congressional intent is not to be discounted, the factor of unsafe working conditions must be given equal consideration with the policies of arbitration and the right to strike by the courts in their balancing of the competing interests of labor and management. Recognition of these policy considerations will greatly simplify the balancing process.

When strictly economic interests are involved they can be reduced, for purposes of weighing them one against the other, to dollars and cents. Safety strikes inject a new interest into the balance—the employee's interest in his physical well-being. It is difficult to conceive of an adequate equation for weighing the loss of dollars against the loss of life and limb. The miner who loses a leg or his life suffers an irreparable harm which cannot be measured and for which exists no adequate remedy at law. While monetary damages in the form of workmen's compensation or life insurance can never be a remedy for lost lives and limbs, the money damages which management can recover from the union for violations of the contract will at least partially compensate the purely economic losses it may suffer. When Hanna Mining Company was struck, the district court in Minnesota found that the miners' safety overrode the economic interests of the Company. The court found it conceptually impossible to equate, for purposes of balancing the equities,

106. Id. § 651.
109. While courts and legislatures have through wrongful death, workmen's compensation, and similar acts, permitted dependent of a decedent to recover compensation of losses, the remedies are only of value to the survivor. Assigning a dollar value to human life is a nineteenth century concept and is based upon the economic value of a person while he is alive. See, e.g., DeVito v. United Air Lines, 98 F. Supp. 88 (E.D.N.Y. 1951) (hearing an appeal from a $300,000 wrongful death jury verdict, the court valued the life of the decedent at no more than $160,000); Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960) (the "value" of a child).
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economic injury and physical injury. The court of appeals' ruling that the Gateway safety strike was sui generis was based in part on its difficulty in equating these interests. Certainly, the proper application of the Boys Markets equitable principles is not foreclosed by the Gateway decision, and it would appear that whenever a court is satisfied that the safety of the workers is in jeopardy, the balance must be struck in favor of refusing to grant an injunction until the safety hazard is removed.

IV. CONCLUSION—THE SIGNIFICANCE OF GATEWAY

Gateway marks the first consideration by the United States Supreme Court of a labor case dealing directly with safety strikes and their legal role in the national labor policy. The facts in every case are crucial and the Gateway facts were not, unfortunately, conducive to a thorough consideration of the issues raised by a safety strike. The particular facts, and especially the district court's decision to suspend the foremen pending arbitration, did not focus the case on safety issues, but instead allowed those issues to be submerged in contracts, statutes, and stare decisis. Perhaps that result was inevitable. The dangers facing the miners were speculative and remote from an objective, legal view. A mine explosion does much more for mine safety than an act of common sense. Despite the union's protests, the facts showed little danger, and the majority could easily have seen the case as that of a union trying to dictate to management who should be hired as foremen. The suspension of the foremen cinched the case, turned attention away from their criminal acts and criminal convictions to their suspension, and made the prospect of injury to the workers seem speculative and remote. The reality of danger, so necessary to present the equities, was not present; no one was hurt.

Nevertheless, some legal principles can be gleaned from the Gateway hold-

111. Id. at 7.

On the other hand, the granting of an injunction could irreparably injure the employees of the plaintiff. The fact that there may be substantial safety and health problems at the Hanna mines is sufficient to warrant this conclusion. On the one hand, the Court is presented with a situation where the plaintiff has failed to demonstrate by clear evidence that it will be irreparably injured if the injunction does not issue, and on the other, with a likelihood that there will be injury or damage as a result of current safety and health conditions at the Hanna properties, if the injunction does issue. The balancing of a conjectural injury to the company with a potential injury to the company's employees is difficult to evaluate, primarily because of the difficulty in equating economic injury with physical safety. Id. (emphasis added).

112. 466 F.2d at 1160. "Considerations of economic peace ... have little weight here. Men are not wont to submit matters of life and death to arbitration and no enlightened society encourages, much less requires, them to do so." Id.

113. Because the Court found no safety issues present, the Gateway holding does not determine how the weighing of the equities which Boys Markets called for should be applied to safety strikes. See 414 U.S. at 387-88.

114. Gateway is the first Supreme Court case to consider the right to strike and the duty to arbitrate in conjunction with a safety strike and not an economic strike. See 41 U.S.L.W. 3382 (questions presented).

115. See authorities collected note 6 supra.
The "presumption of arbitrability" applies to safety strikes; in that respect strikes over safety issues will not be treated as sui generis. Arbitration clauses are to be broadly construed, and the "presumption of arbitrability" includes the presumption that safety disputes are subject to broad arbitration clauses. The policy of encouraging arbitration extends to favoring the arbitration of safety disputes on the dual theories that the parties under contract intended to arbitrate and that this is the best method of settling such disputes.

The Supreme Court's interpretation of the arbitration and mine safety clauses in the Gateway contract suggests to unions and negotiators how future contracts must be written to exempt safety disputes or any other issue from the contract's general arbitration machinery. Because of the Gateway application of the "presumption of arbitrability," a union which wishes to contract to arbitrate, and at the same time retain a right to strike over unsafe working conditions, should explicitly and particularly so state in the arbitration clause. Since the Supreme Court interpreted the balance of the contract as subject to the arbitration clause, arguing that an arbitration clause is the quid pro quo for a no-strike clause, the only alternative which will enable a union to retain the right to strike is to have no arbitration clause at all. That is hardly a desirable alternative since it would force many industries and unions away from the middle ground of arbitration, not only with respect to safety issues, but other issues as well.

Even though it decided that the union had no right to strike under the contract, the Supreme Court's consideration of Section 502 as an exception to the implied obligation not to strike offers new hope to unions and workers wishing to use self-help to make their work places safe. Since the rights arising under the Labor-Management Relations Act are not subject to the terms of collective-bargaining agreements, employees will be protected from loss of jobs and the union from actions for money damages. Regardless of contractual obligations, safety strikes are permissible if "abnormally dangerous conditions" can be proved.

Section 502 seems to provide the most promising avenue of attack upon dangerous, unsafe, and unhealthy working conditions in light of Gateway's failure to confront the equitable issues inherent in a safety strike by finding that safety questions were no longer involved. The strongest argument for finding safety strikes sui generis rests on the inequity of forcing men and women to work in fear of life and limb.

It remains unclear whether the Supreme Court, if faced with a clear case of harmful and hazardous working conditions, would focus on the equities in terms of life and death. Indeed, whether Gateway was even a safety strike decision is uncertain. If, instead, the case involved a safety strike without safety issues, then the Court's abdication of its power to decide the safety issues must be predicated on the notion that arbitrators are specialists with a Solomon's wisdom. The underpinning of the Court's decision finding safety strikes arbitrable is the reliance upon the neutral umpire to resolve the issues.
Whether he is technically capable and legally empowered to find a solution is not the core problem. No matter how expert the arbitrator, the real issue is whether the stakes are not so high that only the workers themselves have the right to make the final decision.

The ecology of the workplace is a daily concern of millions of Americans who are trying to improve it. American workers and unions, the Congress of the United States, and the Third Circuit Court of Appeals have been enlightened that the "ecology of the workplace" is not merely economic. It is to be hoped that the Supreme Court will remember the words of Justice Frankfurter when considering the next strike over on-the-job safety: "Wisdom too often never comes and so one ought not to reject it merely because it comes too late."\[116\]
