

**TNS, INC.* — THE NATIONAL LABOR
RELATIONS BOARD'S FAILED VISION OF
WORKER SELF-HELP TO ESCAPE LONGTERM
HEALTH THREATS FROM WORKPLACE
CARCINOGENS AND TOXINS**

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* 309 N.L.R.B. 1348 (1992).

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I. INTRODUCTION

*You never come back.
I say good-by when I see you going in the door,
The hopeless open doors that call and wait
And take you then for — how many cents a day?
How many cents for the sleepy eyes and fingers?
I say good-by because I know they tap your wrists,
In the dark, in the silence, day by day,
And all the blood of you drop by drop,
And you are old before you are young.
You never come back.¹*

For American workers, the sentiment contained in Sandburg's homage to their sacrifice is still, close to eighty-five years after it was written, an all-too-apt description of employees' status in the American workplace, especially in matters concerning job safety and health. It has a particular poignancy when applied to the working conditions endured by the pre-strike work force at TNS, as can be seen from just a cursory review of the Administrative Law Judge's findings of fact describing the workers and their exposure to depleted uranium.²

Just prior to the “strike,”³ over seventy percent of the TNS workers were under thirty years of age. The company did not require a high school diploma as a condition of employment and none

1. CARL SANDBURG, *Mill Doors*, in THE COMPLETE POEMS OF CARL SANDBURG 6 (1970).

2. TNS, Inc., 309 N.L.R.B. 1348, 1388–1400 (1992). Depleted uranium is a radioactive carcinogen that is also chemically toxic. *Id.* at 1390. Employees were exposed to it in a variety of ways throughout the production process (as well as to other radioactive substances). For additional discussion of company operations, see *infra* pp. 43–49.

3. The word “strike” is used in a descriptive, not a legal, sense. See *infra* pp. 94–97.

of the rank-and-file employees had more than a twelfth-grade education.⁴ Several employees were illiterate.⁵ Many were holding their first full-time job and none had ever worked at a facility which used a hazardous material.⁶ The employees were “poorly trained and ill-prepared to fully appreciate the need to take maximum precautions against exposure to the dangerous substances with which they worked.”⁷

At the end of a workday in the company's foundry, the employees' faces and other exposed portions of their bodies were black from the dust, soot, and smoke.⁸ During one phase of the production process, employees packed depleted uranium in the form of “greensalt,” a powdery, heavy radioactive compound, into pots by hand. The radioactive mixture routinely flew up from the pots and settled into employees' ears, nostrils, and mouths.⁹ Many employees discharged black mucus when they sneezed or blew their noses. An operator testified that “the black soot would make his hair stiff as brillo; he wore plugs to prevent dirt from entering his ears.”¹⁰ Another employee kept a toothbrush at his work station to remove dusty particles which lodged in his teeth.¹¹ Yet another testified how she “scrubbed her skin with a buffing pad at the end of the day to remove the black specks from her pores.”¹² When she asked TNS' Resident Safety Officer, Jim Barlow, whether tests could be performed to sample the black material that infiltrated the workers' nostrils, he told her that “such a test would be too costly.”¹³ TNS' plant engineer acknowledged “that at the end of the workday, the foundry employees looked like coal miners.”¹⁴

Conditions were no better in the penetrator shop. One employee testified that with the shop door opened, he “could see dust motes suspended in the air.”¹⁵ He could not, however, see “the invisible

4. *TNS*, 309 N.L.R.B. at 1398.

5. *Id.*

6. *Id.*

7. *Id.* at 1412.

8. *Id.* at 1398.

9. *Id.* at 1391–92.

10. *Id.* at 1398.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 1398.

15. *Id.*

concentrations of alpha particles which emanated from the airborne contaminants.”¹⁶ Smoke from the furnace and the forge contributed to the “hazy and contaminated atmosphere,” an atmosphere cooled by “mists bearing uranium metal specks which sprayed the operators' faces and clothing.”¹⁷

Uniforms which were fresh in the morning turned into a dingy black by the end of the day. The black dust penetrated outer clothing to soil underclothes and socks as well.¹⁸ The employee change room procedures, which were prescribed not simply for cleanliness' sake but also as a means of decontaminating exposed personnel and confining contamination to controlled areas of the plant, were ineffectual.¹⁹ A yellow and magenta striped piece of tape on the floor proved to be a gossamer barrier for keeping tracked-in dirt and dust from drifting from one side of the room to the other.²⁰ Both sides of the room were equally contaminated.²¹ TNS acknowledged that neither the dirt nor the contamination was ever completely removed from the employees.²² Nor did TNS take measures to limit such contamination in the first place.²³ Although greensalt often spilled to the floor and leaked from broken machinery, the company refused to stop production to clean up the spills immediately and monitor for lingering airborne radiation as required by federal regulations.²⁴ As a result, contamination was spread through the plant on the soles of employees' shoes, the tires of in-plant vehicles, and air currents.²⁵

As found by the Administrative Law Judge (A.L.J.), over time the employees became aware that:

excessive contamination in the plant was causing a variety of ailments. . . . [Employees experienced] recurrent nosebleeds, lower back pain and difficulty in urinating, a condition associated with

16. *Id.* at 1398–99. According to the Administrative Law Judge (A.L.J.), penetrator shop operators explained that the dust was created “when thousands of uranium metal slugs were emptied into the unventilated vibrating bowls of the grinding machines.” *Id.* at 1399.

17. *Id.*

18. *Id.* at 1398.

19. *Id.* at 1399.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 1392, 1399.

24. *Id.* at 1392.

25. *Id.*

kidney disfunction. . . . When employees mentioned their lower back pain to [Resident Safety Officer] Barlow, he agreed that they probably were kidney-related problems and prescribed drinking beer as an antidote.²⁶

Whatever the intent behind this statement, the evidence that precedes it underscores the nature of the problem. When inexperienced, poorly educated, and ill-trained employees are exposed to serious workplace health threats and become concerned about their health, they encounter management indifference, concern with cost, and the need to maintain production.

The situation at TNS addressed here is part of a bigger problem. Indeed, as the twenty-fifth anniversary of the passage of the Occupational Safety and Health Act of 1970 (OSHA)²⁷ approaches, there is strong evidence to suggest that national safety legislation, such as OSHA, has fallen short of its goal of securing "safe and healthful working conditions"²⁸ for all American workers. Year after year, empirical studies document the unnecessary death, injury, and illness that plague the American worker.²⁹ Budget cutbacks during the past decade have further weakened already lax enforcement of

26. *Id.* at 1399.

27. 29 U.S.C. §§ 651-678 (1970).

28. 29 U.S.C. § 651(b) (1988).

29. Approximately ten thousand workers die each year in the United States from job-related injuries and an additional one hundred thousand die from occupational diseases; in all, about 250,000 potentially productive years of life are lost because of premature death. *Comprehensive Occupational Safety and Health Reform Act: Hearings on S. 1622 Before the Comm. on Labor and Human Resources, and the Subcomm. on Labor, United States Senate*, 102d Cong., 1st Sess. 1 (1991) (opening statement of Senator Ted Kennedy). From 1970 to 1990, approximately two hundred thousand workers were killed on the job in the United States, as many as two million more died from diseases caused by the conditions where they worked, and another 1.4 million people were permanently disabled in workplace accidents. William Serrin, *The Wages of Work*, *THE NATION*, Jan. 28, 1989, at 80.

Of the 6.8 million non-fatal injuries and illnesses reported in 1992, 6.3 million were injuries that resulted in lost work time, medical treatment other than first aid, loss of consciousness, restriction of work or motion, or transfer to another job. The remainder of the private industry cases, about 450,000, were work-related illnesses. OFFICE OF STATISTICS, U.S. DEPARTMENT OF LABOR, TECHNICAL INFORMATION NO. 93-553 (1992). The 1992 Department of Labor survey noted: "[L]ong term latent illness caused by exposure to carcinogens, often are difficult to relate to the workplace and are not adequately recognized and reported. The long-term latent illnesses are believed to be understated in the survey's illness measures." *Id.* Workplace injuries also account for the filing of almost two million disability cases a year, as well as the hospitalization of 88,000 workers and the loss of seventy-five million days of work.

workplace safety and health legislation by an understaffed force of inspectors.³⁰

In the face of this crisis, and despite compelling evidence of unrelenting danger at the TNS workplace, the National Labor Relations Board (NLRB) dealt a serious blow to efforts to ensure employees a safe and healthy work environment when it decided that the more than one hundred women and men of TNS could be permanently replaced for “striking” to escape what they in good faith believed to be “abnormally dangerous” working conditions.³¹ While acknowledging that “as a normal working condition” the employees of TNS “faced a greater likelihood of cancer or kidney damage than most other worker populations,”³² the NLRB held that the work stoppage was not protected by § 502 of the Labor Management Relations Act (LMRA)³³ because the employees could not demonstrate “by objective evidence” that the admittedly dangerous conditions in the plant had “substantially worsened” by the time of the walkout, or that their “cumulative exposure to [depleted uranium] had reached the point at which further exposure would have posed ‘unacceptable’ hazards.”³⁴ Although presented with a unique opportu-

30. For example, as of 1980, only 1560 federal OSHA inspectors were available to inspect the country's five million workplaces. LAWRENCE S. BACOW, *BARGAINING FOR JOB SAFETY AND HEALTH* 13 (1980). Up to 1800 state inspectors, operating under state occupational safety and health plans, supplemented this federal force. *Id.* According to the Department of Labor, Occupational Safety and Health Administration, Office of Statistics, as of the end of fiscal year 1993, there were only 1115 federal OSHA inspectors and 1089 state inspectors. The shrinking size of the inspection force obviously means infrequent inspections; as few as two percent of the firms regulated by OSHA are inspected each year according to one study. *Id.*

The failure to inspect can have tragic consequences. Still vivid is the image of 25 workers killed in a September 1991 fire at the Imperial Food Products plant in Hamlet, North Carolina. In a disaster with an all-too-familiar ring, many workers were unable to escape the fire and smoke because exit doors were padlocked by management as a precaution against employee theft of chickens. The plant had neither fire alarms nor sprinklers, and although it was subject to the Occupational Safety and Health Administration's regulatory authority, the plant had never had a safety inspection during its 11 years of operation before the fire. *Editorial*, *THE WASHINGTON POST*, Sept. 7, 1991, at A20; see *OSH Act Reform*, *Labor Relations Week* (BNA), at 1062 (Nov. 3, 1993).

31. *TNS, Inc.*, 309 N.L.R.B. 1348, 1365–66 (1992).

32. *Id.* at 1358.

33. Section 502 of the LMRA provides, in pertinent 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.” 29 U.S.C. § 143 (1988).

34. *TNS*, 309 N.L.R.B. at 1355–56.

nity to breathe life into an infrequently used but potentially meaningful provision of the LMRA that allows employees to escape abnormal danger at their workplace, the NLRB chose to ignore its role in enforcing national labor policy aimed at providing workers with a safe and healthy work environment.

The *TNS* case presented the Board with the opportunity to resolve several novel issues concerning the interpretation of § 502, including its relationship to § 7 of the LMRA,³⁵ whether its protection applies only in situations where a contractual no-strike clause exists, and whether employees who cease work under § 502 can be permanently replaced.³⁶ Foremost, however, the case presented the first occasion in which the NLRB had to apply the law to “the intangible threat of occupational exposure to carcinogens and chemical toxins.”³⁷ While the Board designed a “new” standard in interpreting § 502 in an attempt to address this emerging workplace threat, it did so by using an outdated legal analysis based on a paradigm of workplace safety inapplicable to the hazards faced by the TNS workers. Unlike the paradigmatic situations involving § 502 where employees are forced to “flee for their lives,”³⁸ the *TNS* case presented more complicated and subtle issues of the impact on employee health of continuous exposure to carcinogens and toxins, of which the immediate effects on human tissue are not readily ascertainable and the longterm consequences are difficult to measure.

The NLRB's abdication of its role in implementing workplace safety and health legislation is all the more disturbing since the standard it created serves to strip § 502 of any viability when workers turn to self-help to escape such long term health dangers. As

35. Section 7 of the LMRA provides, in pertinent part: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (1988).

36. The Board did not address the permanent replacement issue since its dismissal of the complaint was based upon the General Counsel's failure to meet the newly imposed standard articulated by the plurality opinion. For discussion of this standard, see *infra* pp. 57–65. Both the Administrative Law Judge and the dissenting Board member would have found that § 502 protects employees from permanent replacement, an opinion shared by this Author. *TNS*, 309 N.L.R.B. at 1355; *id.* at 1371 (Devaney, Member, dissenting).

37. *Id.* at 1357.

38. *Id.* at 1375; *see, e.g.*, Richmond Tank Car Co., 264 N.L.R.B. 174 (1982) (involving employees threatened by a runaway boxcar).

discussed below, the decision reflects a policy choice that too often has motivated decisionmakers when dealing with employee rights. It places the interests of capital squarely ahead of employee participation in regulating the workplace, even where issues of life and death animate the controversy.

Part II of this Article provides an overview of the regulatory framework covering the TNS workplace. It focuses on the nature and scope of employee activity protected under the LMRA concerning safety and health issues, including the relationships between §§ 7 and 502 of the LMRA and between the LMRA and the OSHA.

Part III critiques the NLRB's *TNS* decision, including the new standard adopted by the Board in applying § 502 to longterm workplace health hazards involving radioactive and/or toxic substances. It analyzes how the two-part test adopted by the Board, which looks either to a significant worsening of inherent danger or to the cumulative effect of exposure, is inherently flawed because it requires employees to prove, by ascertainable objective evidence, what the scientific community (and the Board) acknowledges is unprovable: that precise point in time when exposure to radioactive or toxic material results in physiological harm. By failing to appreciate that the "immediacy and severity of the *risk*"³⁹ faced by TNS workers was the standard by which the existence of abnormally dangerous working conditions should be measured, and by instead focusing on the "immediacy of the *consequences*" of the working conditions,⁴⁰ the plurality ignored the essential nature of the danger at issue. This part also examines the irony of the Board's refusal to look beyond the immediate workplace to determine when danger becomes abnormal, an approach which results in providing the least protection to employees in the most hazardous workplaces.

Furthermore, in concluding that the TNS workers did not toil under abnormally dangerous conditions, the plurality placed controlling weight on the failure of the Tennessee Department of Radiological Health (TDRH), the agency responsible for nuclear oversight at TNS, to order a shutdown of company operations. The Board, fearing that employees would invoke § 502 as an "end run around the statutes directly applicable to worker safety," found it "essential" to require employees to defer to the judgment of the regu-

39. *TNS*, 309 N.L.R.B. at 1439 (emphasis added).

40. *Id.* (emphasis added).

latory agency responsible for monitoring safety conditions.⁴¹ Indeed, the Board created a “presumption” that an oversight agency “charged with protecting worker health and safety,” which has the authority to close the plant, “*would* exert that authority on the basis of its own scientific and technical expertise.”⁴² Yet, the evidence is undisputed that TDRH had never exercised its “theoretical authority”⁴³ to shut down a plant and that, admittedly, this would have been a “very, very difficult” thing to do.⁴⁴

Arguably, in fact, it was the failure of the regulatory framework governing safety and health conditions at TNS that left employees with a last alternative: a resort to the principles of self-help lying at the heart of § 502. Drawing upon literature on bureaucratic theory, Part III examines how the Board inexplicably relied on that same failed regulatory framework to create an insurmountable standard that unquestioningly accepts the judgment (or, more correctly, inaction) of an oversight agency as arbitrator of whether unsafe working conditions exist, while shunting aside the judgment of the affected workers themselves. This part criticizes the Board's creation of a “presumption of regulatory efficacy,” which is not based on the facts or the law but on *unstated* policy considerations that motivate the NLRB and decisionmakers generally when they review actions undertaken by employees with safety and health concerns. At a minimum, the plurality's sanguine assumption of regulatory efficacy ignores the shared economic, social, and political interests that often exist between the regulated and the regulators and that affect regulatory conduct.

Part IV examines the unstated assumptions about the nature of the work relationship and the status of employees in that relationship that underlie the policy tensions at issue in *TNS*. It critiques the role of “decisionmakers” who, guided by hindsight, substitute their judgment for that of workers based on embedded notions of a master/servant relationship in the workplace. The Board's opinion, which reflects a hierarchical approach to the workplace, is intrinsically tied to this vision of employee as servant. A natural consequence of this status is the subordination of the legitimate interests

41. *Id.* at 1356.

42. *Id.* at 1364.

43. *Id.* at 1445.

44. *Id.* at 1445, 1349 n.6.

of employees concerning their safety and health to an unarticulated but “inherent” property right of capital to produce.

By deferring to the judgment of a regulatory agency in the first instance, as well as to managerial prerogatives to maintain production, the Board has effectively muted any employee voice in the regulation of the so-called “common enterprise” even in matters so fundamental to the life of a working person as his or her safety and health on the job. This hierarchical construct rejects deference to the judgment of employees, even where their judgment is based on wisdom borne from experience and knowledge of the work they perform. Utilizing literature on moral theory in the workplace, Part IV questions the Board's judgment in failing to protect those workers who, like the TNS employees, are most in need of protection. It argues that in reaching its decision in *TNS*, the Board either ignored the moral dimension to decisionmaking or chose to ignore a basic morality of LMRA: to ensure in § 502 that employees need not toil in conditions “which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society.”⁴⁵

Part IV also proposes a new approach to guide the NLRB and the courts in § 502 cases involving long-acting workplace toxins — an approach based on a reordering of the controlling policy choices that dominate the workplace and motivate decisionmakers. By examining what it means to work, this part offers the possibility that the employment relationship can be altered from one that is based upon a hierarchical market exchange, where work is simply a way of paying for the costs of life, to one based upon the intrinsic value of work to a person's sense of dignity, respect, and worth. This subjectification of the workplace which places the interests of labor ahead of capital transforms the status of employees from servant to equal and allows for greater deference to their judgments in matters affecting their safety and health.

Part V addresses important issues left undecided by the NLRB: Can employees who engage in a § 502 work stoppage be permanently replaced? What is the effect of a contractual no-strike clause? What standard will be used to establish causation when a claim is made that a work stoppage is protected by § 502? Part V argues that a § 502 work stoppage is not the equivalent of an eco-

45. NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962).

nomic, safety, and health strike under § 7 and that § 502 “strikers” cannot be permanently replaced. Indeed, § 502 would be superfluous if employees who cease work under that provision could be permanently replaced, since § 7 already gives them the dubious option of walking out over safety and health issues at the risk of losing their jobs to replacements. Part V also urges the NLRB to adopt a rule that would prevent even the *temporary* replacement of employees who cease work over abnormally dangerous working conditions.

Part V also argues that the applicability of § 502 is not limited to situations involving a contractual no-strike clause or other statutory ban on striking. This part suggests that case law that seemingly limits the use of § 502 to such situations is mere circumstance that has arisen because of the particular factual setting of *Gateway Coal Co. v. United Mine Workers*⁴⁶ case in which the Supreme Court addressed the § 502 standard. Furthermore, to read such a restriction into the law would severely penalize non-union employees by denying them access to § 502, since contractual and statutory bans on striking apply in *unionized* settings.

With respect to the issue of causation in § 502 cases, Part V urges adoption of the standard used to determine whether a strike was caused by an employer's unfair labor practices. Thus, if a work stoppage is caused “in whole or in part” by the existence of abnormally dangerous working conditions, it would be a § 502 work stoppage and not an “ordinary” strike within the meaning of the LMRA. The “but for” test articulated by the dissent,⁴⁷ while a reasonable interpretation of the LMRA, is not consonant with the special protection accorded to employees who cease work to avoid abnormally dangerous conditions, a situation which is more serious than the employer's commission of unfair labor practices. The concurring opinion's “sole” motive test⁴⁸ should likewise be rejected, because it fails to take consider the shared motives and objectives that exist in any strike situation and relies unduly on dicta in the *Gateway Coal* decision.

II. OVERVIEW OF THE REGULATORY FRAMEWORK⁴⁹

46. 414 U.S. 368 (1974).

47. *TNS, Inc.*, 309 N.L.R.B. 1348, 1384–85 (1992) (Devaney, Member, dissenting).

48. *Id.* at 1368 (Raudabaugh, Member, concurring).

49. Regulatory legislation includes the Occupational Safety and Health Act, 29

This overview focuses on §§ 7 and 502 of the LMRA, specifically the circumstances where each applies and the similarities and differences between them. It also compares the protections afforded under the LMRA with those available under the OSHA.

A. Summary of the Legal Distinctions Between §§ 7 and 502 of the Labor Management Relations Act

The most significant difference between §§ 7 and 502 involves the legal standard that must be met in order for employee activity to be protected. Under § 7, a subjective, good faith belief in the existence of a safety or health concern is a sufficient basis for employee self-help.⁵⁰ Under § 502, however, a subjective test is explicitly rejected and only a good faith belief based upon “ascertainable objective evidence” can privilege employee self-help.⁵¹ In addition, while § 7 encompasses a wide variety of safety and health concerns, § 502 is limited to those working conditions that can be labeled “abnormally dangerous.” Furthermore, under § 502, the withholding of labor must be in response to an “immediate” or “presently existing threat.”⁵²

U.S.C. §§ 651–678 (1988) (enacted 1970) (OSHA); Labor Management Relations Act, 29 U.S.C. §§ 141–187 (1988) (enacted 1976) (LMRA); Federal Mine Safety and Health Act, 30 U.S.C. §§ 801–962 (1988) (enacted 1969); and the Surface Transportation Assistance Act, 49 U.S.C. §§ 2301–2305 (1988) (enacted 1984). For an in-depth analysis of the content of these statutes see, James H. Swain, *Protecting Individual Employees: Is It Safe to Complain About Safety?* 9 U. BRIDGEPORT L. REV. 59 (1988).

The TNS work force was subject to the LMRA. However, the OSHA specifically excludes from its coverage employers (like TNS) that use nuclear materials. The excluded employers are subject to the jurisdiction of the Nuclear Regulatory Commission (NRC), a successor to the Atomic Energy Commission established by the Atomic Energy Act of 1946, as amended in 1954. Atomic Energy Act, 42 U.S.C. 2011 (1988); *TNS*, 309 N.L.R.B. at 1404.

The only governmental body with jurisdiction over radioactive hazards at the facility was the Tennessee Department of Radiological Health (TDRH), which operated under agreement with the NRC. TNS was also subject to the jurisdiction of the Tennessee Occupational Safety and Health Agency (TOSHA), the state analog to OSHA, with respect to occupational health and safety standards other than those applicable to nuclear materials. *Id.* at 1405 n.64. The National Institute of Occupational Safety and Health (NIOSH) also conducted inspections of the TNS plant.

50. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

51. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 386–87 (1974).

52. *Id.* at 386. As noted by the A.L.J. in *TNS*, there is little precedent that discusses the meaning of an “immediate or presently existing danger” because in “almost every case applying Section 502, the immediate nature of the harm [or lack thereof] is

An important question that arises when analyzing the rights flowing from §§ 7 and 502 is whether the need for “concert” of employee action required under § 7⁵³ is also a prerequisite for invoking § 502's protection. On its face, § 502 speaks of the “quitting of labor” by either “an employee or employees” and does not mention the requirement of concert.⁵⁴ In *TNS*, the NLRB seemed to settle the issue when it stated that the “plain meaning” of § 502 is that “one or more employees who quit labor because of abnormally dangerous conditions for work” come within the protection of that provision.⁵⁵

B. Safety and Health Protection Under §§ 7 and 502 of the Labor Management Relations Act⁵⁶

Broadly speaking, § 7 of the LMRA protects employees' concerted activity engaged in for the purpose of collective bargaining or other mutual aid or protection. Included within the scope of § 7 activity is the right of employees to organize a union as well as the right of employees to engage in concerted conduct over wages, hours, and other terms and conditions of employment, including safety and health issues. The phrase “mutual aid or protection” encompasses a class of employee concerns apart from immediate terms and conditions of employment but which have a direct relationship to or bearing upon those conditions.⁵⁷

evident from the particular facts involved.” *TNS*, 309 N.L.R.B. at 1438. Thus, a case by case approach must be taken “to establish . . . what is a presently existing abnormal danger or threat of abnormal danger.” *Id.*

53. *Meyers Industries, Inc.*, 281 N.L.R.B. 882 (1986) (*Meyers II*).

54. *See TNS*, 309 N.L.R.B. at 1356.

55. *Id.* (emphasis added). The Board had one other occasion to consider the issue. In *Roadway Express, Inc.*, the Board held that a single employee who refused to drive a truck that he considered dangerous was engaged in activity protected by § 502. 217 N.L.R.B. 278, 280 (1975).

56. Section 7 was included in the original National Labor Relations Act (NLRA, alternatively known as the Wagner Act) enacted in 1935, as well as the Taft-Hartley Act which amended the NLRA (and § 7) in 1947 and added § 502. This statutory regime is collectively referred to as the LMRA.

57. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). In *Eastex*, the Supreme Court agreed with the NLRB that employees' concerted activity aimed at defeating right to work legislation and calling for a higher minimum wage was protected because it bore a direct relationship to the employees' own economic conditions at work. The Court cautioned, however, that at times, employee conduct may involve a subject too attenuated from employee terms and conditions of employment and, therefore, would be unprotected. *Id.* at 567–69.

For an excellent in-depth discussion and insight into this issue, see Cynthia

To find an employee's activity under § 7 to be “concerted,” it must be “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee.”⁵⁸ A variety of working conditions affecting employee safety, health, and simple comfort on the job have been the focal point of § 7 activity.⁵⁹ Section 7 activity is protected even where the employees merely believe working conditions are unsafe or unhealthy.⁶⁰ Inquiry into the objective reasonableness of the employees' concerted activity is neither necessary nor proper in determining whether that activity is protected.⁶¹

In the seminal case of *NLRB v. Washington Aluminum Co.*,⁶² the Supreme Court held that seven employees who walked off the job because of the “bitterly cold” conditions in the plant⁶³ were engaged in protected, concerted activity for the purpose of protesting a condition of employment — the lack of heat in the plant — and that their discharge violated § 8(a)(1) of the NLRA.⁶⁴ Although the em

Estlund, *What do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921 (1992). According to Estlund, “*Eastex* demonstrates that some speech on matters beyond the actual terms and conditions of employment — even matters over which the employer has no direct control — may gain section 7 protection, but only if it can be linked to a traditional self-interested economic objective.” *Id.* at 928.

58. *Meyers II*, 281 N.L.R.B. at 885.

59. See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 11 (1962) (employees protesting cold in plant); *Lenape Prods., Inc.*, 283 N.L.R.B. 178, 179, 181 (1987) (employees protesting supervisory indifference to excessive gas fumes and presence of rats in plant); *Consumers Power Co.*, 282 N.L.R.B. 130, 132 (1986) (employee protesting customer violence toward employee); *Quality C.A.T.V., Inc.*, 278 N.L.R.B. 1282, 1282 (1986) (employees refusing to climb wet utility poles); *Tamara Foods, Inc.*, 258 N.L.R.B. 1307, 1308 (1981) (employees complaining of presence of ammonia gas in plant), *enforced*, 692 F.2d 1171 (8th Cir. 1982).

60. *Du-Tri Displays, Inc.*, 231 N.L.R.B. 1261 (1977) (holding that lack of health hazard from lacquer fumes did not render unprotected employees' efforts to remove what was honestly believed to be a danger).

61. *International Van Lines*, 177 N.L.R.B. 353, 364 (1969). This is in sharp contrast to the requirements underlying access to § 502.

62. 370 U.S. 9 (1962).

63. The day of the walkout was numbingly cold and windy with temperatures ranging from 11 to 22 degrees Fahrenheit. When the non-union machinists arrived for work that morning they entered an unheated plant caused by a broken furnace. Several employees huddled “shaking a little, cold” while waiting for the start of their shift. Shortly after the start of the shift, with working conditions unchanged, seven employees walked off the job after collectively deciding that this might, in their words, “get some heat brought into the plant.” *Id.* at 11, 12.

64. *Id.* at 11. Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to “interfere with, restrain or coerce employees” in the exercise of their § 7 rights. 29 U.S.C. § 158(a). An objective test is applied in determining whether employer

ployer claimed that the walkout did not arise out of a “labor dispute” within the meaning of the NLRA,⁶⁵ the Court reiterated that even if the actions of the employees could be considered “unnecessary” or “unwise,” it had “long been settled that the reasonableness of workers’ decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not.”⁶⁶

In *Washington Aluminum*, the Court referred to the conditions encountered by the employees as “uncomfortable” and of a type “which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society.”⁶⁷ However, neither the NLRB nor the courts have acknowledged or applied this standard of workplace humanity when analyzing whether employee conduct is protected under § 502. In part, this is because the nature of the relationship between §§ 7 and 502 has never been made clear.⁶⁸ This confusion, in turn, is attributable to the lack of legislative history concerning § 502⁶⁹ and to an unduly restrictive interpretation of that section because of the factual context in which the Supreme Court’s *Gateway Coal* decision arose.⁷⁰

statements have a “reasonable tendency” to deprive employees of such rights. *See, e.g.*, *Conair Corp.*, 261 N.L.R.B. 1189, 1271 (1982) (involving employer threat to prevent holding of NLRB election).

65. The LMRA provides that the term “labor dispute” includes “any controversy concerning terms, tenure or conditions of employment.” 29 U.S.C. § 152(9).

66. *Washington Aluminum*, 370 U.S. at 16. Notwithstanding this clear admonition, decisionmakers frequently insist that their judgment concerning the “reasonableness” of worker decisions, given from a distance and always with hindsight, is superior to that of employees reacting to immediate circumstances affecting their safety and health. This is so even where the facts reveal that the employee decision to cease work in the face of conditions they considered dangerous is based upon their significant collective experience concerning the nature of the work and conditions in which it could be performed safely. *See, e.g.*, *NLRB v. Fruin-Colnon Constr. Co.*, 330 F.2d 885, 892 (8th Cir. 1964).

67. *Washington Aluminum*, 370 U.S. at 17.

68. Indeed, there is a question of whether a relationship between the provisions exists at all. *See infra* pp. 97–99.

69. “There appears to be no legislative history on Section 502 to explain the purpose of that section.” *Knight Morley Corp.*, 116 N.L.R.B. 140, 146 (1956), *enforced*, 251 F.2d 753 (6th Cir. 1958). As noted by the A.L.J., “the Supreme Court reached the same conclusion” in its *Gateway Coal* decision. *TNS, Inc.*, 309 N.L.R.B. 1348, 1447 n.201 (1992). The plurality’s attempt to construct a legislative history was disingenuous and, as noted by the dissent, relied on an analysis of congressional commentary concerning legislation that was not enacted. *Id.* at 1373 n.7 (Devaney, Member, dissenting).

70. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974). Professor Atleson states that § 502 has operational value only when a no-strike clause is otherwise applicable, “[s]ince in the absence of such a clause a strike over an alleged safety hazard would be clearly protected under section 7.” James B. Atleson, *Threats to Health and*

C. *Gateway Coal Co. v. United Mine Workers*⁷¹

Gateway Coal remains the only occasion on which the Supreme Court has commented to any significant degree on the scope of protection afforded employees by § 502. Yet, to rely on *Gateway Coal* as an ultimate interpretation of the rights and obligations flowing from § 502 is to ignore the unique factual context of that case to which the Court's more sweeping language concerning the statute was linked. However, through the years, the Court's language interpreting § 502 has been uncoupled from the facts of *Gateway Coal* and applied in a reflexive manner whenever a § 502 issue has arisen.

1. *Factual and Procedural Setting of Gateway Coal*

Gateway Coal Company and the United Mine Workers were parties to a collective bargaining agreement that provided for the compulsory arbitration of disputes. Employees at a Pennsylvania mine refused to work while three company forepersons, who had falsified records concerning a mine's air flow, remained on the job.⁷² A recurring issue in mine safety cases, a substantial reduction of air flow in a mine increases “the danger of the accumulation of dust and flammable gas and the risk of an explosion.”⁷³ The supervisors were initially suspended, but two of the three were later reinstated, even though they faced criminal charges. When the suspended supervisors returned to work, the employees refused to enter the mine.⁷⁴

Safety: Employee Self-Help Under the NLRA, 59 MINN. L. REV. 647, 659 (1975). While it is true that certain employee activity may simultaneously fall with § 502 and § 7, Professor Atleson's observation fails to take into account the different reinstatement rights that may be available to employees under each provision. Thus, a key counterpart to determining the scope of protection afforded by § 502, compared with § 7, involves the question of whether employees who cease work because of “abnormally dangerous conditions” can be permanently replaced. This, in turn, requires an analysis of the definition of a strike under § 13 of LMRA and an analysis of the nature and different types of work stoppages under LMRA. It must also be noted that the actions of a single employee will be protected under § 502, whereas “concerted” activity is required under § 7.

71. 414 U.S. 368 (1974).

72. *Gateway Coal*, 414 U.S. at 371. At the union's request, the federal and state authorities had inspected the mine and concluded that the three supervisors had made entries in their logbooks that failed to disclose the true air flow. *Id.*; see Atleson, *supra* note 70, at 664.

73. Atleson, *supra* note 70, at 664.

74. *Gateway Coal*, 414 U.S. at 371.

Gateway Coal sought to compel arbitration of the dispute and filed an LMRA § 301⁷⁵ action.⁷⁶ The court granted the injunction but specifically conditioned it upon the company's removal of the supervisors at issue from the mine. On appeal, the Third Circuit Court of Appeals reversed, holding that safety disputes were not arbitrable under the terms of the collective bargaining agreement because their arbitrability was neither "particularly stated nor unambiguously agreed in the labor contract and the practice of the parties has been to the contrary."⁷⁷ The Supreme Court disagreed, finding that the arbitration clause was broad enough to encompass the safety dispute.⁷⁸ In reaching this decision, the Court applied its recently formulated presumptions in favor of arbitrability, set out in the landmark *Steelworkers Trilogy* cases, to safety disputes.⁷⁹ The Court thus interpreted the right to refuse hazardous work in light of this policy favoring arbitration "as the preferred means of settling labor disputes" and in view of the increased willingness of the courts to compel arbitration and enjoin work stoppages pending arbitration.⁸⁰

2. *The Court's Treatment of § 502 and the Meaning of Abnormally Dangerous Working Conditions*

Having concluded that the contract's arbitration provision covered the safety dispute in issue, the Court in *Gateway Coal* turned to whether § 502 provided a limitation on the scope of the duty to

75. 29 U.S.C. § 185 (1988).

76. *Gateway Coal*, 414 U.S. at 372. In *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), the Supreme Court held that a strike in violation of a contractual no-strike clause could be enjoined where the strike occurred over an arbitrable grievance. *Id.* at 253-54.

77. *Gateway Coal Co. v. United Mine Workers*, 466 F.2d 1157, 1159 (3d Cir. 1972), *rev'd*, 414 U.S. 368 (1974). In reaching this conclusion, the appellate court described safety disputes as "*sui generis*," possessing a "special and distinguishing character" which rendered them distinct from "ordinary" economic disputes. *Id.* While not specifically relying on § 502 to support its decision, the court looked to the policy underlying that provision to limit the scope of the contractual arbitration clause. *Id.* For further analysis of the Court of Appeals' decision, see Atleson, *supra* note 70, at 665-70.

78. *Gateway Coal*, 414 U.S. at 376.

79. Atleson, *supra* note 70, at 670; see *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).

80. Nicholas A. Ashford & Judith I. Katz, *Unsafe Working Conditions: Employee Rights Under the Labor Management Relations Act and the Occupational Safety and Health Act*, 52 NOTRE DAME L. REV. 802, 809 (1977).

arbitrate.⁸¹ On this point, the Court acknowledged that § 502 “provides a limited exception to an express or implied no-strike obligation” and “that a work stoppage called solely to protect employees from immediate danger is authorized by § 502 and cannot be the basis for either a damages award or a *Boys Market* injunction.”⁸² However, the Court explained that the claim made by the miners did not concern “some identifiable, presently existing threat” to their safety, but rather “a generalized doubt in the competence and integrity of company supervisors.”⁸³ The Court further stated that in order to invoke the protection of § 502, a party “must present ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.”⁸⁴

This “objective evidence” requirement enunciated by the Court in *Gateway Coal* essentially adopted the NLRB's test in *Redwing Carriers*.⁸⁵ In that case, the Board sought to clarify the meaning of the term “abnormally dangerous conditions” as used in § 502 and stated:

the term contemplates, and is intended to insure, an objective, as opposed to a subjective test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered “abnormally dangerous.”⁸⁶

Thus, in order to find employee activity to be protected under § 502, not only must there be a showing of an employee's good faith

81. *Id.* at 384.

82. *Id.* at 385. One of the issues facing the NLRB in *TNS* was whether, as claimed by the company, § 502 is operative only in situations where it is raised as a defense to a violation of a contractual no-strike clause. The A.L.J. rejected this narrow construction of § 502 and the various opinions of the Board members implicitly rejected it as well. This Author also can see no merit in this contention, which is essentially based on the company's concocted “legislative history” of § 502, because there is no legislative history concerning § 502. Based on a plain reading of the statute and principles of statutory construction, no such limitation can be read into the provision. *See infra* pp. 94–97.

83. *Gateway Coal*, 414 U.S. at 386.

84. *Id.* at 387. The Court rejected the more humane standard used by the Court of Appeals majority which looked to an employee's “good faith apprehension of physical danger.” *Gateway Coal Co. v. United Mine Workers*, 466 F.2d 1157, 1160 (1972), *rev'd*, 414 U.S. 368 (1974).

85. 130 N.L.R.B. 1208 (1961).

86. *Id.* at 1209.

belief in the existence of abnormally dangerous working conditions, but that belief must be substantiated by ascertainable objective evidence that such conditions existed.⁸⁷ However, this does not mean that a “danger-in-fact” must exist⁸⁸ or that there need be a showing of present injury.⁸⁹ Yet, under this test an employee essentially must guess correctly about the existence of “abnormally dangerous” conditions at the time of the strike, since a good faith belief of that fact is an insufficient basis on which to claim statutory protection.⁹⁰ What is considered abnormally dangerous and how much evidence is necessary to meet the standard is analyzed on a case-by-case basis.

As seen by the *TNS* decision, the test is at its most insidious when applied to inherently dangerous work. In those circumstances, the presence of “abnormally dangerous” conditions is measured by the existence of “new factors or circumstances which change [i.e., worsen] the character of the danger.”⁹¹ As discussed below, the Board plurality relied on this reasoning in formulating the first prong of its two-prong test for determining the existence of abnormally dangerous working conditions in situations involving long acting workplace carcinogens and toxins. Yet, this standard, articulated over twenty years ago before questions concerning the longterm effects of workplace toxins on the human body altered the

87. Prior to the Board's *Redwing Carriers* decision, a more subjective test of good faith appeared to have emerged in *NLRB v. Knight Morley Corp.*, 251 F.2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958); see Atleson, *supra* note 70, at 686–90; see also *Ashford & Katz*, *supra* note 80, at 805–06.

88. *Banyard v. NLRB*, 505 F.2d 342, 348 n.38 (D.C. Cir. 1974) (holding that fact that another employee drove truck without incident after first employee refused to do so because of shaking of vehicle “is irrelevant to whether there was suitable ‘ascertainable objective evidence’ supporting a justified conclusion that an abnormally dangerous condition existed”). Likewise, in *TNS*, the Board agreed with the A.L.J. that the General Counsel “need not prove abnormal danger-in-fact under the *Gateway Coal* test.” *TNS, Inc.*, 309 N.L.R.B. 1348, 1357 (1992).

89. *TNS*, 309 N.L.R.B. at 1357; see *Fruin-Colnon Constr. Co.*, 139 N.L.R.B. 894, 905 (1962).

90. As Professor Atleson aptly puts it, “employees act with the risk that a later tribunal, not affected by the . . . situation or personally endangered by the peril, will find the danger only ‘normal.’” Atleson, *supra* note 70, at 688.

91. *Anaconda Aluminum Co.*, 197 N.L.R.B. 336, 344 (1972) (stating that “work which is recognized by 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”). In *TNS*, the A.L.J. noted that case law provides “no definite criteria for determining how much greater than usual the risk of harm must be to convert a work place which is normally dangerous into one which is abnormally so.” *TNS*, 309 N.L.R.B. at 1436.

nature of the dialogue on worker safety and health and lent new meaning to the very “character of the danger,” is an inapt measure of this emerging workplace threat.

D. The Relationship Between the Occupational Safety and Health Act and the Labor Management Relations Act in Protecting an Employee's Right to Cease Work to Avoid Workplace Dangers

The principle federal statute covering employee safety and health on the job is the Occupational Safety and Health Act. OSHA includes a provision that allows employees or their representatives to request an inspection of their employer's place of business when they believe a “violation of a safety and health standard exists that threatens physical harm”⁹² or when they believe an “imminent danger” exists. Section 13 of OSHA defines an imminent danger as one “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 this chapter.”⁹³ For a *health* hazard to be considered an “imminent danger,” an OSHA inspector “must conclude that toxic substances or health hazards are present and that exposure to them will cause irreversible harm to such a degree as to shorten life or cause reduction in physical or mental efficiency even though the resulting irreversible harm may not manifest itself immediately.”⁹⁴

When an inspection reveals that an imminent danger exists, § 13(a) of OSHA empowers the Secretary of Labor to seek an order from a United States District Court to restrain the practice or condition causing the danger.⁹⁵ Such an order may “require . . . steps to be taken . . . to avoid, correct, or remove such imminent danger and prohibit the employment or presence of an individual in [affected]

92. Susan Preston, Comment, *A Right Under OSHA to Refuse Unsafe Work or a Hobson's Choice of Safety or Job?*, 8 U. BALT. L. REV. 519, 522 (1979).

93. OSHA, 29 U.S.C. § 662(a) (1988). Courts have not had occasion to compare this OSHA standard with the “abnormally dangerous” standard of § 502 of the LMRA.

94. Ashford & Katz, *supra* note 80, at 830 (citing OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, FIELD OPERATIONS MANUAL 77:3301 (1977)). Ashford and Katz state that “[w]here epidemiology can clearly demonstrate an increase in the amount of a disease over that in the general population or where numerous employees are found to be suffering the same abnormal symptoms, the imminent danger could be found to exist.” *Id.* at 830 n.211.

95. OSHA, 29 U.S.C. § 662(a) (1988).

locations.”⁹⁶ The statute, however, does not explicitly give employees the right to strike when confronted with an imminent danger.

In *Whirlpool Corp. v. Marshall*,⁹⁷ the Supreme Court upheld the validity of a regulation promulgated by the Secretary of Labor interpreting the anti-discrimination provisions of § 11(c) of OSHA to include an implied, but limited, right to refuse work that threatens life or serious bodily harm.⁹⁸ Under this regulation, an employee has the right to choose not to perform an assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available.⁹⁹

In order to be protected from employer retaliation for a refusal to work, an employee must satisfy four elements under the regulation. First, the working conditions that caused the refusal to work “must be of such a nature that a reasonable person [under the circumstances] would conclude that there is a real danger of death or serious injury.”¹⁰⁰ Second, because of the urgency of the situation, there must be “insufficient time . . . to eliminate the danger” by using OSHA’s regular enforcement procedures.¹⁰¹ Third, to the extent

96. Preston, *supra* note 92, at 523 (quoting OSHA 29 U.S.C. § 662(a) (1976)).

97. 445 U.S. 1 (1980).

98. *Id.* at 3–4. Section 11(c)(1) of OSHA provides:

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 chapter.

29 U.S.C. § 660(c)(1) (1988).

99. The Secretary of Labor’s regulation provides in pertinent part:

(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.

29 C.F.R. § 1977.12(b)(1)–(2) (1993); see Larry C. Backer, Note, *Refusals of Hazardous Work Assignments: A Proposal for a Uniform Standard*, 81 COLUM. L. REV. 544 (1981) (calling for “unified national standard” concerning right of employees to refuse hazardous work assignments).

100. 29 C.F.R. § 1977.12(b)(2) (1993).

101. *Id.*

possible, the employee must seek a correction of the hazard from her employer.¹⁰² Finally, the employee's refusal to work must be undertaken in good faith.¹⁰³ The use of these elements by the courts has led to 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."¹⁰⁴

The relationship between § 502 of the LMRA and § 11(c) of OSHA is subject to different interpretations, including which of the provisions provides greater protection to employees facing workplace dangers. For example, the "reasonable belief" standard under § 11(c) is "considerably more flexible than the objective evidence test of section 502."¹⁰⁵ In addition, there is a difference in the degree of danger that entitles employees to refuse work under each statute. Under OSHA, "[o]nly a serious threat to life or limb will sustain an action . . . while the nature of the occupation determines the extent of danger that would allow workers to refuse work under section 502."¹⁰⁶ According to Ashford and Katz, "11(c) may afford union employees more protection under certain circumstances than section 502 because [the] dangerous conditions [need] . . . not be abnormally so"¹⁰⁷ and because, as noted, "only a reasonable basis for belief on the part of the employee is required."¹⁰⁸ However, Ashford and Katz suggest that "if the norm for safety is no longer the *usual* industry practice, but rather what the OSH Act seeks to establish as the norm, i.e. compliance with health and safety standards and *desirable* industry practice, then section 502 . . . could evolve into a more

102. *Id.*

103. *Id.*; see James A. Gross & Patricia A. Greenfield, *Arbitral Value Judgments in Health and Safety Disputes: Management Rights over Workers' Rights*, 34 *BUFF. L. REV.* 645 (1985); Backer, *supra* note 99, at 563; Preston, *supra* note 92, at 526.

104. Gross & Greenfield, *supra* note 103, at 677-78 n.178 (citing Backer, *supra* note 99, at 563).

105. Preston, *supra* note 92, at 547.

106. *Id.* Preston states that the effect of § 11(c) could be to "expand the situations in which employees in particularly hazardous occupations can refuse to work while narrowing the scope of the right to refuse work in occupations where threats to life and limb are uncommon." *Id.*

107. Ashford and Katz believe that § 502 "applies to union employees" only because they view the provision as a limited exception to the operation of a contractual no-strike clause. Ashford & Katz, *supra* note 80, at 836. The interpretation that § 502 is operative only in situations involving a contractual no-strike clause is unwarranted. Furthermore, limiting availability of § 502's protections to unionized employees has no basis in the law and the policy that created it.

108. *Id.*

protective avenue.”¹⁰⁹

On the other hand, the need to harmonize potentially conflicting or duplicative statutory protection in the area of worker safety and health has prompted a call to apply the OSHA regulation as “a uniform standard to govern the rights of individual workers confronted with a hazardous work assignment.”¹¹⁰ This viewpoint is founded on the belief that the OSHA standard provides “the most unambiguous guide for employers and employees regarding their rights and obligations” and that the regulation “extends protection to workers actually threatened by the workplace hazard without imposing burdensome or complex problems of proof.”¹¹¹ Backer, the author of this proposal, believes that the OSHA standard strikes a fair balance between the interests of management to maintain discipline and production and that of employees “in preserving their health and safety.”¹¹²

However, certain premises on which this viewpoint is based appear erroneous. For example, Backer subscribes to the traditionally narrow, but erroneous, interpretation of § 502 as applying only in situations where a contractual no-strike clause exists. Furthermore, the proposal would create divisions in the work force between union and non-union employees regarding matters affecting job safety and health.¹¹³ Thus, Backer would continue to apply § 502 “in cases where an entire union calls a walkout to protest the existence of abnormally dangerous conditions somewhere in the plant,”¹¹⁴ and he would leave § 7 as relevant only to those situations involving

109. *Id.*; see Preston, *supra* note 92, at 547 (noting that “several commentators have argued that OSHA standards should be employed as definitions of conditions that are abnormally hazardous or used as conclusive presumptions of such dangers”); Atleson, *supra* note 70, at 706.

110. Backer, *supra* note 99, at 576.

111. *Id.*

112. *Id.* According to Backer:

[T]he 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.

Id.

113. See *infra* pp. 94–97 discussing the applicability of § 502 to union and non-union employees alike.

114. Backer, *supra* note 99, at 576 n.196.

“group activity” by “unorganized” employees.¹¹⁵ Nevertheless, the point is well-taken that the effectuation of a national labor policy to provide employees with a safe and healthful workplace requires a consistent and harmonized approach under different statutory regimes, something that the NLRB's decision in *TNS* ignores.¹¹⁶

115. *Id.* This approach misunderstands the relationship between § 7 and § 502, the qualitative difference in the safety and health issues encompassed by a walkout under each of those provisions, and the different levels of protection they afford, including different reinstatement rights. *See infra* pp. 97–104.

116. Backer, *supra* note 99, at 577–78, 578 n.202 (citing *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (noting that NLRB must engage in “careful accommodation of one statutory scheme to another”)).

III. THE TNS, INC. DECISION

A. Introduction

The TNS story began over a decade ago and was the oldest case on the Labor Board's docket by the time it was decided on December 23, 1992.¹¹⁷ The walkout, which began on May 1, 1981, was claimed by the strikers to be "the first concerted protest against abnormally dangerous working conditions in the history of the nation's labor movement."¹¹⁸ At first, the strike received national attention: congressional hearings, chaired by then Tennessee Congressman Al Gore,¹¹⁹ and the television show *60 Minutes*¹²⁰ both examined the sorry working conditions that led to the strike and the serious health risks faced by the workers.

On July 31, 1987, Administrative Law Judge Arlene Pacht issued her opinion in *TNS*, finding that the walkout was protected by § 502 and that the employees could not be permanently replaced and were entitled to immediate reinstatement. Based on the "objective evidence" in the record, the A.L.J. concluded that the "TNS employees had good cause to protest their working conditions, for unprecedented levels of uranium contaminants at their work place subjected them to unacceptable risks of radioactive and chemically toxic biologic harm."¹²¹ The A.L.J. relied on the following "competent, objective evidence" in reaching this result:

- (1) air quality at the facility exceeded MPC [maximum permissible concentrations]¹²² at 11 work stations for at least the last quarter preceding the strike;
- (2) the protracted use of respirators by a substantial number of employees was deleterious to their health;
- (3) the employees' average whole body uranium exposures were far greater than those typical for the nuclear industry; and
- (4) repeated and excessive uranium-in-urine levels indicated seri-

117. *TNS, Inc.*, 309 N.L.R.B. 1348 (1992).

118. *Id.* at 1390.

119. H.R. REP. NO. 102, 97th Cong., 1st Sess. 232 (1981).

120. *60 Minutes: On Strike for Their Lives* (CBS television broadcast, Nov. 29, 1981).

121. *TNS*, 309 N.L.R.B. at 1439.

122. MPC is defined as the amount of airborne radioactive material beyond which no worker is to be exposed for 40 hours per week for 13 weeks. *Id.* at 1350 (citing 10 C.F.R. § 20.103(a)(1)).

ous risk of kidney damage.¹²³

B. Company Operations and Working Conditions

At the time of the strike, TNS manufactured and sold armor piercing projectiles at its Jonesboro, Tennessee, plant.¹²⁴ Depleted uranium, a radioactive carcinogen which is also chemically toxic, was used in the production process.¹²⁵ During each phase of that process, contamination (i.e., radioactive particles from greensalt — a powdery, extremely heavy radioactive compound), uranium oxides, and uranium metals were released into the plant's atmosphere and settled on the employees.¹²⁶ As framed by the A.L.J., the crucial factual question to be answered was “whether the TNS employees were subjected to unacceptably high levels of DU [depleted uranium] contaminants which posed abnormal risks to their health.”¹²⁷ The A.L.J.'s findings of fact provide a detailed look into the production processes at TNS, the toxic and carcinogenic nature of depleted uranium, including an evaluation of substantial expert testimony and scientific evidence on the subject and the impact of the working conditions on employee health and safety, as well as the actions or inaction of regulatory oversight agencies responsible for the production process at TNS.¹²⁸

In sum, the A.L.J.'s factual findings, based mainly on uncontroverted evidence, paint a picture of a workplace out of environmental control. The production process at TNS included foundry and penetrator shop operations.¹²⁹ Greensalt frequently spilled to the floor, sometimes in three- to four-foot-wide swaths, and leaked from broken machinery.¹³⁰ Although federal regulations required that the area of such spills be cordoned off and vacuum cleaned immediately

123. *Id.* at 1439–40. The A.L.J. also concluded that the company was responsible for these conditions because it failed to comply with government regulations that prescribed “sound health physics practices.” *Id.* at 1440.

124. *Id.* at 1390.

125. *Id.* at 1391.

126. *Id.*

127. *Id.*

128. The facts are voluminous and thoroughly set forth in the A.L.J.'s decision. *See id.* at 1390–1445. This part will provide a summary of some of the key facts upon which the A.L.J. and NLRB based their opinions.

129. *Id.* at 1391, 1396.

130. *Id.* at 1391–92.

and then monitored for lingering airborne radioactivity, the A.L.J. concluded that “these desirable precautions existed on paper but not in practice.”¹³¹ Instead, because management refused to stop production for this purpose, the spills remained on the floor and were circulated through the shop.¹³² Not only was there a repeated failure to clean up spills, but the company also chose to ignore rules requiring it to monitor for lingering airborne radioactivity following a spill.¹³³

Large pots filled with greensalt frequently overflowed and leaked when moved throughout the shop.¹³⁴ As noted above, employees who packed greensalt into the pots by hand would routinely have the mixture fly up from the pots and settle in their ears, nostrils, and mouths.¹³⁵ Safety “collars,” which were supposed to prevent this from happening, rarely worked. The furnaces for firing greensalt had no protective shields, leaving employees defenseless to the dust and smoke generated by frequent furnace “blowout” accidents.¹³⁶ These blowouts varied in force. Some blowouts merely produced a shower of sparks while more severe ones filled the shop with smoke and quickly oxidizing particles of inflamed uranium.¹³⁷ Holes were occasionally burned through the steel walls of the furnace.¹³⁸ Judge Pacht found that some “blowouts were spectacular and terrifying.”¹³⁹ On one occasion, a gigantic steel furnace lid was hurled fifteen feet into the air, denting a steel beam in the ceiling, while the operator tending the furnace was thrown across the room by the force of the explosion.¹⁴⁰ Supervisors rarely exercised their discretion to order the building evacuated after a blowout.¹⁴¹

Because of the lack of information contained in TNS' production records, there was no way to calculate precisely how much uranium erupted and oxidized into the working environment.¹⁴² Based on the available evidence, the A.L.J. concluded that thousands of pounds of

131. *Id.* at 1392.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 1393.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

rapidly oxidizing uranium metal “erupted” into the shop's atmosphere during the numerous blowouts that occurred in the five months preceding the strike.¹⁴³ Employees exposed to this uranium oxide were confronted with a “relatively insoluble compound” that, when ingested or inhaled, is not quickly expelled from the body.¹⁴⁴ Rather, “it lingers, primarily in the lungs, for a prolonged period of time where it may do far more damage than soluble compounds which are more readily excreted.”¹⁴⁵

Other aspects of the production process brought employees into contact with more contaminants. For example, the company's operations included the production of billets, rod-like objects measuring two and one-half feet long by six inches wide, which were finished into penetrators.¹⁴⁶ Billets were formed by melting two large uranium ingots, called “derbies,” in a huge vacuum furnace.¹⁴⁷ The furnace in which the volatile depleted uranium was fired under pressure periodically exploded, emitting so much smoke and dust that the plant had to be evacuated.¹⁴⁸ Employees cleaned the dense radioactive material from the furnace by hand, since the vacuum hose designed for this purpose lacked sufficient suction to do the job.¹⁴⁹ As noted by the dissent, “[t]he judge found that this part of the manufacturing process was especially hazardous as thorium-234, a radioactive material emitting beta particles, floated to the top of the molten substance.”¹⁵⁰ Also, “[v]ats of radioactive sludge overflowed onto the plant floor, and a fine mist of recirculating coolant

143. *Id.* There was a factual dispute as to the number of blowouts per shift in one of the production processes. In a telling comment, the A.L.J. concluded that the approximations testified to “could not be verified since the production records . . . were too contaminated to be copied without ruining [TNS'] duplicating equipment.” *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *TNS*, 309 N.L.R.B. at 1394. The derbies themselves were produced by heating greensalt with magnesium to 3000°F in huge pots or retorts. Derbies were supposed to be cooled for approximately 12 to 16 hours before being brought to the “breakout” area where employees would remove slag from the ingot. Yet employees would often find themselves working with derbies that were still hot and smoldering. *Id.* at 1393. As noted by the A.L.J., “[s]ince uranium oxidizes rapidly while warm, working with inadequately cooled derbies exposed these [employees] to substantial quantities of uranium oxide particles.” *Id.* “As employees slagged [removed waste matter from] the derbies, black dust containing uranium oxide flew into their faces.” *Id.* at 1394.

148. *Id.* at 1378 (Devaney, Member, dissenting).

149. *Id.* at 1395.

150. *Id.*

contaminated with radioactive dust sprayed into the air.”¹⁵¹

Because the long-lived alpha particle emitted by U-238, the principle depleted uranium isotope, invades the human cell and remains lethal throughout the host's lifetime, federal and state regulations have been enacted to prevent the inhalation or ingestion of alpha particles in the first place.¹⁵² The A.L.J.'s factual findings show convincingly that TNS failed to meet the regulatory standards on all accounts.¹⁵³

The A.L.J. found that the company “knew that the air quality at 11 work stations . . . exceeded MPC for the 4 months prior to the strike” and that “every employee was proximately exposed to the taint.”¹⁵⁴ Rather than halt production to renovate its equipment in a systematic way, the company “opted for a less expensive course, muzzling many of its employees in respirators for months on end.”¹⁵⁵ Although federal regulations permit respirator usage under certain limited conditions, resort to the devices must be for “brief intervals” only, in response to emergency situations where “processing or other engineering controls are impracticable.”¹⁵⁶ The A.L.J. found that TNS “flouted these conditions” and that the respirators were worn improperly, developed leaks, and were not maintained properly.¹⁵⁷ The judge concluded that “[w]ithin the regulatory framework, it becomes clear that [TNS'] protracted and poorly administered respirator program imposed intolerable working conditions on its employees. Rather than protecting them, [TNS'] demand that they wear respirators for prolonged periods drove them to cheat, and in doing so, to expose themselves to hazardous airborne contamination.”¹⁵⁸

151. *Id.*

152. *Id.* at 1440. As explained by the A.L.J., this involves a three-tiered system of (1) controlling contaminants at their source (a cardinal tenet of health physics); (2) setting ceilings to limit maximum permissible contaminants (MPC) in the air and workplace surfaces; and (3) carefully monitoring the workplace and the worker to evaluate the extent of the hazard and take appropriate actions to remedy it. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 1412. As one expert witness credited by the A.L.J. testified, “workers being forced to wear respirators and then failing to, or not wanting to, is understandable and a return to a bizarre era of inadequate and unrealistic worker protection.” *Id.* at 1440. The Board plurality's treatment of the A.L.J.'s findings of fact concerning respirator use turned the evidence on its head. The plurality concluded that “the respirator pro-

The Board's creation of such a stringent standard in this case is even more remarkable given the composition of the TNS work force.¹⁵⁹ The employees were too poorly educated and inadequately trained¹⁶⁰ to allow them to even begin to understand the voluminous technical scientific data analyzed by the A.L.J. and NLRB in order to determine whether abnormally dangerous working conditions existed.¹⁶¹ Furthermore, while the Board imposed a standard that relied on conduct of outside regulatory bodies to determine the level of danger in the plant, it ignored what information the employees

gram did not itself create or exacerbate any health and safety hazards [such as abnormal cardio-pulmonary risks]." *Id.* at 1358–59. But this missed the point. TNS was forced to turn to a respirator program that violated NRC regulations because of the already high doses of depleted uranium circulating throughout the plant which represented an enhanced risk of contamination to the employees. The longer the employees were exposed to that contamination, the more the threat was "exacerbated."

In addition, the plurality chose to penalize the employees because of the union's bargaining position, which would have allowed TNS to continue the use of respirators while design and other safety improvements were made to the plant to directly confront the airborne contaminant problem. It is ironic that the union's compromise position at the bargaining table was ultimately used by the Board to deny *employees* the right to strike over abnormally dangerous conditions. The plurality's focus on the union's conduct at the bargaining table was misplaced. Section 502 speaks to the right of "an employee or employees" to cease work and is "aimed at protecting employees and not unions." Atleson, *supra* note 70, at 700. The union's willingness to allow its members to tolerate these conditions for an additional period, in exchange for some bargained-for improvement in the safety and health conditions in the plant, had no bearing on whether abnormally dangerous conditions existed at the time of the work stoppage.

159. See *supra* text accompanying notes 3–7.

160. *TNS*, 309 N.L.R.B. at 1412. The A.L.J. found that employees were given perfunctory orientation sessions when they were hired and that weekly training sessions, which lasted from 15 to 20 minutes, were the responsibility of shop foremen who "had as little knowledge of [health and safety regulations] as did their fellow workers." *Id.* at 1413. Health and safety trainers consistently underplayed the hazards present in the workplace and often presented safety and health information that was difficult to understand or simply incorrect. *Id.* For example, after TNS hired TDRH inspector Sally Hock as a member of its health and safety staff in the fall of 1980, she lectured the employees about three different kinds of radioactive rays. *Id.* at 1414. According to the A.L.J., Hock explained that the alpha ray could not penetrate a piece of paper and that while penetrating rays were bad, "there was not much of this variety at TNS." *Id.* Yet, the truth is that "alpha particles cannot pass through a piece of paper because they are so effective in damaging the chemical bonds in the sheet that they transfer all their energy to it." *Id.* Thus, "rather than incorrectly assuming that alpha particles are weak because they can be halted by a single sheet, the correct conclusion is that alpha particles are very damaging if they invade human tissue." *Id.* The A.L.J. concluded that "Hock's failure to make it absolutely clear that alpha particles pose a threat 20 times greater than beta or gamma rays if absorbed into the body and that alpha was the principal and prominent offender at TNS, was irresponsible, if not dangerous." *Id.* at 1414.

161. For a discussion of scientific evidence, see *infra* pp. 52–55.

themselves had to determine whether abnormally dangerous conditions existed.¹⁶² The A.L.J. examined the information available to the employees that “set the stage for concerted action,” including their physical appearance; their “generalized notion that [depleted uranium] was responsible for radiation which could lead to cancer;”¹⁶³ the reassuring and misleading remarks [of TNS' safety staff] which so trivialized the possibility of hazard;” the gradual increase in the employees' “sense of danger” based on the number of events that occurred prior to the strike; and the increased focus and discussions at union meetings of “health conditions and management's failure to correct problems.”¹⁶⁴

TNS was well aware of the hazards the employees faced. While failing to apprise them of the risks, TNS based its own procedures for reducing employee exposure to the dangers on rotating employees to different jobs within the plant and on the notion that most employees only worked for the company for a short period of time.¹⁶⁵ Presumably this meant that whatever poison they ingested during that short tenure of employment was kept to what the NLRB agreed was an “acceptable” level.

The image of employees as disposable pieces in the production process is an unfortunate reminder of a turn-of-the-century laissez-faire capitalism that was thought to have been banished by regulatory measures. However, regulatory measures too lenient to begin with, and inadequately enforced to boot, leave employees with little but their own risky initiatives to effect change.

C. Regulatory Failure and the Resort to Self-help

TNS' use of radioactive materials in its manufacturing processes was subject to the jurisdiction of the United States Nuclear Regulatory Commission (NRC). Under the Atomic Energy Act, the NRC entered into an agreement with the State of Tennessee whereby the state would exercise primary regulatory responsibility in adminis-

162. *TNS*, 309 N.L.R.B. at 1364.

163. *Id.* at 1439. The A.L.J. noted how “the most knowledgeable among [the employees] had little insight into how radiation affected the body and what the extent of the risk might be” and that “[n]one appeared to understand the chemically toxic properties of [depleted uranium] and only a few appreciated that kidney damage might ensue.” *Id.*

164. *Id.*

165. *Id.* at 1443–44.

tering that law. The Tennessee Division of Radiological Health (TDRH) is the state agency responsible for protecting workers from occupational radioactive hazards through the promulgation of regulations consistent with federal standards and the licensing and inspection of facilities using radioactive materials.¹⁶⁶ The action or inaction of TDRH concerning TNS operations illustrates a critical point of departure between the plurality opinion and the dissenting and A.L.J. opinions.

In deciding that there was insufficient evidence to conclude that the “employees’ cumulative exposure to [depleted uranium] had reached the point at which further exposure would have posed unacceptable hazards,” the Board’s plurality emphasized the fact that TDRH had never even considered TNS operations.¹⁶⁷ The plurality explained that “in a highly regulated industry like that involving nuclear materials, an individual cannot form a reasonable belief concerning whether conditions in a particular plant are abnormally dangerous without giving due consideration to the views of the agency that is charged under the Federal scheme with monitoring safety conditions.”¹⁶⁸ The plurality saw this “as essential lest we allow the invocation of section 502 as an end run around the statutes directly applicable to worker safety in this industry, at least where, as here, there was no evidence that the monitoring agency was failing to do its job.”¹⁶⁹

Yet, the evidence is strikingly to the contrary. As early as 1979, TDRH found a “severe laxity” in TNS’ commitment to employee safety.¹⁷⁰ Beginning that year, “TDRH inspected TNS semiannually, a schedule reserved for licensees requiring the greatest oversight.”¹⁷¹ As documented in the A.L.J.’s decision, from 1979 until the start of the strike in 1981, TDRH conducted five regular and/or special inspections of TNS’ operations. Its first inspection in September 1979 resulted in the issuance of a November 12, 1979, letter citing TNS for sixteen violations, including that employees were receiving consistently high exposures of radiation. TDRH noted that “with numerous documented incidents of overexposures, TNS does not

166. See *supra* note 49 for discussion of regulatory legislation.

167. *TNS*, 309 N.L.R.B. at 1355–56; see *infra* pp. 57–65.

168. *TNS*, 309 N.L.R.B. at 1356.

169. *Id.*

170. *Id.* at 1422.

171. *Id.*

seem to have provisions for assuring that these people do not continue to receive high exposures.”¹⁷² TDRH then issued a formal letter of noncompliance dated December 5, 1979, which concluded that “a severe laxity in [TNS’] radiation safety program had developed” and that “[i]mmediate attention should be given to upgrading this program.”¹⁷³

Unfortunately, TNS’ response to this letter and to subsequent non-compliance letters was to “either [deny] that problems existed or [to make] vague promises to take unspecified corrective action in the future.”¹⁷⁴ Yet, the future held nothing but more of the same: the issuance of noncompliance letters by TDRH with little, if any, action by TNS.

For example, after an inspection in August 1980, TDRH cited TNS once more for sixteen areas of noncompliance, six of which were repeat violations from the preceding year. As found by the A.L.J., “[s]ounding a note of alarm, TDRH stated that based upon air monitoring, instrument and smear survey records, there was an imperative need to reduce ‘radioactive contamination level’ for . . . personnel . . . [who] are consistently receiving high exposures and overexposures in excess of applicable limits.”¹⁷⁵ In sum, TDRH inspections revealed and criticized deficiencies in training and safety procedures, excessive levels of radiation and contamination, and less than two months before the walkout the institution of a continuous, full-time respirator program.¹⁷⁶

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 1423.

176. *Id.* at 1378 (Devaney, Member, dissenting). The interaction between TDRH and TNS concerning the respirator program is particularly revealing of the game they played. By letter of January 29, 1981, TDRH cited TNS for noncompliance in 15 areas, with many violations identical to those found previously. *Id.* at 1424. TNS’ response to this letter was “noteworthy for its omissions.” *Id.* As noted by the A.L.J., TNS had “found it necessary to initiate a mandatory respiratory program several weeks previously in response to elevated urine sample results and air concentrations exceeding MPC, yet no reference to either the problem or the program appears in the Company reply, although these were circumstances that should have been reported.” *Id.* TDRH visits on March 9 and 10, 1981, which focused on a narrow employee complaint of illegal dumping of radioactive materials, did not discover that “many employees in various sections of the plant were enduring respirators for prolonged periods.” *Id.* Instead, as found by the A.L.J., “it was not until many months later that [TDRH inspector] West indignantly demanded to know why TNS had not previously divulged to TDRH that it had imposed a mandatory respirator program.” *Id.*

Indeed, TNS' own experts, Radiation Management Consultants (RMC), sharply criticized the safety and health environment of the plant. The RMC report¹⁷⁷ concluded that TNS was out of compliance in six evaluative areas: limitation of concentrations of airborne materials to restricted areas; respiratory protection;¹⁷⁸ surveys of emissions; release of effluents to unrestricted areas; personnel monitoring; and training¹⁷⁹ and calibration.¹⁸⁰ In sum, RMC found a “lack of management commitment to a radiation safety program.”¹⁸¹

The A.L.J. found that TDRH's “endless correspondence with [TNS] reveals the dimensions of its persistent concern with the [company's] health and safety program. That correspondence also reveals a *regrettable incapacity to effectuate reforms prior to the strike.*”¹⁸² In a critical finding, the A.L.J. concluded:

Even if TDRH had been apprised of all of TNS' health and safety deficiencies, it is doubtful that it would have attempted to shut down [TNS'] operations. Such a sanction was *virtually unthinkable* to the Agency's functionaries. The State's Attorney General advised TDRH it had no authority to impound material or equipment. State's attornies [sic] made it abundantly clear to Inspector West that license revocation through judicial process was “very, very difficult.” Thus, although TDRH had *theoretical authority* to seek a

177. TNS had this study conducted surreptitiously shortly after the start of the strike without notice to the union, which had called for such an independent evaluation. H.R. REP. NO. 102, 97th Cong., 1st Sess. 103 (1981). The A.L.J. found the Radiation Management Consultants (RMC) report to be a “particularly probative document because it represents the work of a private, paid consultant whose candid findings and severe critique of [TNS'] health and safety program confirmed all of the employees' complaints.” TNS, 309 N.L.R.B. at 1415.

178. On the question of TNS' respirator program, the report warned that “[i]t is too much to expect a person to wear a respirator day in and day out without experiencing physiological and mental strains. Where this occurs, he tends to cheat on the wearing of the mask.” H.R. REP. NO. 102, 97th Cong., 1st Sess. 127 (1981); TNS, 309 N.L.R.B. at 1415. RMC was highly critical of TNS' approach to airborne contamination. Finding that individual air samples showed a concentration of depleted uranium as much as five times the MPC, RMC stated that there was an “immediate need to correct the high airborne problem by engineering means.” H.R. REP. NO. 102, 97th Cong., 1st Sess. 134 (1981). RMC found unacceptable TNS' timetable for making such changes which stretched over a period of “months” and which provided no assurance that the problem would be corrected. *Id.*

179. RMC found that TNS had a “very sketchy and poorly documented training program.” H.R. REP. NO. 102, 97th Cong., 1st Sess. 103 (1981).

180. TNS, 309 N.L.R.B. at 1415.

181. *Id.* at 1445.

182. *Id.* (emphasis added).

license revocation, it was a *power never invoked*. The TNS employees had good reason to resort to self help when the Agency charged with protecting them, lacked the power or will to do so.¹⁸³

D. Scientific Evidence and Expert Opinion

The A.L.J. analyzed copious amounts of scientific evidence and expert testimony bearing on whether abnormally dangerous working conditions existed in the plant.¹⁸⁴ After evaluating the conflicting viewpoints concerning the “acceptable” exposure limits to radioactive materials, the A.L.J. adopted the principles stated by the District Court in *Allen v. United States*¹⁸⁵ and concluded that “a reasonable person, exercising great care in light of the best of available scientific knowledge, would err on the side of caution by assuming [that there is] no ‘safe’ threshold exposure to atomic radiation.”¹⁸⁶

As found by the A.L.J., depleted uranium does not present an external radiation hazard to the biological well-being of an exposed individual since it emits alpha radiation at too low an energy level to penetrate the skin's outer layers; however, if alpha particles become

183. *Id.* (emphasis added). The A.L.J. also noted that after the Gore Committee hearing, the Tennessee General Assembly amended the Radiologic Health Service Act, granting TDRH authority to impose civil and criminal fines and/or imprisonment for each day that regulations continued to be violated. *Id.* at 1445 n.192.

184. As noted by the A.L.J., to “evaluate this evidence, a grasp of some basic principles of nuclear physics and the biologic effects of radiation is necessary.” *Id.* at 1400. As described above, none of the TNS employees were schooled in physics or biology. While a summary of the scientific evidence in the case is provided, there is a certain incongruity in requiring proof of “abnormal danger” by reliance on expert witnesses, who give conflicting and often self-serving testimony about the significance of sophisticated scientific evidence which is beyond the ken of most of humanity. Reliance on such evidence to prove the existence of abnormally dangerous working conditions is far removed from the experience and knowledge of the employees who are exposed to the danger. The conflicting arguments over the scientific evidence in *TNS* are more pertinent to a “danger-in-fact” test, a standard, as noted above, that is clearly not to be used to assess whether abnormally dangerous conditions exist. *Id.* at 1355–57.

185. 588 F. Supp. 247, 258 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (10th Cir. 1987). *Allen* involved a federal tort claim action where 1200 plaintiffs claimed that open air atomic weapons test programs conducted in the late 1940s and 1950s negligently exposed them to low levels of radioactive fallout, producing injury and death. *Id.*

186. *TNS*, 309 N.L.R.B. at 1401. The A.L.J. went on to note that “an individual who receives a dose below a regulatory ceiling does not necessarily escape bodily harm” since such standards “reflect a public policy [choice] that doses below the ceilings constitute an ‘acceptable’ risk — in the sense that a worker who knowingly takes a job which exposes him to radiation has accepted the risks which attend exposures below the regulatory limits.” *Id.* at 1403.

airborne as a result of contamination and are inhaled or ingested, they may menace human health.¹⁸⁷ The biological hazards of depleted uranium are not solely related to its radioactivity, for aside from its carcinogenic potential it can cause severe kidney damages.¹⁸⁸ In order to protect employees from the health threats presented by depleted uranium, “radiation protection standards” have been established by regulatory bodies.¹⁸⁹

While the Nuclear Regulatory Commission has not established an official regulation concerning the “allowable” amount of depleted uranium in the kidney, its Regulatory Guide 8.22 set proposed limits on acceptable levels of uranium in urine to protect against chemical toxicity in the kidney.¹⁹⁰ However, because the regulation was not legally binding, and because TNS argued that the regulations were developed based on studies of uranium mills which processed “yellow cake,” a compound different from the greensalt used at TNS, TNS applied guidelines published in the U.S. Army's “DARCOM” Manual which established more lenient “action” and “notice” levels.¹⁹¹ The A.L.J. rejected this contention based on a September 1981

187. *Id.*

188. *Id.*

189. The Nuclear Regulatory Commission has promulgated standards providing for a maximum dose to the whole body of one and one-fourth rems per calendar quarter and no more than five rems annually. *Id.* at 1404 (citing 10 C.F.R. § 20.101 (1993)). A rem is a unit for measuring a dose of radiation received by an individual. The A.L.J. also noted that “the NRC limit for workers in unrestricted areas and for the public is .5 rems per year, or one-tenth of the dose which occupationally exposed workers may receive.” *Id.* at 1404 n.59. NRC standards also require that licensees make every effort to maintain radiation releases “as low as reasonably achievable,” a principle “rooted in the no-threshold theory that no dose of radiation is so low that it may be assumed to be safe or risk-free.” *Id.* at 1404.

190. Regulatory Guide 8.22 stated that “kidney damage may occur if any single urine sample was greater than 130 micrograms of uranium per liter of urine (ug/l), or if four or more consecutive samples were greater than 30 ug/l.” NUCLEAR REGULATORY COMMISSION, PROPOSED REVISION 1 TO REGULATORY GUIDE 8.22 BIOASSAY AT URANIUM MILLS (1987). It set “notice” and “action” levels at 15 ug/l and 30 ug/l respectively. TNS, Inc., 309 N.L.R.B. 1348, 1349, 1405 (1992). A uranium level meeting the “notice” level required an employer to investigate the causes of the elevated urine level so that corrective action could be taken. If urine samples reached the “action” level, the affected employee would have to be removed from the work station until subsequent urinalysis readings fell below the “notice” level. *Id.* at 1349 n.9.

191. The DARCOM “notice” and “action” guidelines were set at 100 ug/l and 50 ug/l, respectively, and “did not contain any danger level analogous to the 130 ug/l level set forth in Reg. Guide 8.22.” TNS, 309 N.L.R.B. at 1349. At any rate, during the trial TNS admitted that its standards were actually based upon a 1962 Union Carbide Corporation publication. *Id.* at 1405.

NIOSH advisory to TNS stating that it was “reasonable to apply NRC guidelines [8.22] for urine bioassay in uranium mills to depleted uranium facilities.”¹⁹²

Using Regulatory Guide 8.22 as a basis for assessing the potential for kidney damage to the TNS employees from exposure to toxic substances, as measured against the employees' uranium-in-urine records, the A.L.J. concluded that there was widespread overexposure to uranium before the strike occurred.¹⁹³ The A.L.J. noted that NIOSH had examined the urinalysis data for the period from 1978 to 1981 and concluded that excessive uranium exposures at TNS could cause renal damage with further exposure at those levels producing significant renal damage and disease.¹⁹⁴ The A.L.J. rejected the company's argument that there was no medical showing of biological damage to the striking employees, because there was insufficient testing to reach such a conclusion and, most significantly, because § 502 “does not require proof of actual injury.”¹⁹⁵ Based on the expert judgments in the record, the judge concluded that “the production processes at TNS generated excessive amounts of uranium dust which subjected the TNS employees to grave and abnormal risks of kidney damage had they continued to labor under the working conditions which existed prior to the strike.”¹⁹⁶

Furthermore, based on a NIOSH study, the A.L.J. found that the TNS workers were receiving whole body radiation doses exceeding those of other segments of the nuclear industry.¹⁹⁷ The judge

192. *Id.* This is because Regulatory Guide 8.22 is based on chemical toxicity and “because depleted uranium and natural uranium differ primarily in their isotopic composition (which does not affect chemical toxicity).” *Id.* The A.L.J. noted that in January 1987, the NRC “affirmed the validity of the original Reg. Guide 8.22 standards by again publishing them for comment with slight revisions based in part upon new studies.” *Id.* The A.L.J. also noted that “[d]espite Reg. Guide 8.22's unofficial status, the NRC and NIOSH relied upon it as a valid yardstick.” *Id.* at 1441.

193. *Id.* Of the one hundred employees on strike, 53 were found “to have exceeded one or both of the NRC and Company ceilings” and “28 of these exposures were over the 130 ug/l one time ceiling.” *Id.* The A.L.J. noted that “[e]ven using the Company's more lenient guidelines . . . urine samples of 26 employees who worked throughout 1980 contained a uranium content above 100 ug/l.” *Id.* at 1441.

194. *Id.* NIOSH decided that further study of renal function was not necessary because of the short careers TNS employees had with the Company and the unlikelihood of measurable changes in renal function in that time. *Id.*

195. *Id.* at 1442. The A.L.J. noted that the “very purpose of § 502 is to guarantee that employee may withhold their labor before actual damage befalls them.” *Id.*

196. *Id.*

197. *Id.* While NIOSH noted that TNS employees' whole body radiation doses did

found that the average whole body dose to TNS employees in 1980 left them with “an abnormally high risk of cancer when compared to the national average for workers in all other nuclear facilities,”¹⁹⁸ especially given the low average age of the TNS work force.¹⁹⁹ As aptly noted by the judge, “the ante was increased for the youthful TNS workforce.”²⁰⁰

not exceed regulatory limits, it looked to the performance of related industries and the DARCOM manual as the standards to be observed. *Id.* “Applying these alternative standards to the TNS data,” NIOSH found that “the whole body doses of TNS employees between 1975 and 1980 averaged 10% higher than those of fellow workers in the nuclear industry.” *Id.*

198. *Id.*

199. *Id.* The risk of cancer is believed to increase proportionately with the number of years of life expectancy remaining after radiation exposure. *Id.*

200. *Id.* The A.L.J. noted that NIOSH had also found that the TNS data from in-vivo monitoring of the lungs reflected an inadequate margin of safety and, like the urine bioassay results, reflected “substantial dust exposure.” *Id.*

E. Summary of the Administrative Law Judge's Legal Conclusions

The A.L.J. concluded that the employees commenced and continued their work stoppage as a good faith protest of abnormally dangerous conditions at TNS and that objective evidence supported the employees' belief that working conditions were abnormally dangerous.²⁰¹ Because the TNS workers labored in what was already a dangerous work environment, the A.L.J. had to determine “the magnitude of the risk . . . required to convert a normal danger into an abnormal hazard under § 502.”²⁰² The A.L.J. framed the issue as follows: “Where the risks of harm are cumulative and increase in some proportion to the dose received, when does an ordinarily dangerous worksite such as TNS become abnormally dangerous within the meaning of § 502?”²⁰³

The A.L.J. concluded that TNS' failure “to meet its obligations under the regulatory scheme . . . subjected its employees to abnormally dangerous conditions.”²⁰⁴ On the question whether the employees quit their labor in satisfaction of *Gateway Coal's* “presently existing” danger requirement, the judge concluded that it is “not the immediacy of the consequences but the immediacy and severity of the risk that are relevant.” In the circumstances of the TNS case, “immediacy is not defined in terms of long delayed biologic harm . . . [but] is tied to the degree of the risk and the likelihood of harm which continued, cumulative exposure to [depleted uranium] may produce.”²⁰⁵

201. *Id.* at 1437. The A.L.J. also concluded that § 502 protects employees who engage in a work stoppage over abnormally dangerous conditions after expiration of their collective bargaining agreement, and that such employees are not economic strikers and cannot be permanently replaced. *Id.* at 1438.

202. *Id.* at 1436.

203. *Id.* at 1437. As a measure of abnormal danger, the A.L.J. looked to regulatory standards as an “objective means to assess whether the TNS employees were subjected to abnormal dangers,” but with qualification. The A.L.J. also made it clear that “compliance or noncompliance with administrative standards” does not conclusively resolve the question of abnormal danger since § 502 was “designed to protect employees before peril occurs.” *Id.* According to the A.L.J., “it would be error to find that abnormal dangers exist only when regulatory limits are exceeded, for then employees would be compelled to subject themselves to unacceptable levels of harm before invoking § 502.” *Id.*

204. *Id.* at 1440.

205. *Id.* at 1439. The A.L.J. found that “[c]linically observable biologic damage from

F. The NLRB Plurality Opinion and Its Test for Abnormal Danger

A plurality of the National Labor Relations Board concluded that the General Counsel had failed to meet the test for “abnormally dangerous” working conditions.²⁰⁶ Specifically, the plurality held that the General Counsel had failed to show that the TNS employees “reasonably believed, on the basis of objective evidence, either that conditions at the [company's] plant had changed to an extent necessitating a walkout or that the employees' cumulative exposure to [depleted uranium] had reached the point at which further exposure would have posed unacceptable hazards.”²⁰⁷

On the latter point, the plurality gave “substantial weight to the fact that Tennessee Department of Radiological Health never sought, or even considered seeking, measures available to it that could have required any shut down of all or part of the TNS operations.”²⁰⁸ Denying that it was abdicating its responsibility to decide the legal and factual issues in the case to TDRH, the plurality explained that “in a highly regulated industry like that involving nuclear material, an individual cannot form a reasonable belief concerning whether conditions in a particular plant are abnormally dangerous without giving due consideration to the view of the agency that is charged under the Federal scheme with monitoring safety conditions.”²⁰⁹ The plurality saw this requirement as “essen

exposure to toxic agents may be long postponed. However, the risk from exposure is no less a presently existing threat than is the risk of defective equipment or hazardous weather conditions simply because the consequences are not visible until a latency period has intervened.” *Id.*

206. TNS, Inc., 309 N.L.R.B. 1348 (1992). Chairman Stephens and Member Oviatt constituted the plurality of the Board.

207. *Id.* at 1355.

208. *Id.* at 1356.

209. *Id.* The Board went so far as to “find of some significance the fact that the employees could have consulted TDRH before the walkout” in evaluating the “reasonableness of the employees' professed belief.” *Id.* at 1358. There is no clue, however, as to what the result might have been had this “consultation” taken place, nor is there a clue as to exactly what the employees were to ask and what the agency response might have been in order to support the claim of reasonableness.

This exercise in speculation by the Board should be rejected outright. First, it is the employees' good faith belief that is controlling, a belief which should be based on their experience in the workplace without regard to the opinion of an oversight agency. Abnormally dangerous working conditions within the meaning of LMRA may very well

tial lest we allow the invocation of Section 502 as an *end run* around the statutes directly applicable to worker safety in this industry, at least where, as here, there was no evidence that the monitoring agency was failing to do its job.”²¹⁰

Although the plurality acknowledged that this was the first case where it had to apply the law to “the intangible threat of occupational exposure to carcinogens and chemical toxins,” it nevertheless relied on precedent “support[ing] the view that there must be some manifest *present* need for employees to quit the workplace.”²¹¹ However, the plurality’s approach to the *Gateway Coal* “immediacy” issue rested on a paradigm of “present need” inapplicable to the “stealth-like” workplace dangers at TNS.²¹² Rather than focus on the “immediacy and severity of the *risk*” posed by the abysmal working conditions at the company as urged by the A.L.J., the Board took the short view which focused solely on the “immediacy of the *consequences*.”²¹³ The plurality chose not to look beyond those situations where danger was imminent, as defined by the paradigm of workers “fleeing for their lives” in the face of obvious peril.²¹⁴ Less obvious to the Board was the need for the TNS workers to flee from a hidden, but potentially more devastating, threat to their safety and health caused by the radioactive environment in which they toiled. The re-

exist even where (1) the standards of another statute are not violated, or (2) are violated but not to an extent requiring a shutdown of operations. *See, e.g.*, *Roadway Express, Inc.*, 217 N.L.R.B. 278 (1975); *see also* *Tamara Foods, Inc.*, 258 N.L.R.B. 1307, 1309 (1981) (holding that since “the rights guaranteed to employees under the NLRA are distinct from and are not subordinate to the provisions” of other legislation, OSHA’s finding that plant did not violate regulations did not render walkout unprotected). Secondly, the record evidence is overwhelming that TDRH ineffectively carried out its statutory mandate, a fact apparent to the employees and the union representing them. To require consultation with this failed regulatory body is to raise an exercise in futility to the level of a legal requirement without a basis in record or precedent. Finally, to impose a burden on employees that requires them to appreciate the regulatory function of TDRH or any other governmental body defies reason and ignores the reality of the workplace.

210. *TNS*, 309 N.L.R.B. at 1356 (emphasis added). The image of employees as recklessly striking without justification has a long history in labor law. *See* JAMES B. ATLESON, *Managerial Control and the Fear of Anarchy*, in *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 97 (1983). In commenting on the objective test established by the Court in *Gateway Coal*, Professor Atleson comments that the “alleged fear of strikes caused by [employee] `whim' or `naked assertions' denigrates the integrity, honesty, and intelligence of workers [and] ignores the low propensity of workers to strike.” *Id.* at 99.

211. *TNS*, 309 N.L.R.B. at 1357.

212. *Id.*

213. *Id.* at 1379 (Devaney, Member, dissenting).

214. *Id.* at 1358.

sult is a standard constructed by the plurality that is simply unworkable and that effectively cuts off access to § 502 in cases involving the longterm effects of workplace carcinogens and poisons.²¹⁵

Firm in its belief that it was acting in a manner consistent with this “present need” requirement, the Board formulated a two-prong test and established:

[A] party attempting to demonstrate Section 502 coverage in the context of employee exposure in the workplace to radioactive and/or toxic substances may do so by showing that the employees reasonably believed, on the basis of objective evidence, *either* (1) that inherently dangerous conditions in the subject workplace had changed significantly for the worse, so as to impose a substantial threat of imminent danger if exposure were continued at the time the employees began to withhold their services, *or* (2) that the cumulative effects of exposure to those substances had reached the point at which any further exposure would pose an unacceptable risk of future injury to employees.²¹⁶

Applying that standard, the Board held there was “insufficient proof that the employees reasonably believed that the dangers which were inherent in the TNS workplace had changed materially

215. The plurality was correct in stating that “the burden of objective proof imposed under Section 502 is a heavy one.” *Id.* at 1357. However, the plurality disingenuously found support for this proposition in what it described as “manifest congressional intent” and in the fact that “in over 40 years since the passage of Section 502, the Board has found abnormally dangerous working conditions in only six contested cases.” *Id.*; see *Richmond Tank Car*, 264 N.L.R.B. 174 (1982) (involving runaway boxcars); *Combustion Eng'g, Inc.*, 224 N.L.R.B. 542 (1976) (involving threat of violence from co-workers); *Roadway Express, Inc.*, 217 N.L.R.B. 278 (1975) (involving dangerous truck); *Fruin-Colnon Constr. Co.*, 139 N.L.R.B. 894 (1966) (involving wet and slippery mine shaft); *Philadelphia Marine Trade Ass'n*, 138 N.L.R.B. 737 (1962) (involving danger from use of wooden pallets to load cargo), *enforced*, 330 F.2d 492 (3d Cir. 1964); *Knight-Morley Corp.*, 116 N.L.R.B. 140 (1956) (involving excessive heat and dust in work room), *enforced*, 251 F.2d 753 (6th Cir. 1957).

The plurality's first argument is simply incorrect, for as noted *supra*, there is a distinct absence of legislative history concerning § 502. Its second argument is circular: the fact that only six cases in 40 years have held working conditions to be abnormally dangerous is as much a testament to an unduly restrictive interpretation of § 502 as it is reflective of a “heavy burden.” Even under an objective test, the quantum and type of evidence required to satisfy the burden is still susceptible to differing judgments. Greater deference to the judgment of employees and less hindsight justice would yield a greater number of cases where abnormally dangerous working conditions are found and would serve to restore an important, but underutilized, statutory right.

216. *TNS*, 309 N.L.R.B. at 1357–58.

for the worse at or around the time of the walkout.”²¹⁷ The Board further concluded that “the record does not indicate that the TNS employees reasonably believed, on the basis of objective evidence, that their cumulative exposure to [depleted uranium] had reached a level at which any further exposure would have been unacceptably risky.”²¹⁸

In applying the first prong of its test, the Board admitted that “[a]s a normal working condition” the employees of TNS “faced a greater likelihood of cancer or kidney damage than most other worker populations.”²¹⁹ Yet, the Board conjured up language from precedent fundamentally inapplicable to the TNS situation and noted that “the appropriate benchmark of normalcy for evaluating the claim of abnormal danger is set by the ‘prevailing conditions’ at the TNS plant, rather than by conditions in the nuclear industry at large or in the industrial subgroup of employees working with [depleted uranium].”²²⁰ The Board insisted that this was “true even if the existing dangers of the subject workplace are significant.”²²¹

Ironically, under the first prong of the Board's test, employees in the most hazardous workplaces enjoy the least protection. By refusing to look beyond the workplace in question to determine when danger becomes abnormal, the Board necessarily allowed the employer to set the floor by which the levels of danger will be measured. Furthermore, a relatively safe work environment will be found to be abnormally dangerous on a much lower showing of overall danger to the health and safety of employees than an inherently dangerous workplace. This result is at odds with the intent of health and safety legislation which seeks to provide a healthful and safe work environment for all employees, and it runs counter to the plain need to provide greater protection to employees laboring in the most hazardous jobs and industries.²²²

217. *Id.* at 1358.

218. *Id.* The Board did not elaborate on what would be an unacceptable risk. The plethora of scientific evidence in the record was inconclusive on this very point. The Board did not explain how employees are to know when the threshold risk has been breached when even the scientific community cannot settle on this point.

219. *Id.*

220. *Id.*

221. *Id.*

222. The test also leads to anomalous results. Compare the facts and results in *TNS* with *Combustion Eng'g, Inc.*, 224 N.L.R.B. 542 (1976). In *Combustion Engineering*, six employees engaged in a boiler demolition and renovation job “quit work” when confront-

The second prong of the Board's test fared no better. Again, the Board acknowledged that "in a workplace such as the TNS plant, at which employees are subjected to repeated exposure to radioactive or toxic substances, the cumulative exposure level may build, over time, to a point at which further exposure may pose unacceptable risks to the workforce, even though no material change in the employees' working conditions may have occurred."²²³ The plurality then logically noted that "the fact that employees may have worked under inherently dangerous conditions for a long time without protesting or quitting work would not preclude a finding that the Section 502 protection applies," since "[i]t is likely that only by 'accepting' such conditions over a period of time would employees reach the levels at which further exposure would pose excessive risk."²²⁴ The Board stated that to conclude otherwise would leave employees in the "Catch 22" position of losing § 502 protection because they had previously "accepted" the dangerous conditions even though the "critical exposure threshold" was reached.²²⁵ But the Board's reasoning when *applying* the second prong of the test left employees seeking to claim § 502 protection in even more difficulty than "Catch 22" suggests.

Thus, the Board held that employees can establish the presence of abnormally dangerous conditions by showing a reasonable, objective belief in such danger.²²⁶ The Board concluded, however,

ed by violence and threats of violence from two former employees. *Id.* at 548. The NLRB adopted the A.L.J.'s finding that the demolition of the boiler exposed employees to "normally dangerous" working conditions which were made abnormally dangerous by "adding to the scene the presence of two belligerent, partly inebriated intruders . . . bent on forcing the . . . men by violence to leave the job." *Id.* at 549. The Board also agreed with the A.L.J. that "danger at the place of employment from violence and threat of violence are well within the reach of Section 502." *Id.* at 550. If the threat to safety from drunken former co-workers renders *safety* in the plant abnormally dangerous, there can be no less a finding of abnormal danger to *health* by repeated exposure to excessive uranium dust as found by the Board in *TNS*. The dissonance between these results signals the failure of the Board's approach.

223. *TNS*, 309 N.L.R.B. at 1359–60.

224. *Id.* at 1360.

225. *Id.*

226. *Id.* There is a dissonance between the two prongs of the Board's test. On the one hand, the Board found that the TNS employees faced a greater likelihood of cancer or kidney damage due to the inherent danger of the work they performed. Nevertheless, the plurality concluded that the long term risks to the employees because of their exposure to depleted uranium is not so great so as to cross the "exposure threshold." *Id.* at 1358. But that threshold is inevitably crossed at that point when the longterm risks are

that the General Counsel failed to make such a showing and that the employees had not established the “threshold level of exposure” or a reasonable belief that such a level had been exceeded at the TNS plant.²²⁷

That the Board could base its decision on the absence of evidence establishing the “threshold level of exposure” which transforms inherent danger into abnormal danger was simply unjustified and contrary to the overwhelming weight of the evidence. The record on which the Board's decision presumably was based was replete with expert and scientific evidence on this very point, and it is clear from that evidence that the existence of such a threshold is the subject of an inconclusive debate within the scientific community itself. Indeed, there is no consensus on such a threshold level of exposure.

The plurality admitted as much by noting that “[t]he massive amount of conflicting scientific evidence and opinion in the record demonstrates that there is a considerable debate about safety standards . . . in the nuclear industry.”²²⁸ Still, the Board maintained that “[t]his does not prove . . . that the governing regulatory process is so clearly unreliable that the Board should not rely on it as an objective factor in deciding whether employees reasonably believed abnormally dangerous conditions existed at the TNS plant.”²²⁹

To the contrary, this evidence proves precisely the opposite of the Board's conclusion. The principle of a “threshold level of exposure” is “clearly unreliable” as an “objective factor” bearing on the reasonableness of employee belief in the existence of abnormally dangerous conditions, because it is not susceptible to proof and therefore fails to meet a basic requirement of the *Gateway Coal* test. “Ascertainable” objective evidence, by which the existence of abnormally dangerous conditions for work is measured under the *Gateway Coal* test,²³⁰ is built upon a factual predicate which itself is susceptible to proof, whether it be by the employees who face the danger or by the decisionmakers who routinely employ hindsight to question

increased due to the unhealthful working conditions that *enhance* the likelihood of that risk.

227. The Board stated that “the record does not even establish what that threshold level of exposure is.” *Id.* at 1360.

228. *Id.*

229. *Id.*

230. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 384–87 (1974); *see supra* pp. 35–38.

the employees' judgment. While there may be varying assessments of that evidence based upon differing perspectives and values, the quarrel is not over its existence but only over its significance.²³¹

Here, the Board conceded that the scientific community and regulatory bodies, whose role it is to "ascertain" the threshold level of excessive exposure to depleted uranium in the first place, are incapable of doing so. Indeed, there is no "ascertainable" objective evidence of this threshold. Yet, the Board would saddle employees with the impossible task of determining that unascertainable point as a condition precedent to invoking § 502 protection.

The *TNS* plurality also recognized that the "TNS production employees were not privy to most of the voluminous scientific data, opinion, and analyses in the record of this proceeding relating to [depleted uranium]-exposure hazards in their workplace and may have lacked the educational skills necessary to gain full comprehension of the specific meaning of such information their own."²³² Given this reality, the plurality appeared to retreat from its own test by focusing on what the employees themselves experienced. Thus, the plurality noted that it was "clear . . . that TNS employees had a fundamental appreciation of the potential risks of working with uranium products" since they "daily confronted working conditions which required no special expertise to interpret: visible [depleted uranium]-dust, inadequate ventilating and shielding equipment, furnace blowouts, and unsanitary changing rooms."²³³

Although these facts formed a basis for a finding of "ascertainable objective evidence," the plurality chose to disregard the evidence and instead faulted the employees for not bringing it to the attention of either TDRH or TOSHA before the strike.²³⁴ Indeed, the plurality's reasoning consistently disregarded what the employees plainly knew to be true: that they were bathed daily in a radioactive carcinogen which indisputably had a deleterious effect on human

231. See, e.g., *NLRB v. Fruin-Colnon Constr. Co.*, 139 N.L.R.B. 894 (1962), *enforcement denied*, 330 F.2d 885 (8th Cir. 1964). In this case, employees quit work in a mine when wetness and an updraft in a shaft imperiled their safety. *Id.* The Board found that § 502 applied based on objective evidence related to the physical environment faced by the miners. *Id.* at 905. The court of appeals disagreed, but did so based on its evaluation of that same evidence. *Fruin-Colnon Constr.*, 330 F.2d at 892.

232. *TNS*, 309 N.L.R.B. at 1361.

233. *Id.*

234. However, the evidence is clear that these regulatory bodies were aware of the dangerous conditions at TNS. See *supra* pp. 49–52.

tissue; that their efforts to improve the working conditions proved futile; and that over time, the chance of contracting a catastrophic illness, such as cancer or kidney dysfunction, was enhanced. Instead, the plurality's reasoning placed a burden on the employees to prove what cannot be proven: that precise point in time when exposure to the workplace poisons crossed the threshold of "acceptable" risk.

However, the plurality's decision went further. Not satisfied with having employees prove the unprovable, the plurality added that the "findings of NRC and TDRH are significant not only as to whether abnormally dangerous conditions actually existed, but also as to whether the employees' belief was reasonable, even if based on objective evidence."²³⁵ According to the plurality, "[r]easonable employees and their unions cannot ignore" the views of experts from the regulatory agencies.²³⁶ The plurality believed that TDRH's refusal to order the closing of the TNS plant was a factor that reasonable employees would have considered in deciding whether to strike.²³⁷ However, this was a unwarranted assumption by the Board. The plurality failed to explain or even address why employees should have been expected to rely on the judgment of an outside agency which for years had failed to have TNS comply with regulatory standards.

Furthermore, at no time did the Board address the underlying interests that animate regulators in their relationships with the regulated. Instead, it responded to the undisputed fact that TDRH had never exercised its authority to shut down an operation by stating:

[W]hen an agency is charged with protecting worker health and safety and is garbed with the authority to seek closure of abnormally dangerous plants, the proper course is to *presume* that the agency *would* exert that authority if it found, on the basis of its own scientific and technical expertise, that conditions in the plant were,

235. *TNS*, 309 N.L.R.B. at 1363. The plurality noted that the "decisions of these regulatory agencies, made after numerous inspections of the TNS facility, to allow that facility to continue operation, militate against a finding that the employees *reasonably* believed that the conditions leading to the walkout were *abnormally* dangerous." *Id.* However, reliance on the actions of ineffectual regulatory bodies, which possess only a theoretical authority to shut down operations, cannot support the Board's finding.

236. *Id.* at 1364.

237. *Id.*

in fact, abnormally dangerous. That presumption could, of course, be rebutted by showing, for example, that the agency did not intend to seek closure, or that it had a record of chronic inaction or dereliction regarding health or safety matters.²³⁸

The Board found that “no showing of either sort has been made here.”²³⁹ It also found irrelevant that the circumstances that would prompt TDRH to close the TNS plant were not known.²⁴⁰ Reiterating that TDRH “was the state agency charged with protecting the health of employees in the nuclear industry,” and that TDRH had not acted to shut down the plant for any reason, the Board concluded that “for unexplained reasons, the employees apparently did not seriously consider those salient facts.”²⁴¹ Fundamentally, however, the idea that employees would give “significant weight” to the failure of TDRH to close the plant ignores the nature of the employment relationship and assumes a familiarity with the workings of government that likely does not exist even amongst the most educated of workers, much less the “untutored workforce” at TNS.²⁴²

The plurality ignored the A.L.J.'s specific finding that by “failing to meet its obligations under the regulatory scheme, [TNS] subjected its employees to abnormally dangerous conditions.”²⁴³ To the plurality, it was not enough that TNS failed to meet the regulatory standards by a wide mark. Instead, the plurality looked to the conduct of a regulatory body (TDRH) and inquired whether it exercised its most drastic remedy — shutting down the plant — in determining whether abnormally dangerous working conditions existed. By

238. *Id.* (first emphasis added). Plainly, however, it could be argued that TDRH's historical failure to shut down any operation and the admitted difficulty that such a move would entail overcomes the presumption in this case. Aside from creating the presumption and generalizing as to how it could be overcome, the Board did not evaluate the record evidence pertinent to the issue.

239. *Id.* Nevertheless, at the very least, the evidence compels the conclusion that TDRH “did not intend” to seek closure of TNS.

240. *TNS*, 309 N.L.R.B. at 1364.

241. *Id.* However, as aptly noted by the dissent, the plurality's approach “shifts the focus of a Section 502 inquiry from whether the *employees* had a good faith belief, based on objective evidence, that conditions were abnormally dangerous, to whether the *oversight* agency had such a belief.” *Id.* at 1381 (Devaney, Member, dissenting).

242. The A.L.J. referred to the “untutored workforce” at TNS in a different context, finding that it was “ill-equipped” to evaluate the results of tests used “to measure exposure to alpha particles or chemically toxic agents emitted by [depleted uranium].” *Id.* at 1443.

243. *Id.* at 1440.

looking to the actions of the oversight agency as dispositive, the Board effectively placed the experience and judgment of the employees about their working conditions at the bottom of a hierarchical pyramid of values, where managers' and regulators' judgment is controlling.

G. Whose Good Faith Belief Is It?

The presumption of regulatory efficacy articulated by the Board is itself the product of an assumption that an oversight agency necessarily performs its statutory duties in an effective way that implements underlying policy. The dissent and A.L.J. saw the fallacy inherent in this assumption. Thus, as stated by the *TNS* dissent, “the plurality's unquestioning assumption that if TDRH or NRC [Nuclear Regulatory Commission] had concluded that the situation at TNS had reached ‘abnormally dangerous conditions’ it would have closed down the facility, or at least tried to do so, without delay, is unrealistic and arbitrary” and was based on the erroneous “assumption that employee safety is the chief priority of these agencies.”²⁴⁴

At minimum, the plurality's opinion ignored the potential for shared economic, social, and political interests between the regulated and their regulators. This potential is especially prevalent where the relationship between the two is based on a shared objective such as that in the nuclear industry. The statement of purpose of the Atomic Energy Act, which established the NRC, underscores this point by declaring it is the nation's policy that:

the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare,

244. *Id.* at 1381 (Devaney, Member, dissenting). The dissent came to this conclusion, in part, based on the “statement of purpose of NRC's enabling legislation,” which contains no mention of employee safety or rights. Similarly, the purpose of the Tennessee Radiologic Health Service Act governing atomic energy and nuclear materials “is, in relevant part, to apply ‘controls and regulations with respect to radiological health and safety to protect the health and well-being of the people of Tennessee.’ No mention is made of the health and well-being of employees who handle such substances.” *Id.* at 1381 n.46. The plurality's response acknowledged that the statutes “refer only to the ‘public’ health and do not specifically mention employee health and safety” but noted that “employees surely are members of ‘the public.’” *Id.* at 1382 n.50. It must also be noted that the phrase “abnormally dangerous conditions for work” is not in the lexicon of either the TDRH or Nuclear Regulatory Commission.

subject to . . . the maximum contribution to the common defense and security . . . [and] shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and *strengthen free competition in private enterprise*.²⁴⁵

This statement of purpose begins to expose the serious shortcomings with the presumption of regulatory efficacy created by the plurality. It is a fair question to ask whether it can be presumed that a state oversight agency such as TDRH, established under the auspices of the NRC and sharing similar policy objectives, would act to shut down a member of the industry whose economic interests it was meant to strengthen. Furthermore, it is not only a particular company's or industry's immediate economic interests that are at stake but the state's as well should unemployment occur as a result of a shutdown. The impact on the "general welfare" must also be considered in the event that a shutdown impacts on energy use or public services fueled by nuclear energy. The state's image as either hospitable or hostile to business interests is a significant factor that could bear directly on attracting industry and jobs to the state.

As noted previously, it is undisputed that in the State of Tennessee at the time of this dispute, it was "very, very difficult" for TDRH to seek a revocation of an employer's license to operate.²⁴⁶ As found by the A.L.J.:

the procedure for license revocation was administratively elaborate. In theory, it began by seeking a Commissioner's Order which identified the violations and the remedy sought. In the event a licensee failed to comply with the Order . . . the matter [was referred] to the State's Attorney who would decide whether to initiate judicial enforcement proceedings to close the offending facility.²⁴⁷

The evidence at the hearing "made it quite plain . . . that these procedures were intricate, time consuming, and *involved decision-making at bureaucratic levels above TDRH*."²⁴⁸

245. Atomic Energy Act, 42 U.S.C. § 2011(a)–(b), *cited in TNS*, 309 N.L.R.B. at 1381 (Devaney, Member, dissenting) (emphasis added).

246. *TNS*, 309 N.L.R.B. at 1445.

247. *Id.* at 1405.

248. *Id.* (emphasis added). The plurality did not explain whether employees also needed to take into account the judgment of this unidentified upper-level bureaucracy, in addition to the judgment of TDRH, prior to striking.

H. The Regulated and the Regulators: What Kind of Presumption Is Warranted?

The *TNS* plurality's presumption failed to take into account the nature of bureaucracy and the factors that may influence the way in which a regulatory body carries out its functions. Aside from the well-accepted notion that regulatory agencies are often "captured" by the interests they are supposed to be regulating,²⁴⁹ the economic interests of the regulated entity "always remain directly relevant to regulatory policy."²⁵⁰ This is plainly the case here, as furtherance of the interests of "private enterprise" (i.e., economic profitability) is a stated purpose of the regulatory framework. As explained by Thomas McGraw:

[t]his is true because every industry, whether regulated or not, does possess a certain underlying economic structure: characteristics that make it different from other industries and that help to shape the internal conditions for regulatory opportunities and constraints. More than any other single factor, this underlying structure of the particular industry being regulated has defined the context in which regulatory agencies have operated.²⁵¹

Fundamentally, however, regulatory policy is shaped by political considerations, which are subject to change depending on the philosophy and values of those in power²⁵² and of society generally. Indeed, one noted historian has bluntly stated that "we should focus on the substantive choices made by regulators as political choices and work outward from that beginning."²⁵³ Yet, this is a common

249. THOMAS K. MCGRAW, *PROPHETS OF REGULATION* 305 (1984).

250. *Id.*

251. *Id.* Furthermore, McGraw states that "because the underlying characteristics of the industry so often shape the limits of governmental action, the industry may be regarded as the dog, the regulatory agency only as the tail." *Id.* at 305–06.

252. Given the pro-management appointments to the NLRB by Presidents Reagan and Bush as well as the anti-worker climate fostered by their administrations, the result in *TNS* can be labeled as a politically motivated exercise in bureaucratic discretion. However, it is not suggested that the decision is purely political. Nevertheless, it was a result sought by the Bush Administration as the United States, on behalf of the Department of Energy and Nuclear Regulatory Commission, filed an amicus brief with the NLRB urging reversal of the A.L.J.'s opinion and a finding for the company.

253. Samuel P. Hays, *Political Choice in Regulatory Administration*, in *REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS* 124, 128 (Thomas K. McGraw ed., 1981). Hays also

theme in the analysis of regulatory policy. The dominant role of the central government in addressing public problems has not meant neutral administration, “but politicization of the bureaucracy. . . . This politicization, in combination with the growth of regulation, [has] created a balkanized policy environment dominated by organized interests.”²⁵⁴

Administrative discretion is an important counterpart to the economic and political interests that motivate the relationship between the regulated and the regulators.²⁵⁵ However, as noted by Gary Bryner and as particularly relevant here, “the enforcement decisions of administrative agencies have been the source of some of the most widely discussed concerns of administrative discretion.”²⁵⁶ Nevertheless, the presumption created by the Board ignored this element of discretion and implied a routine approach based on an objective standard. This is simply contrary to the interests that influence bureaucratic action.²⁵⁷

comments that “there is a close connection . . . between value choices made by administrators, managers, economists, planners and scientists, all closely associated in the regulatory process, and the value choices made by society at large.” *Id.* at 126.

254. RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE* 82 (1989). According to these authors, “sub-governments define the institutional environment in which regulatory politics occur.” *Id.*

255. See GARY C. BRYNER, *BUREAUCRATIC DISCRETION, LAW AND POLICY IN FEDERAL REGULATORY AGENCIES* 5 (1987). According to Bryner, “[d]iscretion is especially important in regulatory agencies, as it permits administrative officials to be flexible and adaptable in tailoring their efforts to specific situations.” *Id.* Because laws, as written, cannot be expected to cover all possible situations within an agency’s jurisdiction, laws must “permit a consideration of economic, regional, cultural, personal and other differences among those who fall with the agency’s regulatory reach.” *Id.*

256. *Id.* at 6.

257. Harris and Milkis provide an excellent contrast between the policy objectives and political priorities of different administrations and social movements: those of the “new left” and public lobby advancing new social regulation in the 1970s compared with the “regulatory relief” that was a keystone of the Reagan administration in the 1980s. Indeed, these authors note that the consequences of the politicization and centralization of the executive department “reached a new stage of development during the Reagan years, due to the ideological character of the Reagan presidency and the unprecedented assault that ideology inspired against the prevailing domestic program.” HARRIS & MILKIS, *supra* note 254, at 99–100.

Driven home is the point that political and social currents play an instrumental role in the operation of bureaucracy and that any presumptions about how an oversight agency will conduct its operations are speculative at best. For example, as Harris and Milkis explain, President Carter appointed over 60 public lobbyists to executive posts, many of which involved considerable influence in shaping of public policy. This included appointments like that of Eula Bingham, an advocate of strict health and safety regulations, to head OSHA. *Id.* at 103. In contrast, Harris and Milkis state that “the effort by

The evidence in *TNS* strongly suggested that, consistent with its historical approach to problems in the industry, TDRH had no intention of shutting down TNS because this was simply not a policy option available to the agency. Even if the TDRH bureaucracy believed a shutdown was appropriate, it was incapable of implementing such a measure absent approval by an even higher bureaucratic authority.²⁵⁸ This “failsafe” system of centralized administrative control on the state level closely parallels the model of centralized control on a federal level, and it replicates the political, economic, and social interests that shape regulatory policy.²⁵⁹

the Reagan administration to select department and agency heads who would be ideologically in tune with the president represented a sharp departure from practices of recent administrations.” *Id.* at 116. They note a *New York Times* editorial from mid-1981 that spoke of “a revolution of attitudes involving the appointment of officials who in previous administrations might have been ruled out by concern over possible lack of qualifications or conflict of interest, or open hostility to the mission of the agency they now head.” *Id.*

258. The fact that the State of Tennessee amended the Radiological Health Services Act to provide for civil and criminal sanctions following the Gore Committee hearings reflects an inherent problem with the regulatory scheme at the time of the strike. The RHSA failed to provide a range of sanctions for violations of the law. Thus, TDRH enforcement policy was faced with an almost all-or-nothing choice: closing the facility or dispatching ineffectual action letters citing violations and demanding compliance. It is not surprising that TDRH exercised its bureaucratic discretion in a way that avoided using its ultimate regulatory weapon, given the state's interest in the economic strength of the regulated industry.

259. Nor must we rely on administrative and bureaucratic theory alone in addressing the presumption created by the Board. In JAMES C. ROBINSON, *TOIL & TOXICS: WORKPLACE STRUGGLES & POLITICAL STRATEGIES FOR OCCUPATIONAL HEALTH* 150 (1991), the author provides a case study of the interests that shape regulatory policy. It is of special significance here since it involves the creation of standards by the Occupational Safety and Health Administration to control occupational exposure to carcinogens.

Robinson documents the circumstances surrounding the “start-up standards” used by OSHA, including, in particular, the agency's adoption of permissible exposure limits for many toxic substances found in the workplace. This includes virtually all of the approximately four hundred threshold limit values (TLVs) developed voluntarily by the American Conference of Governmental Industrial Hygienics (ACGIH), “a *non-governmental* group with close ties to private industry,” without so much as a “cursory evaluation of their adequacy.” *Id.* According to Robinson, this made OSHA dependent upon a pre-regulatory, industry-based “source of research on occupational health.” *Id.* Robinson labels the ACGIH's claim that the TLVs were based upon health data alone and not upon economic considerations as “inaccurate and misleading,” particularly in light of ACGIH's dependency on the “collaboration of industry representatives for the development of the TLVs” and the gradual granting of “direct responsibility for reviewing particular substances” to these same industry representatives. *Id.* at 151. Robinson concludes that “a pattern developed in which industry experts were given responsibility for recommending safe thresholds for chemicals in which they had a strong financial stake.” *Id.*

Economic interests, however, were not the sole influences exerted by industry

IV. *THE STATUS OF EMPLOYEES IN THE WORKPLACE,
THE VALUES OF DECISIONMAKERS, AND THE
NATURE OF WORK*

Although the NLRB placed an unwarranted and legally insupportable importance upon the judgment of an oversight agency in determining both whether abnormally dangerous working conditions existed and whether the employees possessed a good faith belief of that fact, the reason for this was, at least, explicitly stated. The Board saw this deference to supposed administrative expertise “as

upon OSHA. During the 1970s, OSHA demonstrated a new “regulatory vigor” and focused much of its standards setting energies on carcinogens. Industry responded with equal vigor with court challenges to specific standards and with a “political strategy to replace the existing OSHA leadership with one more sensitive to corporate concerns.” *Id.* at 153. For example, in 1980, after years of litigation OSHA issued the Generic Carcinogen Policy, which categorized confirmed or suspected carcinogens and provided for immediate regulatory action for substances falling into the highest priority category. *Id.* at 154. In January 1981, following another judicial setback effectively invalidating the policy, OSHA issued a revised Generic Carcinogen Policy. However, as explained by Robinson, the inauguration of Ronald Reagan that same month was “[o]f greater import for the Generic Carcinogen Policy” since it “was listed by the new administration’s Task Force on Regulatory Relief as one of the first twenty-seven regulations to be reconsidered due to their economic costs.” *Id.* at 155. Robinson calls the Generic Carcinogen Policy OSHA’s “most aggressive initiative directed at occupational carcinogens.” *Id.* Yet, by March 1981, “the policy was withdrawn” and has “remained in abeyance from then on and has never been used as the basis of standards setting at OSHA.” *Id.* Indeed, by 1989, “regulatory policy at OSHA seemed to have come full circle” as the Agency “fell back upon the ACGIH Threshold Limit Values from which it had started.” According to Robinson, “nothing better illustrates the strength of employers in defeating occupational health initiatives.” *Id.*

Robinson allows, however, that the “appearance of industry invincibility can be deceiving.” *Id.* He notes that while the regulatory scheme of OSHA has not met its expectations, the basic principle of the legislation, “namely, that occupational health is a matter of legitimate public concern rather than a private matter between individual employers and individual employees, has become firmly established.” *Id.*

For a contrary view of OSHA’s regulatory policies, see, e.g., James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 373 (James Q. Wilson ed., 1980). According to Wilson, the Occupational Safety and Health Administration has, in general, “chosen stricter and more costly standards over more lenient, less expensive ones.” *Id.*; see EUGENE BARDACH & ROBERT KAGAN, *GOING BY THE BOOK, THE PROBLEM OF REGULATORY UNREASONABLENESS* 58 (1982). The authors argue that while regulators recognize the “many mismatches between uniform rules and diverse circumstances,” their efforts to “improve the match” are derailed by a lack of discretion “to adjust the rules or to overlook deviations.” *Id.* According to Bardach and Kagan, the “results are unreasonable (the imposition of uniform regulatory requirements in situations where they do not make sense) and unresponsiveness (the failure to consider arguments by regulated enterprises that exceptions should be made).” *Id.*

essential lest we allow the invocation of Section 502 as an *end run* around the statutes directly applicable to worker safety in this industry. . . .²⁶⁰ Rarely has so clear a message been sent by decisionmakers to shed light upon the values driving a particular result. However, the policy constructed on the basis of such values remains unstated.

This section attempts to show how the *TNS* decision can be seen as another instance where, to paraphrase the words of Professor James Atleson, decisionmakers utilize unspoken values and underlying assumptions²⁶¹ regarding the nature of the employment relationship to find against worker interests and significantly weaken workers' rights. The NLRB's reasoning in *TNS* can perhaps be best understood if viewed as the product of an entrenched labor policy that refuses to sever its ties to traditional notions of a master/servant relationship in the workplace. Historically, this policy and the hierarchical workplace it has spawned have rejected deference to the judgment of employees, even where it is based on wisdom borne from experience and knowledge of the work they perform. Instead, the policy allows decisionmakers to routinely substitute their judgment, always with hindsight and from a safe distance, for that of employees who must decide what course to take in the face of real danger.

Legislation, such as the LMRA and OSHA, may speak in eloquent terms about policies which seek to empower workers. Yet, courts routinely disregard the values implicit in those policies, such as the importance of work and the principles of dignity and responsibility forged by the so-called "common enterprise." Given the inadequate state of workplace health and safety, especially concerning the effects of long-acting carcinogens and toxins, decisionmaking that respects the employee voice in the workplace must replace a system of justice that mistrusts employee motives and judgments and fears their collective strength. The Board's decision here reflects this mistrust and fear: its fear of an "end run" is plainly rooted in these assumptions about workers and the values that they bring to the employment relationship, and it suggests an intent to keep employees in their proper place in that relationship.²⁶²

260. *TNS, Inc.*, 309 N.L.R.B. 1348, 1356 (1992).

261. See generally ATLESON, *supra* note 210.

262. The plurality's fear reflects an assumption that "chaos and anarchy" would

In *TNS*, even the dissent's reasoned standard did not go far enough in dealing with these undercurrents of policy. Citing earlier precedent that defined "abnormal" as "deviating from the normal condition or from the norm or average,"²⁶³ the dissent:

would look at the risks in the work itself to determine the "normal" level of danger and would find abnormally dangerous conditions where employees are exposed to risks that, under a standard of reasonableness, constitute excessive or "abnormal" risks to their lives when compared to dangers inherent in the work itself, whether these heightened risks arise from a change in conditions or from a disregard for employee safety.²⁶⁴

The dissent called for "an industry-wide hazard comparison" with "the characteristics of day-to-day operation in the . . . plant [being] of central importance," as this would allow an "examination of the facts as the employees knew them" in assessing their "reasonable belief."²⁶⁵

While certainly a more liberal standard than the plurality's nullification standard, the dissent failed to tackle what it correctly perceived as a plurality result dictated by "unstated policies" which "are clearly incompatible with the underlying purposes of the Act" and "foreclose employee access to the statute."²⁶⁶ The dissent further noted that the plurality ignored the "experience and judgment" of the employees as well as their "perceptions."²⁶⁷ But the underlying policy tensions hinted at by these comments were not explored nor even exposed.

Among the questions that must be answered is whether, if it is our national policy to provide a safe and healthy work environment,

result if employees were entrusted with the discretion of judging workplace hazards for themselves. See Atleson, *supra* note 70, at 700. According to Professor Atleson, "[i]mplicit in this fear is the assumption that employees do indeed face job dangers but are not capable of discerning *when* they face these dangers." *Id.* "This assumption denigrates the integrity of workers and implies class-based notions about workers and their proper status." *Id.*

263. *TNS*, 309 N.L.R.B. at 1377 (Devaney, Member, dissenting) (citing *Fruin-Colnon Constr. Co.*, 139 N.L.R.B. 894 (1962), *enforcement denied*, 330 F.2d 885 (8th Cir. 1964)).

264. *Id.*

265. *Id.* The dissent appeared to equate the "good faith" requirement of § 502 with the "reasonable belief" element it proposed.

266. *Id.* at 1372.

267. *Id.* at 1381 n.43.

this can be achieved without a fundamental shift towards the interests of employees and away from those of production. Must legislation be reformulated to specifically allow for a labor policy that provides a true measure of deference to the employee voice in the workplace, especially in matters affecting safety and health? Arguably, unless the basic policy considerations are altered, the result under virtually any standard will lean away from the legitimate interests of workers and expose them to unnecessary danger. As discussed below, results will change in meaningful ways only when decisionmakers acknowledge different policy priorities in the regulation of the workplace.

A. Moral and Political Choice and a Worker's Right to Be Free from Harm

“Every instance of rule formulation and rule application involves some component, often subtle and obscure, of moral and political choice and, therefore, of decisionmaker responsibility.”²⁶⁸

Given the evidence in *TNS*, one must question why the NLRB chose to exercise its “decisionmaker responsibility” using ill-conceived standards. As the A.L.J.'s thorough and well-reasoned opinion shows, there was more than a clear preponderance of the evidence that *could* have shown that the strikers were protected by § 502. The Board's General Counsel and the strong and well-reasoned dissent by Board Member Devaney (the only Democratic Party member of the Board at the time that *TNS* was decided) also reflected an interpretation of the evidence that opposed the plurality's interpretation.²⁶⁹ Why, then, did the plurality see it dif-

268. Karl E. Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW* 65 (David Kairys ed., 1990). Professor Klare, a distinguished leader in the critical legal study of labor law, has stated that “[a]ntiformalist critique aims to show that the prevailing rules are not preordained by the nature of things, nor are particular case results required by legal logic. To the contrary . . . legal rules and decisions are contingent and conventional — they are products of human choice. There is always room for discretion . . . in applying the rules.” *Id.*

269. The concurring opinion of Member Raudabaugh skirted the central issues in the case concerning the working conditions at *TNS*. Instead, Member Raudabaugh, while noting his “discomfort with the approach taken by the plurality” with respect to the standards articulated for finding “abnormally dangerous working conditions,” concluded that the strike was actually an economic strike and not one called “solely” to escape dangerous working conditions. *TNS*, 309 N.L.R.B. at 1368–69 (Raudabaugh, Member, concurring).

ferently?

1. *Statutory Policy: Fact and Fiction*

When the Wagner Act was enacted in 1935, giving employees a basic right to unionize and engage in collective bargaining, it was considered the most radical of the New Deal legislation.²⁷⁰ The underlying policies of the NLRA are varied and have been stated with differing emphasis. The Wagner Act itself refers to the imbalance of power between workers and capital and establishes the principle of collective bargaining as a means to address this “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.”²⁷¹ A central premise is that purely individual dealings between employer and employee will not produce fair and decent employment conditions.²⁷²

Despite an ambiguous legislative history, reference to the “Findings and Policies” found in § 1 of the Wagner Act, as well as to case law and commentary, establishes “at least six statutory goals.”²⁷³ According to Professor Klare, the Wagner Act sought to establish: (1) industrial peace; (2) enhancement of collective bargaining; (3) an equalization of bargaining power; (4) freedom of choice for workers; (5) promotion of economic recovery; and (6) industrial democracy.²⁷⁴ Klare states that these “statutory premises . . . make apparent why the Wagner Act was, at first, perceived by employers as such a radical threat.”²⁷⁵ He explains:

the Act by its terms apparently accorded a governmental blessing to powerful workers' organizations that were to acquire equal bar-

270. See, e.g., Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

271. National Labor Relations Act, 49 Stat. 449 (1935), as amended by Public Law No. 47-101, 1947, and Public Law No. 59-257; 29 U.S.C. § 151 (1988).

272. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (finding the Wagner Act constitutional).

273. See Klare, *supra* note 270, at 281.

274. *Id.* at 281-85. Klare refers to the goal of industrial democracy as the “most elusive” aspect of legislative purpose but finds support for the concept in scholarly literature as well as Senator Wagner's sounding of the “industrial democracy theme in ringing notes.” *Id.* at 284.

275. *Id.* at 285.

gaining power with corporations, accomplish a redistribution of income, and subject the workplace to a regime of participatory democracy. The Act's plain language was susceptible to an overtly anti-capitalist interpretation.²⁷⁶

In response, the business community mounted an "extraordinary campaign of lawlessness and opposition to the statute."²⁷⁷ Klare concludes that this overtly illegal conduct was provoked, in substantial part, by "a fear that collective bargaining meant the loss of control over the production process, the fatal subversion of the hallowed right of managerial freedom to run the enterprise."²⁷⁸

Within three years of enactment of the Wagner Act, however, the Supreme Court issued its decision in *NLRB v. Mackay Radio & Telegraph Co.*²⁷⁹ That decision sent a reassuring message to industrialists that the order of the workplace had not changed radically and that the prerogatives of production and ownership remained intact.²⁸⁰ Although § 13 of LMRA explicitly provides that the law should not be "construed so as either to interfere with or impede or

276. *Id.*

277. *Id.* at 287. Klare notes that the Wagner Act "was denounced in vivid terms by representatives of a wide spectrum of business interests." *Id.* at 285. The assault on the legislation was not limited to the verbal arena. Between 1935 and 1937, "[t]he business community embarked upon a path of deliberate and concerted disobedience to the Act . . . a response marked by determination and often by violence. Large and respected corporate employers engaged vast resources in systematic and typically unlawful anti-union campaigns involving such tactics as company unionism, propaganda, espionage, surveillance, weapons stockpiling, lockouts, pooling agreements for the supply of strikebreakers, and terrorism." *Id.* at 286-87.

278. Klare, *supra* note 270, at 287. Klare states that "[i]n short, business took the Act's rhetoric of industrial democracy seriously" which triggered a "fear of loss of managerial control." *Id.* at 287-88.

279. 304 U.S. 333 (1938); *see infra* pp. 92-94.

280. *See, e.g.*, JAMES B. ATLESON, *The Right to Strike: False Promises and Underlying Premises*, in VALUES AND ASSUMPTIONS, *supra* note 210, at 19-34. According to Atleson, *Mackay Radio* reflects the "traditional judicial deference given to productivity, hierarchical control, and continued production" and can be viewed "as the almost automatic response of judges raised in an era of acknowledged managerial freedom." *Id.* at 33; *see* Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803 (1993). As part of their recommendations for legal reform of the NLRA, Getman and Marshall urge elimination of the *Mackay Radio* doctrine. Based on an empirical study of the doomed strike at the International Paper Company in Jay, Maine, as well as on labor relations at other companies in the paper industry, Getman and Marshall note the destructive impact of the *Mackay Radio* doctrine and its role in creating "a labor law system that permits the economic devastation of our best people." *Id.* at 1877.

diminish in any way the right to strike,” the *Mackay Radio* Court relied on unspoken but preexisting premises concerning “inherent” employer rights to do exactly that.

On too many occasions since then, the message that there are inherent employer rights that supersede employee statutory rights has been reiterated.²⁸¹ *TNS* can be viewed as but another point on a continuum of status-based decisionmaking that has robbed employees of the dignity and voice to which they are entitled in the workplace. As noted above, in *TNS* the Board approached the evidence from a hierarchical view of the workplace that placed employee voice at the level of least importance, while managerial prerogatives and bureaucratic discretion enjoyed a symbiotic preeminence. This ordering of the workplace by the NLRB is consistent with “class-based notions about workers and their proper status.”²⁸² Klare has long stated that the “basic assumption [is] that enterprises must be organized and directed hierarchically. Employees are bound to obey the employer's commands and operational decisions; this is deemed a natural and eternal feature of the employment

281. See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (limiting the duty to bargain over those decisions, such as closing a part of the business, that lie at the “core of entrepreneurial discretion”). Commentators point to *First National Maintenance* as a classic example of the hierarchical ordering of the workplace and the lower status accorded to employees within that hierarchy. See, e.g., ATLESON, *The Scope of Mandatory Bargaining*, in VALUES AND ASSUMPTIONS, *supra* note 210, at 111; WILLIAM B. GOULD, IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 172 (1993). Professor Gould, who envisions a more cooperative workplace of the future and urges revision of NLRA § 8(a)(2) for that purpose, argues that there are “profound” problems with the Court's decision in *First National Maintenance* because it “declines against the proposition that labor is to be an ‘equal partner’ with management in the United States.” *Id.* He also is critical of the decision's categorization of certain managerial decisions, such as advertising and product design, as being “peculiarly within the province of management prerogatives and therefore always non-mandatory subjects of bargaining.” *Id.* He sees a false dichotomy between those subjects of bargaining that are mandatory (because they have a direct relationship to employee terms and conditions of employment) and those that are “non-mandatory” because they have only an “attenuated” impact of working conditions.

As Professor Gould contends, *First National Maintenance* should be reversed “on both the job security issue and its attempt to categorize managerial decisions as non-mandatory.” *Id.* In addition, while more of a “partnership” should exist between capital and labor, giving workers a greater voice in the “common enterprise,” a cautious approach should be taken to changing § 8(a)(2) and the adversarial model of collective bargaining, lest cooperation becomes co-optation.

282. Atleson, *supra* note 70, at 700.

relationship.”²⁸³

One obvious source of this view of the workplace is the historical principle of master and servant.²⁸⁴ In recounting the history of this legal doctrine, Marc Linder notes that the “English ruling classes enacted a great volume of legislation overtly hostile to the working classes” in the close to five hundred years between the Statute of Labourers²⁸⁵ and the repeal of the Combination Laws in 1825.²⁸⁶ Also, “[l]egislation with regard to labour has almost always been class-legislation. It is [an] effort of some dominant body to keep down a lower class, which had begun to show inconvenient aspirations.”²⁸⁷

2. *The Status of Workers Must Be Transformed from Servant to Equal in Matters Affecting Their Health and Safety*

Like the early English master/servant laws, a key assumption underlying judicial interpretation of the NLRA is that “employees owe certain obligations of deference and respect to their employer.”²⁸⁸ Thus, to a significant degree, “the NLRA has been used to define the employment contracts in terms of nineteenth-century

283. Klare, *supra* note 268, at 81.

284. For a historical perspective on the origins of the master/servant relationship and its theoretical framework and evolution, see MARC LINDER, *THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE* (1989).

285. The 1348 Ordinance of Labourers and the 1351 Statute of Labourers were enacted in response to the reduced supply of labor created by the Black Plague, which threatened to make “a significant rise in wages” possible. *Id.* at 45–46. Linder notes that “[i]t is to these laws, as developed by subsequent legislation, that we must look . . . for the beginnings of the law as to master and servant.” *Id.* at 46. He states that the “three basic principles of the [law] were compulsory service, at pre-plague wages and criminalization of the failure to comply with these conditions.” *Id.* at 47; see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

286. See Linder, *supra* note 284, at 74 n.1 (quoting *Archer v. James*, 121 Eng. Rep. 996, 1004 (K.B. 1859)).

On the other hand existed regulations in favour of the master, and against the workmen collectively, who in the aggregate and acting in combination were deemed stronger than their masters, and likely to oppress, not only their employers, but individuals of their own body. These were the laws against combinations and strikes.

Id.

287. *Id.* at 45 (quoting W. STANLEY JEVONS, *THE STATE IN RELATION TO LABOUR* 33–34 (1883)).

288. ATLESON, *supra* note 210, at 84.

master-servant law, a process that recognizes the lower status of employees in the employment context.”²⁸⁹ This underlying policy inevitably subordinates the legitimate interests of employees in the workplace to managerial prerogatives concerning production.

As noted earlier, however, a re-ordering of such workplace priorities and a re-thinking of corresponding public policy is required in order to effect a meaningful change in outcomes that permits deference to employee values and judgments. As discussed below, such a change must originate with a social reconceptualization of the meaning of work as well as a reevaluation of our assumptions about why

289. *Id.* See *NLRB v. Local 1229, International Bhd. of Elec. Workers*, 346 U.S. 464 (1953), the lead case on this status question. In *Local 1299*, during a breakdown in contract negotiations, company technicians distributed handbills criticizing the company for poor quality programming, inadequate equipment for local programming, and providing “second-class” television service to the community. *Id.* at 469–72. The handbills, which made no reference to the ongoing labor dispute, also questioned whether the company viewed the community as a “second-class city.” *Id.* at 468. The company, stressing the troubling nature of the “attack” on its product, discharged 10 technicians for their roles in distributing the handbills.

Concluding that the handbills were unprotected, the NLRB upheld the discharges, finding that the employees deliberately sought to alienate the employer's customers. The Board stressed that the product disparagement was related neither to the dispute nor to legitimate employee interests. The Supreme Court affirmed the Board, stating that “[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer.” *Id.* at 472. The Court further noted that it was “equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise.” *Id.* Yet, as seen in *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1982), the concept to loyalty to a “common enterprise” is one-sided: management owes no loyalty to the employees when decisions relating to the “core of entrepreneurial discretion and judgment” are involved. *Id.* at 679.

For an analysis of this loyalty doctrine, see Estlund, *supra* note 57, at 989. Estlund sees the duty of loyalty as stemming not from the Taft-Hartley Act itself but from legal rules pre-dating the Act; in particular, from “a species of agency law that is still often referred to as the law of ‘master and servant.’” *Id.* Estlund argues that the Court's decision turns on a “fundamental premise . . . that employees have no legitimate interest in the product or service they produce or in other aspects of the enterprise.” *Id.* at 994. According to Estlund, the Court's limitation on

the actual interests of employees . . . makes a normative claim that echoes a strong current in the interpretation of the entire statutory scheme of labor-management relations: the rights of employees created by the Act are limited by the rights of employers to run their businesses and to make basic business decisions without the interference of employees and unions.

Id. at 995. Estlund notes that this “commitment to the prerogatives of capital and its managers pervades the interpretation of the Act.” *Id.* (citing ATLESON, *supra* note 210, at 91–107; Klare, *supra* note 270, at 298–303); see Melinda J. Branscomb, *Labor, Loyalty, and the Corporate Campaign*, 73 B.U. L. REV. 291 (1993).

individuals work. By examining the intrinsic value of work to an individual's life, separate from but related to its financial value, the nature of the relationship between worker and management can be changed from a hierarchical one imbued with managerial prerogative to one involving a shared voice in, and concomitant loyalty to, the common enterprise.

Simply stated, the notion of workers as servants must be banished in order to take seriously their own judgments about the work they are called upon to perform, especially when matters of health and safety are involved. If a worker is viewed as a servant of capital who labors solely for the earned wages in order to pay for the costs of life, it ineluctably leads to a lower status in the workplace, a status that reflects the prevailing principles of the marketability (i.e., disposability) of labor. On the other hand, if work has value in and of itself, and if workers are perceived not as servants of production but as the "subject, rather than the object, of work,"²⁹⁰ the status of labor becomes equal with that of capital. It follows then that the judgment of equals on matters concerning workplace safety and health can be more readily accepted and deferred to than the judgment of servants.

290. See David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119, 128 (1988).

B. The Social Reconceptualization of the Meaning of Work: Utility and Vocation

Work, or at least the aspiration to work, is ubiquitous. Work permeates, and is often nearly synonymous with, much of both individual and social life. The individual person is dignified by work; the community is enriched by work. Society stands condemned by failure to provide meaningful work. In the book of Genesis, God enjoined humanity to earn its living: "In the sweat of your face you shall eat bread." By sin work was reduced to toil. Work became nothing more than a necessary means to the end of preserving life. Gradually, however, work as means was understood as affording its own intrinsic dignity. . . .²⁹¹

When we examine the nature of work, we must ask what is it that we accomplish from working? Does the eloquent quote by Professor David Gregory reflect the existing paradigm of what it means to work, or is there another paradigm that shapes the social consciousness of work? If work "is a fundamental dimension of human existence" as suggested by Professor Gregory,²⁹² how and why is that so? Certainly work fulfills needs: that of the employer, who requires our labor in order to "produce," and our own need to earn a living from our labor. But beyond this "exchange relation" of labor²⁹³ exists a transcendental reason for work that assumes an almost spiritual dimension based on intrinsic human needs, such as purpose, meaning, worth, fulfillment, dignity, and respect. To a greater or lesser extent, our labor — our work — can instill a purpose to life and imbue it with meaning and feelings of self-worth and fulfillment. This in turn allows us to gain self-respect from the dignity that meaningful work allows us to achieve.²⁹⁴

291. *Id.* at 129. This section draws upon Professor Gregory's article exploring the significant "interdisciplinary potential that the synergy of law and theology hold for labor law." *Id.* at 119. Professor Gregory's article resonates with themes central to the meaning of work. "Not a Catholic message in any parochial sense," Professor Gregory "describes the potential for contribution by a very progressive Catholic social teaching to the legal theory, and one day, to the practice of work." *Id.* at 120.

292. *Id.* at 130.

293. See Howard Lesnick, *The Consciousness of Work and the Values of American Labor Law*, 32 BUFF. L. REV. 833, 843 (1983) (discussing ATLESON, *supra* note 210).

294. Yet, it is troubling that "[w]ithin the minority of the world's population fortunate enough to be employed, a substantial portion of workers hate their working lives.

Unfortunately, this other “consciousness of work” is not the prevailing model. Professor Howard Lesnick describes the dilemma with acuity. He argues that there “is a consciousness of work that underlies and shapes our response to questions of law and questions of values.”²⁹⁵ This consciousness is defined as a “set of ordering perceptions, priorities, and premises that answers the questions: What is it to work? What is it that a person is doing when he or she works?”²⁹⁶ He sees the answer not as “simply some observed phenomena, but rather [as] a social construct — a choice of some kind that human beings have made for a reason.”²⁹⁷ According to Professor Lesnick, “the prevailing consciousness of work sees work as an exchange relation, the giving up of leisure, the expending of effort, in return for compensation (income, status).”²⁹⁸ In an exchange relation of work, the “meaning or value of work to the person who works is that it is a means toward self-sufficiency.”²⁹⁹

The exchange relation of work is rooted in the freedom of contract, a principle that pre-dated the Wagner Act as a means of governing the workplace.³⁰⁰ As Karl Klare noted, “despite the strongly anti-contractualist overtones of the [Wagner] Act, the Supreme

Rather than ennobling and empowering lives of workers with dignity and meaning, work instead often has the opposite influence of debasing workers' lives.” Gregory, *supra* note 290, at 120. The subject of worker alienation — or the “alienation of labor” — is not new. Indeed, according to Professor Gregory, the absence of true job satisfaction “proves the enduring rule of alienation almost a century and a half after Karl Marx first incisively analyzed the problem of alienated labor.” *Id.* at 123. Professor Gregory describes the situation as follows:

A profound malaise of spirit afflicts many workers. Misery, meaninglessness, deep dissatisfaction, and often unarticulable impoverishment of purpose plague even many of the “successful,” especially if “success” is measured only by conventional norms of monetary remuneration in late capitalist society. It has long been axiomatic that most persons who work for a living, as distinguished from those peculiarly driven to “live to work,” dread Monday morning.

Id. at 122.

295. Lesnick, *supra* note 293, at 842.

296. *Id.*

297. *Id.* Professor Lesnick captures this Article's premise that because choice is possible, the existing social order as it relates to the nature of work is not pre-ordained and can be changed. *Id.* at 843. Lesnick reminds us of Klare's observation that “[t]he mission of all critical social thought is to free us from the illusion of the necessity of existing social arrangements.” *Id.* at 843 n.44 (citing Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 *INDUS. REL. L.J.* 450, 482 (1981)).

298. *Id.* at 843.

299. *Id.*

300. Klare, *supra* note 270, at 293.

Court ensured from the start that contractualism would be the jurisprudential framework of the law of labor relations.”³⁰¹ According to Klare, the “central moral ideal of contractualism was and is that justice consists in enforcing the agreement of the parties so long as they have capacity and have had a proper opportunity to bargain for terms satisfactory to each.”³⁰² Contractualism is not concerned with the substantive terms of agreements reached and rejects governmental intrusion into the making of the bargain. It is an economic model based on human behavior within a “marketplace analysis using articulations of social costs and benefits.”³⁰³

In the labor law context, so-called labor and economics theory focuses on “economic efficiency” as a basic tenet of decision-making.³⁰⁴ Thus, adherents of this philosophy “tend to make cost and benefit arguments in support of legal rules that they find to be efficient and against legal rules that they find to be inefficient,” as a means of maximizing wealth and achieving “the best attainable social arrangement.”³⁰⁵ However, the policy goals of the LMRA must be considered in the “broader context of the employment relationship” and the role it plays in society.³⁰⁶ Thus, it can be argued that because employment has a significance beyond “mere economic subsistence” and because it “molds and . . . is molded by institutions

301. *Id.* at 294–95.

302. *Id.* at 295. Klare explains that the freedom of contract doctrine was central to the emerging capitalist order of the nineteenth century. “In the spirit of *laissez faire*, the doctrine extolled the social virtue of uncompelled private-ordering of most transactions: the right of private citizens to establish the legal incidents and standards governing most of their relationships.” *Id.*; see Feinman, *supra* note 285, at 132. According to Professor Feinman, “[a]n essential component of a capitalist system is the labor market,” where capital and labor enter into a wage bargain. *Id.* Feinman notes that while “the worker need not enter the wage bargain, or may do so only on favorable terms . . . in practice most of the advantages in this regard belong to the purchasers, not the suppliers of labor.” *Id.* at 133 n.120.

303. ROBIN P. MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* 53 (1990).

304. James B. Zimarowski et al., *An Institutional Perspective on Law and Economics (Chicago Style) in the Context of United States Labor Law*, 35 *ARIZ. L. REV.* 397, 398 (1993) (providing an excellent overview of the competing economic theories influencing American labor law).

305. MALLOY, *supra* note 303, at 60–61. Stated another way, “when examining a particular conflict situation, Chicago Style law and economics mandates a decision which maximizes the economic efficiency of the party having the most market power, and, because the discipline of the market is accepted as unassailable truth, it is taken on faith that society will inevitably benefit.” Zimarowski et al., *supra* note 304, at 430.

306. Zimarowski et al., *supra* note 304, at 410.

and society at large,” labor and employment law is “too complex and rich to be subsumed within a narrow economic efficiency theory.”³⁰⁷ Rather, social systems should be seen “as evolving political-economic-cultural processes,” and human decisionmaking within such systems should be “studied in a behavioral context as it actually occurs — that is, as a dynamic, cultural, structural, institutional, *imperfect* phenomenon — instead of as a theoretical, static, constrained optimization problem based solely on information about relative prices.”³⁰⁸

Furthermore, any claim that an individual worker who seeks employment in the modern labor market is the bargaining equal of her putative corporate employer “is difficult to swallow.”³⁰⁹ Professor Lesnick captures the contractualist ideal:

So long as it is not the law that interferes with your freedom, you are free, and the equality that is the majesty of the law is the equality of legal right. Substantive inequality — “inequalities of fortune” — is neither ignored nor lamented; it is valued positively; it is a social good.³¹⁰

Contractualism acts to reinforce the exchange relation of work and the lower status of the employee in the workplace, because it treats

307. *Id.* at 410–11. These authors note that the “NLRA was also concerned with redistributing bargaining power or wealth” and had as its basic goal the promotion of “industrial peace.” *Id.* at 426–27; see Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 995 (1986) (stating that “[t]he economist must first recognize that Congress intended a wealth transfer, not merely efficiency enhancement”).

308. Zimarowski et al., *supra* note 304, at 432.

309. ROBINSON, *supra* note 259, at 172. According to Robinson, there are many signs of the “economic and political power of management” over the worker: the decline of union representation; resistance to union health and safety programs; firing of workers in hazardous jobs; reorganization of production to reduce dependence on skilled workers; employer concealment of hazard information and opposition to disclosure requirements; corporate efforts to limit the worker’s right to act on workplace hazards; and political campaigns to eviscerate government regulation. *Id.*; see Jim Foster, *Health and Safety Versus Profits in the Coal Industry: The Gateway Case and Class Struggle*, APPALACHIAN J. 122 (Autumn-Winter 1983–84). According to Foster, the political consequence of this freedom of contract is to “legitimate inequalities of economic power.” *Id.* at 138 n.17.

310. Lesnick, *supra* note 293, at 845. Like Klare, Professor Lesnick notes that notwithstanding the enactment of regulatory schemes (such as the NLRA, OSHA, Fair Labor Standards Act, and Civil Rights Act of 1964) that are “seen as embodying a fundamental rejection of freedom of contract as a primary social value . . . each regulatory program is explicitly required to be construed to respect the principle of freedom of contract as much as possible.” *Id.* at 245–46.

the employment relationship as merely a function of the market where economic prerogative is controlling. Once the wage deal is struck, “authority over the manner of work and the workplace belongs to the employer, not the employee.”³¹¹

According to Lesnick, in the exchange relation of work, freedom of choice is seen as “an employee trading off the benefits and burdens of his or her options,”³¹² and, as particularly relevant here, it “is this framework that channels discussion of occupational health and safety . . . into a focus on employee trade-offs, reinforcing the assumption that high-risk jobs pay better.”³¹³ But this assumption may not be warranted.

Adam Smith argued that labor market competition leaves employers who possess hazardous job positions with no alternative but to offer higher wages or some other desirable benefits to retain workers.³¹⁴ In theory, according to Robinson, these competitive pressures result in the payment of extra wages to compensate workers for the extra risks they face.³¹⁵ Equally important, “hazard pay premiums provide employers with incentives to reduce health and safety risks.”³¹⁶ According to Robinson, two assumptions lie at the heart of Smith's “theory of compensating differentials:”

First, workers must be aware of the hazards they face and must not adopt an attitude of complacency, denial or machismo. Second, workers must have a number of meaningful job possibili-

311. Feinman, *supra* note 285, at 132.

312. Lesnick, *supra* note 293, at 846.

313. *Id.* According to Professor Lesnick, because “the prevailing consciousness rests on a world-view that denies that work can be made to be life affirming,” we accept as a given that work will “just barely [be] able to sustain life.” *Id.* at 851. Because we are resigned to this “reality” of work, all that is left is how to deal with it. Lesnick explains that this is reflected in the area of safety and health, where repeatedly we see “the strength of the belief that it is chimerical to expect the workplace to become truly safe. This mindset is a powerful input to the law's response to the prevalence of hazardous employment, and to our response to the law.” *Id.* Thus, “[o]ur sense of injustice about . . . a law [that denies protection to employees who quit work over safety concerns] is blunted by a basic skepticism about safe work.” *Id.* (citing ATLESON, *supra* note 210, at 97–100).

314. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 27 (1776).

315. ROBINSON, *supra* note 259, at 77. The extra wages or “hazard pay” is a kind of “insurance premium” paid to all workers but which only a few collect. *Id.*

316. *Id.* Thus, “[c]ompetition between workers in the labor market . . . provides compensation for injured workers and incentives for prevention of new injuries.” *Id.*

ties. [However,] [b]oth of these assumptions are at variance with the facts in the real world. *Workers are often not aware of the risks they face; this is particularly true in the case of subtle, long-term hazards to health.*³¹⁷

With the publication of *The Principles of Political Economy* in 1848, John Stuart Mill's "theory of non-competing groups" provided a compelling alternative to Adam Smith's theory.³¹⁸ According to Robinson, Mill believed that "the theory of compensating differentials was outrageously at odds with day-to-day observations about the wages paid in jobs with bad working conditions."³¹⁹ To Mill, it was a false view to argue that workers received extra compensation for employment in disagreeable jobs. Mill believed that this was because:

*[t]he really exhausting and the really repulsive labours, instead of being better paid than others, are almost invariably paid the worst of all, because performed by those who have no choice. . . . The more revolting the occupation, the more certain it is to receive the minimum of remuneration, because it devolves on the most helpless and degraded, on those who from squalid poverty, or from want of skill and education, are rejected from all other employments.*³²⁰

The payment of lower wages is premised on organizing the production process to facilitate the retention of a basically unskilled work force. This can be accomplished both through the technology that is brought into the workplace and by the institution of a layering of supervisory and managerial controls.³²¹ This type of operation is consistent with the prevailing view among employers that "it is more profitable to use less productive but lower-paid unskilled

317. *Id.* (emphasis added).

318. *Id.* at 78.

319. *Id.*

320. ROBINSON, *supra* note 259, at 78–79 (emphasis added).

321. *Id.* at 79. Yet, "unskilled workers are less productive than are skilled workers." *Id.* Robinson explains that "[a]ll employers seek the appropriate balance of skill, productivity, and wages that yields the highest surplus of revenues over costs." *Id.* Mill's theory of non-competing groups implies that "employers using hazardous technologies generally . . . [reduce] skill requirements and wage rates rather than raising them" because they "find that the extra productivity of skilled workers is not adequate to cover their wage demands." *Id.*

workers for jobs posing health and safety risks.”³²² Furthermore, as amply demonstrated by the TNS workplace, characteristically, unskilled workers are less educated and minimally trained;³²³ they are much less likely to receive on-the-job training than workers in safe occupations,³²⁴ and, importantly, contrary to common wisdom, “[t]he pattern across the various data sets is consistent and clear: workers in hazardous occupations are paid less than workers in safe occupations.”³²⁵ Hazardous occupations also offer less job security, with rates of both permanent and temporary layoff significantly higher than rates in safe occupations.³²⁶ In sum, a comparison of safe and hazardous jobs reveals that unsafe work is performed by employees who have less education and on-the-job training, who have few promotional opportunities and little job security, and who perform more routinized and rule-bound work, all for lower pay.

Robinson's observation that “the typical hazardous occupation is unattractive in virtually every measurable dimension [and that] [p]eople do not voluntarily choose hazardous occupations if they have other possibilities”³²⁷ would resonate with familiarity for the TNS workers. While collective bargaining provided TNS workers with a measure of remunerative benefit for their labor, it could not give them other possibilities when their working environment became poisonous. Attempts to negotiate better working conditions fell upon deaf ears, and regulatory agencies were impotent to act. When self-help became a last means of protection for the workers from their daily exposure to excessive radioactivity, the law chose to

322. *Id.* at 80.

323. For Mill, “the important characteristic of modern society is the inequality in access to education and training that persists among workers.” *Id.* Based on statistics compiled by the 1977 Quality of Employment survey conducted by the University of Michigan, and the 1978 and 1980 National Longitudinal Surveys conducted by Ohio State University, Robinson concludes that “[t]he association between hazard levels and educational requirements is very powerful. While approximately one third of workers in hazardous occupations lack a high school diploma, only one-tenth of workers in safe occupations have no diploma.” *Id.* at 82; *see id.* at 18, 80.

324. *Id.* at 83.

325. *Id.* at 88. Robinson's conclusion is based on an analysis of five data sources. *Id.* at 87–88.

326. *Id.* at 87.

327. *Id.* at 88–89. Robinson concludes by pointedly asserting that “[e]ndemic social and economic inequality in society at large provides . . . employers with a supply of disadvantaged workers willing to accept health and safety risks in return for very modest amount of compensation.” *Id.* at 94.

second-guess their judgment — eleven years later.

However, if moral choice is a basic foundation of law, it must be exercised in a way that protects those most in need of protection, such as those employees laboring in hazardous occupations. The NLRB's decision in *TNS* can be viewed as either ignoring this moral dimension to decisionmaking or choosing to reject a basic morality of the LMRA: to ensure in § 502 that employees need not toil in conditions “which modern labor-management legislation treats as too bad to have to be tolerated in a human and civilized society.”³²⁸

An examination of the pre-strike work force at TNS provides a compelling case study of Mill's theory of non-competing groups. The work force was inexperienced and uneducated, and they were ill-trained and had little by way of qualifications to allow them to seek employment elsewhere.³²⁹ Management treated the work force as

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

329. One of the issues in *TNS* dealt with the timing of the strike. The plurality found that the employees failed to respond to “immediate danger” (as they interpreted the *Gateway Coal* test) by delaying their strike while they continued to work under the putative abnormally dangerous conditions. *TNS, Inc.*, 309 N.L.R.B. 1348, 1370 (1992). According to the plurality, “when the issue is whether employees reasonably believe that their working conditions threaten their lives and health, the longer they remain in the plant, working under those same conditions, the more difficult it is to find the existence of such a belief.” *Id.* In so finding, the plurality rejected the dissent's argument that the employees delayed their strike because “they needed the jobs” as “unsupported surmise.” *Id.*

In fact, the dissent's argument was much more textured and credible than the plurality's description of it. First of all, the time lapse between the union's ultimatum to TNS that the employees would strike over the safety issues and the actual strike was but seven weeks. During that time, the employees pursued a permanent remedy for the abysmal working conditions through good faith collective bargaining, as contemplated by the statute. *Id.* at 1371 (Devaney, Member, dissenting). When collective bargaining failed, the walkout ensued. The dissent accurately pointed out that the plurality's evaluation of the timing of the strike and the “very questions the plurality raises with respect to the actions of the . . . employees indicate its failure to grasp the meaning of slowly developing dangers and how employees who face such threats grapple with the issues such dangers raise.” *Id.* at 1374 n.13. According to the dissent, although such questions as why the employees failed to consult with TDRH before striking and why they chose May 1 to strike when the plant was just as dangerous at other times “would be highly relevant to a situation in which employees were faced with dangers that might strike them down at any moment,” they are not “directly relevant to the question of whether TNS employees reasonably believed that day by day, shift by shift, their chance at living a healthy life was diminishing.” *Id.* Importantly, the dissent evaluated the nature of the work force at TNS, especially its overall lack of education and training, and found that “many employees . . . afraid that they were being poisoned by the toxins at TNS . . . wanted to walk out before [the expiration of the contract] but fear that they would lose their jobs restrained them.” *Id.* at 1374 n.11. The dissent's observation about the employ-

disposable pieces in the production process, rotated workers from job to job, and depended upon their generally short tenure of employment as a means of avoiding a finding of immediate physiological harm. The workers' environment was filled with carcinogenic dust to which management responded by forcing employees to strap on choking respirators for periods far in excess of regulatory limits. "Blowouts" that emitted flaming bits of uranium and thick smoke were common occurrences. Safety equipment was either nonexistent, severely compromised, or rigged.³³⁰

If Klare's observation that all decisionmaking is a product of moral and political choice is accurate, as it appears to be, then the Board's decision in *TNS* appears to be a political choice based on a skewed morality. Among the rights of employees "there should never be overlooked the right to a working environment and to manufacturing processes which are not harmful to the workers' physical health or to their moral integrity."³³¹ Given the opportunity to choose an interpretation of the law based on this inherent morality underlying the policy of § 502, and in the face of overwhelming factual support for an interpretation that "protects those most in need of protection," the Board chose another much more frequently traveled course. That course is a paean to the "exchange relation" of work, as the Board's decision was bereft of any recognition of employee voice in the workplace and simply reinforced hierarchical status assumptions about the role and proper "place" of workers in the employment relationship.

C. An "Alternative Consciousness" of Work Will Lead to Greater Deference to Employee Judgments About Working Conditions and to a Healthier and Safer Workplace

If the prevailing consciousness of work leads to such a result,

ees' fear of losing their jobs was not only supported by evidence in the record but by empirical studies and by plain common sense, something that the plurality's analysis seemed to have neglected and the absence of which often has been criticized by reviewing courts. See David L. Gregory, *The National Labor Relations Board and the Politics of Law*, 27 B.C. L. REV. 39 (1985).

330. An employee and union steward Bettis observed that "duct tape" was used extensively to keep equipment in operation. H.R. REP. NO. 102, 97th Cong., 1st Sess. 10 (1981).

331. Lesnick, *supra* note 293, at 855 n.78 (citing POPE JOHN PAUL II, *LABOREM EXERCENS (ON HUMAN WORK)* (Papal Encyclical Letter 1981)).

what benefit, if any, would ensue from an “alternative consciousness?”³³² Is this a viable vehicle for changing workplace priorities so that employee judgments can be heard? According to Professor Lesnick, “[a]n alternative consciousness starts from the ontological reality that work is the expression of a basic human need.”³³³ He explains that “[w]ork is more than the sale of a saleable portion of oneself in return for self-sufficiency; it is an expression of one's energy, one's capacity and desire to be useful, one's responsibility and connection to fellow humans.”³³⁴

Professor Gregory shares in the belief that “the world of work will be transfigured only when labor is given priority over capital and material is harnessed to serve humanity.”³³⁵ He finds that the “illegitimate transmogrification of the worker into object rather than subject of work is one root aspect of the alienation of labor.”³³⁶ Therefore, it is only when the person is viewed as the “subject of work” that he or she will become “more important than the object produced.”³³⁷

The subjectification of the workplace could lead both capital and labor to a new relationship where the goal is not necessarily the total abolishment of hierarchy in the workplace, but a re-casting of

332. *Id.* at 853.

333. *Id.* at 854. Similarly, Professor Gregory states that “there is no doubt that human work has an ethical value of its own” and “helps us become more fully human.” Gregory, *supra* note 290, at 130. Furthermore, “[w]ithout meaningful work, crushing poverty of both material and spiritual life is inevitable.” *Id.*

334. Lesnick, *supra* note 293, at 855. Professor Lesnick believes that “[s]eeing the utility of work as not wholly external to the worker, and its meaning as more than a means toward self-sufficiency, would tend to legitimate the issue of work restructuring — the desire to make the workplace consonant with the values of a democratic social order and a fully enfranchised citizenry, and to make work consonant with the values of the individual worker.” *Id.* at 856.

335. Gregory, *supra* note 290, at 121. Gregory believes this viewpoint to be consistent with the 1981 Papal Encyclical Letter, which “expressly declared the priority of labor over capital and asserts the inherent dignity of work.” *Id.* at 127.

336. *Id.* at 128.

337. *Id.* As Professor Gregory explains:

The dignity and honor which work communicates to people is derived not so much from the objective dimension, from their achievement, from the product of their hands and minds, as from the subjective dimension; it is ultimately man's engagement which counts, his fidelity to the call, his increasing sense of responsibility, his self realization. In labor the transformation experienced by the subject is of greater value and importance than the object produced.

Id. (citing GREGORY BAUM, ON THE PRIORITY OF LABOR 14 (1982)).

the role of the worker.³³⁸ Allowing workers greater discretion in how to perform their work and giving them more responsibility for the work they perform as well as involvement “in the process of work” can make dangerous workplaces safer.³³⁹ This would also be consistent with an alternative consciousness of work.

As Lesnick explains, “[t]he central idea of that consciousness is that part of your being a person is bound up with wanting to work, with wanting to be useful, with wanting to express your energy, your creativity, your connection to other people. . . .”³⁴⁰ Thus, work can mean more than just a way of earning a paycheck, if the process of work is structured to tap into the intrinsic needs of people: this includes more of a say in the destiny of their working lives, such as whether or not the way work is performed and the conditions in which it is accomplished are safe and healthful. Furthermore, the values which underlie an alternative consciousness of an individual's work are equally the values that will inure to the benefit of capital.³⁴¹

338. See David L. Gregory, *Lessons from Publius for Contemporary Labor Law*, 38 ALA. L. REV. 1 (1986). Professor Gregory repudiates both “radical workplace democracy” and the “free’ market black letter of the Constitution,” believing instead in the preeminence of the adversarial collective bargaining model. *Id.* at 13–14. He sees total democracy in the workplace as abolishing the “factions of labor and ownership at the heart of collective bargaining.” *Id.* at 16. More ominously, Professor Gregory asserts that “[r]adical egalitarian labor theory will implode,” because it can be exploited “by ruthless corporate paternalism” which will follow principles of workplace democracy “only when, and to the extent that, it suits the immediate interests of ownership.” *Id.* at 21. He foresees the potential for the utter compromising of “labor militancy . . . as workers increasingly adopt the views of management and are robbed of their labor consciousness.” *Id.* at 22–23.

Certainly, the “ideological debilitation” of workers must be avoided even as they are given a greater voice in the workplace. What is needed, however, is not a labor force that seeks to manage the enterprise, but which assumes equal status on questions affecting their working environment. Paraphrasing Klare, the issue is “not whether the workers will take ownership of the means of production,” but whether workers will “gain some measure of control over their industrial lives” on matters affecting their safety and health. *Id.* at 16–17 (citing Karl E. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 758 (1985)).

339. See Gregory, *supra* note 290, at 140.

340. Howard Lesnick, *Artists, Workers and the Law of Work: Keynote Address*, in THE JOURNAL OF ARTS, MANAGEMENT AND LAW, Vol. 16 (1986).

341. See David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C. L. REV. 135, 149 (1988). Professor Gregory discusses the role of the International Labor Organization in furthering the “dignity and human rights” of workers and notes that “[t]he I.L.O.’s aim is not, in short, simply to protect workers

If we accept that there is a symbiotic relationship between labor and capital,³⁴² another vision of the "common enterprise" can be created. In this vision, labor's duty of loyalty would be balanced by an equivalent loyalty on the part of capital to honor the judgment of labor concerning safety and health conditions in the plant.³⁴³ A concomitant duty of loyalty on the part of employers may necessarily curb capital's heretofore virtually inviolate rights of property and production.³⁴⁴ But this seems like a fair accommo

from exploitation and injury. *It is also to demonstrate the salutary effects that good, safe, and humane working conditions can have on the workers' morale and thus on the output and growth of the economy. . . .*" *Id.* (emphasis added).

342. Gregory, *supra* note 290, at 148. As noted by Professor Gregory:

The Catholic model for effectuation of the priority of labor continues to appreciate the aphorism that labor needs capital as its means. Capital needs labor, because capital as means is designed to serve the labor ends of achieving human dignity in the world of work. Capital is the means, the important instrument of labor.

Id. at 149.

343. See Patricia H. Werhane, *Accountability and Employee Rights*, in PHILOSOPHICAL ISSUES IN HUMAN RIGHTS 259 (1986). Werhane argues that the reciprocal nature of the employee/employer relationship in the workplace "entails some important employee rights, in particular: the right to fair treatment and respect in the workplace." *Id.* at 262. Werhane believes that employee loyalty produces a correlative duty of respect towards the employee by the employer in matters of employee privacy, worker safety, and due process in the workplace, among others. According to Werhane, "[i]f an employee is to respect his or her employer and the decisions of that employer, the employer reciprocally needs to honor the employee as a human being." *Id.* at 263. Such respect for the employee includes "maximizing worker safety and providing [employees with] information about unavoidable hazards in the workplace." *Id.*

344. A duty of loyalty on the part of employers might have far-reaching implications. For example, would the mobility of capital be constrained by a duty of loyalty owed to employees who would be terminated by a plant relocation or shutdown? Would a duty of loyalty on the part of capital extend to a community which has supported the company's operations with tax incentives and the like? See, e.g., *Local 1330, United Steelworkers of Am. v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980). While the district court denied an injunction request that would have prevented the defendant from closing its plant, its language spoke to the relationship between the parties and the public interest and shed light on the questions this Article has presented:

Everything that has happened in the Mahoning Valley has been happening for many years because of steel. . . . [T]o accommodate that industry, lives and destinies of the inhabitants of that community were based and planned on the basis of that institution: Steel. . . . But what has happened over the years between U.S. Steel, Youngstown and the inhabitants? Hasn't something come out of that relationship . . . looking at the law as a whole . . . and reflecting on what it seeks to do . . . to adjust human relationships in keeping with the whole spirit and foundation of the American system of law, to preserve property rights.

It would seem to me that when we take a look at the whole body of

dation when the stakes are balanced. The right of production, while important, should yield to what is arguably the greater moral prerogative of workers to be free from employment hazards that pose a serious threat to their safety and health.³⁴⁵

American law and [its] principles . . . that a property right has arisen from this lengthy, long-established relationship between United States Steel, the steel industry as an institution, the community in Youngstown, the people in Mahoning County and Mahoning Valley in having given and devoted their lives to this industry. Perhaps not a property right to the extent that it can be remedied by compelling U.S. Steel to remain in Youngstown. But I think the law can recognize the property right to the extent that U.S. Steel cannot leave that Mahoning Valley and the Youngstown area in a state of waste, that it cannot completely abandon its obligation to that community, because certain vested rights have arisen out of this long relationship and institution.

Id. at 1280.

Ultimately, however, the court concluded that there is no “legally recognizable property right in a job” even where it “has been held for something approaching a lifetime.” *Id.* at 1281. The court also rejected the promissory estoppel and detrimental reliance arguments advanced by the plaintiffs. However, for a perspective on the potential for using contract law theory to change the social order in a case such as *Local 1330*, see Jay Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983). In addition, it can be argued that there is a constitutional or civil right to a job. See *infra* note 345.

345. This prerogative could be described in terms of a “civil right” to be free from workplace hazards and poisons that endanger safety and health. While beyond the scope of this Article, the recognition of such a “civil right” or of a broader civil or constitutional right to a job, are related issues dealing with the status of workers and the prerogatives of capital.

For example, Professor Arthur Miller has argued that if “our constitutional system rests on . . . [the] moral theory that men have moral rights against the state,” then “high among those ‘moral rights’ is that of a constitutional right to a job.” Arthur Miller, *Toward Recognition of a Constitutional Right to a Job*, in *POLITICS, DEMOCRACY AND THE SUPREME COURT, ESSAYS ON THE FRONTIER OF CONSTITUTIONAL THEORY* (1985) (quoting RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 147 (1977)). Professor Miller looks to the Supreme Court to establish that workers have “a constitutional right to a job” as a way of “ameliorat[ing] the adverse consequences” of unemployment caused by new technologies. *Id.* at 319, 326. According to Professor Miller, “[t]he basic principle that would have to be established (invented) is that the liberty protected by due process includes a right to a job; or . . . more concretely, that the citizenry have property rights in jobs.” *Id.* at 330. He believes that “the time has come for serious consideration to be given to the idea that constitutions should be directed toward the reasonable satisfaction of human needs” such as the need for work. *Id.* at 321.

Catholic labor theory itself approaches work from a moral perspective:

Man is defined as worker. Man creates his own history through labor. Man is the subject of labor, and through his labor is meant to become more fully subject of his work. Man's self-constitution through labor is a moral task
GREGORY BAUM, *ON THE PRIORITY OF LABOR* 7 (1982). “[B]ecause employment is a basic right, society has a duty to protect it.” Gregory, *supra* note 290, at 132. “[T]he rights of workers and of humans are fundamental human rights.” Gregory, *supra* note 341, at

V. UNSETTLED QUESTIONS: CAN EMPLOYEES WHO ENGAGE IN A § 502 WORK STOPPAGE BE PERMANENTLY REPLACED? WHAT IS THE EFFECT OF A CONTRACTUAL NO-STRIKE CLAUSE OR OTHER STATUTORY BARS ON STRIKING? WHAT STANDARD OF CAUSATION SHOULD BE USED?

In the landmark *NLRB v. Mackay Radio & Telegraph Co.* case, the Supreme Court was asked to decide whether the company had violated § 8(a)(1) and (3) of the NLRA by discriminatorily failing to reinstate five strikers because of their activities in behalf of the union.³⁴⁶ Yet, the case is not recalled for the Court's holding on this narrow issue but, rather, for the Court's dicta anointing companies with the right to permanently replace workers who strike over economic issues.

The facts in *Mackay Radio* are straightforward. In response to a strike called by the union during contract negotiations and in order to replace striking workers, the company transferred several employees to its San Francisco office from other offices around the country.³⁴⁷ These employees accepted the transfers on the condition that they could remain in their new jobs at the strike's conclusion.³⁴⁸ When the strike failed, the company reinstated all but five strikers who were "prominent" in the union.³⁴⁹ There was strong evidence of a discriminatory motive behind the company's failure to reinstate the five.³⁵⁰

The Court upheld the NLRB's finding that the company violated the NLRA by discriminating against those most active in the union by denying them reinstatement.³⁵¹ However, in the course of reaching this result, the Court noted that there was "no evidence and no finding that the [company] was guilty of any unfair labor practice in

152.

346. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

347. *Id.* at 338.

348. *Id.*

349. *Id.* at 339.

350. *Id.* As noted by the Court, several of the five men were told that their union activities "made them undesirable" workers. *Id.* There was also evidence of disparate treatment concerning the re-employment process. *Id.*

351. *Id.* at 346.

connection with the negotiations.”³⁵² Despite it being unnecessary to a determination of the issue before it, the Court then stated as follows:

Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although § 13 provides, “Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,” it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by . . . [the company] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.³⁵³

Since the creation of the *Mackay Radio* doctrine, the search to define the nature or cause of a work stoppage has become a focal point of inquiry, since the fate of the strikers and, in all likelihood, the success of the strike itself hang in the balance. If a strike is found to have been motivated by a dispute over economic issues — such as wages, hours, and other terms and conditions of employment, including safety and health issues — it is considered an economic strike.³⁵⁴ In such instances, the employer may deny reinstatement to the strikers provided it can demonstrate that a replacement employee for the striker has been hired on a “permanent” basis.³⁵⁵ The hiring of permanent replacements qualifies as a “legitimate and substantial business justification” that would allow an employer to deny reinstatement to an economic striker.³⁵⁶

352. *Id.* at 345. Indeed, there was no issue concerning the conduct of the negotiations.

353. *Id.* at 345–46. Likewise, there was no issue concerning whether the company had committed an unfair labor practice by hiring and retaining replacement employees.

354. *See* *Keystone-Seneca Wire Cloth Co.*, 244 N.L.R.B. 398 (1979).

355. *Belknap, Inc. v. Hale*, 463 U.S. 491, 500 (1983).

356. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967). Other examples of legitimate and substantial business justifications for denying reinstatement to strikers include acts of picket line misconduct or a loss of business. *See* *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984). However, unreinstated economic strikers remain employ-

However, if a strike is caused “in whole or in part” by a company unfair labor practice, it is considered an unfair labor practice strike.³⁵⁷ In that case, the employer may not permanently replace the strikers, who are entitled to reinstatement to their former positions upon their unconditional offer to return to work, even if replacements for them have been hired.³⁵⁸

A. A Work Stoppage Under § 502 Is Not a Strike and the Reach of § 502 Is Not Limited to Situations Involving Contractual or Statutory Bars on Striking

In *TNS*, the National Labor Relations Board was faced with several questions concerning the nature of the work stoppage and the reinstatement rights of the strikers.³⁵⁹ Naturally, the strike had to be categorized; yet the traditional pigeonholes — economic or unfair labor practice — do not readily apply to a work stoppage under § 502. Indeed, that section makes it plain that a cessation of work over abnormally dangerous working conditions is not a “strike” at all, as that term is used in § 13 and defined in § 501 of the LMRA.³⁶⁰ As noted by the Administrative Law Judge, in § 502 “[C]ongress took pains to provide . . . that certain employees' conduct would not be deemed a strike within the definition of Section 501.”³⁶¹

In rejecting *TNS*' argument on the scope of § 502 protection, the A.L.J. concluded that there is “nothing in the Act or its legislative history which supports . . . [the] view . . . or which indicates that

ees and are entitled to reinstatement as replacements leave. *See Laidlaw Corp.*, 171 N.L.R.B. 1366, 1368 (1968).

357. *Tufts Bros., Inc.*, 235 N.L.R.B. 808, 810 (1978).

358. *See Mastro Plastics, Inc. v. NLRB*, 350 U.S. 270, 278 (1956).

359. *TNS* contended that even if the strikers were “protected” by § 502, they must be considered economic strikers subject to permanent replacement. Essentially, *TNS* argued that there was no difference between a safety and health strike under § 7 and a work stoppage under § 502, and that in either case the strike was “economic” in nature. *TNS, Inc.*, 309 N.L.R.B. 1348, 1355 (1992). *TNS* also argued that the protection of § 502 is applicable only in cases where the work stoppage would otherwise be in violation of a contractual no-strike clause or other statutory ban. *Id.*

360. Section 501 defines a strike to include “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.” Labor Management Relations Act, 29 U.S.C. § 142(2) (1988).

361. *TNS*, 309 N.L.R.B. at 1450. The A.L.J. concluded, “Section 502 is titled and intended as a savings provision: work stoppages coming within this section are ‘saved’ from the definition of strikes contained in its companion 501.” *Id.*

Congress intended to limit . . . [§ 502] solely to situations in which employee actions are barred by a no-strike clause.”³⁶² The A.L.J. believed this conclusion “inescapable” since the “normal meaning of the words ‘shall not be deemed a strike’ . . . [when] considered in the context of the Act as a whole” demonstrate that § 502 was “meant to protect employees who ceased working because of abnormally dangerous conditions . . . even when their collective-bargaining agreement has expired.”³⁶³ In reaching this result, the A.L.J. rejected case law that seemingly limited § 502 relief to instances where the cessation of work occurred in the face of a contractual no-strike clause.³⁶⁴

While the opinions by the various Board members in *TNS* did not specifically address this issue, it appears that Member Raudabaugh's concurring opinion and Member Devaney's dissent implicitly acknowledged the applicability of § 502 to the TNS work stoppage, even though the collective bargaining agreement had expired and there was no contractual obligation to refrain from striking.³⁶⁵

As the A.L.J. contended, the only interpretation available based on the wording of the statute and the dearth of legislative history concerning § 502 is one that does *not* limit its applicability to situations involving a contractual or statutory bar on striking. Not only is

362. *Id.*

363. *Id.* The A.L.J. believed that “[a]cceptance of a contrary view would thwart the benevolent purpose which underlies Section 502.” *Id.*

364. As the A.L.J. stated, this mere circumstance has arisen because of the factual setting of *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974). *Gateway Coal* involved a section 301 action to enjoin a “strike” which was alleged to be in violation of a contractual no-strike clause. *See supra* pp. 34–38. In deciding the specific issue before it concerning the arbitrability of the dispute, the *Gateway Coal* Court commented that § 502 “provides a limited exception to an express or implied no-strike obligation.” *Id.* at 385. The Court was not called upon to decide the applicability of § 502 in other contexts and, as aptly noted by the A.L.J., “[t]his one interpretation did not exclude all others.” *TNS*, 309 N.L.R.B. at 1451.

Commentators have also contributed to a restrictive understanding of § 502. *See, e.g.,* Ashford & Katz, *supra* note 80, at 807 (stating that “§ 502 defines the scope of the concerted activities protected by § 7 in the context of a no-strike clause in the collective bargaining contract”); Atleson, *supra* note 70, at 659; Backer, *supra* note 99, at 545 (stating that “§ 502 exempts work stoppages related to ‘abnormally dangerous conditions’ from no-strike clauses in collective bargaining agreements”). As noted, these unwarranted, restrictive interpretations flow from the facts of *Gateway Coal* and not from the statute or its legislative history.

365. The difference of opinion between the concurring and dissenting Board members dealt with the issue of causation and the standard to apply in determining whether a work stoppage was in response to abnormally dangerous working conditions.

this “limitation” on the use of § 502 traced to the *Gateway Coal* decision and its specific factual setting (which cannot legally exclude other contexts in which the issue might arise), but to read such a restriction into the law would severely penalize non-union employees by denying them access to § 502.

As discussed below, because there is a qualitative difference in the reinstatement rights available to employees under § 502 compared to § 7, one cannot simply argue that unrepresented employees, who are not covered by a collective agreement, can seek refuge in § 7 in order to escape abnormally dangerous working conditions. Equally important, under § 502 a single employee, acting alone, may cease work and find protection under the law, while under § 7 “concert” of action is required and a single employee acting alone is unprotected.³⁶⁶ To deny non-union employees this protection would be an especially ironic result, given that § 502 is intended as a source of empowerment for employees and not necessarily for unions.³⁶⁷ Perhaps unwittingly, it would also provide a statutory sanction for the preferential treatment of individual employees on the basis of union representation.³⁶⁸

366. See *supra* pp. 32–34. As noted, even the plurality's decision in *TNS* reaffirms this principle by stating that the plain meaning of § 502 “is that *one* or more employees who quit labor because of abnormally dangerous conditions for work are not engaged in a strike.” *TNS*, 309 N.L.R.B. at 1356 (emphasis added).

367. See Atleson, *supra* note 70, at 660 (arguing that § 502 “should be interpreted to protect even an unauthorized walkout” since “[t]he Section is aimed at protecting employees and not unions”); see also *TNS*, 309 N.L.R.B. at 1450 (stating that § 502 “was added to safeguard employee rights when workers withheld their labor because of abnormally dangerous conditions . . . [and] Congress recognized that individuals, not the union entity, required protection under such circumstances”).

368. A related question is whether and to what extent § 502 modifies § 7. The crux of the issue is that § 8(a)(1) of the NLRA makes it an unfair labor practice to “interfere with, restrain or coerce employees” in the employees' exercise of § 7 rights. Although § 502 establishes a separate source of employee rights, the literal language of § 8(a)(1) does not redress a violation of those rights. In *Tamara Foods, Inc.*, 692 F.2d 1171 (8th Cir. 1982), the court raised the issue of whether § 502 modifies § 7 and concluded that it did not. Yet, other circuit courts have reached the opposite conclusion. See, e.g., *Philadelphia Marine Trade Ass'n v. NLRB*, 330 F.2d 492 (3d Cir. 1964); *NLRB v. Knight Morley*, 251 F.2d 753 (6th Cir. 1957). The NLRB has not specifically addressed this issue, reserving its right to do so until it is squarely confronted with the issue. See *Beker Indus. Corp.*, 268 N.L.R.B. 975, 975 n.1 (1984).

It would appear that § 502 must modify § 7 in order to satisfy the remedial scheme of the statute. As noted by Ashford and Katz, “the relationship between § 7 and § 502 remains unclear in many respects.” Ashford & Katz, *supra* note 80, at 807. The authors suggest that the sections could be “read as establishing separate rights, without coterminous application.” *Id.* In *TNS*, the A.L.J. concluded that “employees who withhold

B. The Permanent Replacement Issue

When workers turn to self-help under § 7 of the LMRA to escape unsafe conditions in the plant, they do so only at great peril to their jobs. As noted above, while employees may have the right to strike over safety and health issues, they are considered economic strikers who can be permanently replaced.³⁶⁹ The right to strike is thus an illusory one at best. In *TNS*, the Board was presented with an opportunity, which it did not seize,³⁷⁰ to decide whether workers who invoke § 502 and strike over “abnormally dangerous” working conditions are also subject to permanent replacement.

The A.L.J. concluded, contrary to TNS' claim, that a work stoppage under § 502 is not analogous to a “safety strike” under § 7.³⁷¹ Noting the different levels of danger contemplated by the two sections, and especially the significantly higher standard of proof required under § 502,³⁷² the A.L.J. found that “employees engaged in a

their labor because of abnormally dangerous conditions are engaged in concerted activity for their mutual aid and protection within the meaning of [§] 7 of the Act.” *TNS*, 309 N.L.R.B. at 1454. While this was an appropriate analysis of the collective action in *TNS*, it overlooked the more restrictive definition of concerted activity under *Meyers Industries, Inc.*, 281 N.L.R.B. 882 (1986), and the fact that individual employee action is protected under § 502 but not under § 7 except in limited circumstances.

Additionally, while the A.L.J. concluded that TNS' unlawful conduct “stems from permanent[ly] replacing and refusing to reinstate its employees” in violation of §§ 8(a)(1) and 8(a)(3) of the NLRA and labeled such conduct as interfering with, coercing, and restraining employees in the exercise of their § 7 rights, it was fundamentally not § 7 but rather § 502 activity that was at issue. *TNS*, 309 N.L.R.B. at 1454. Yet, it would be anomalous for Congress to provide statutory protection in order to escape abnormally dangerous working conditions but not to provide a remedy for an employer's retaliation toward the exercise of that right. One must conclude that Congress did not intend such a result and that § 502's protections are implicitly, if not explicitly, a part of employees' § 7 rights.

369. See *Keystone-Seneca Wire Cloth Co.*, 244 N.L.R.B. 398 (1979); see also text accompanying note 359.

370. Specifically, in view of its finding that the work stoppage was not protected by § 502, the plurality declined to address the permanent replacement issue. The concurring opinion of Member Raudabaugh, while hedging on whether abnormally dangerous working conditions existed at TNS, saw it as unnecessary to reach that issue based on his conclusion that the strike was economic in nature. Although Member Raudabaugh likewise did not specifically answer the question of statutory interpretation concerning the permanent replacement issue, he articulated a causation standard to assess when a strike is protected by § 502. Member Devaney's dissent squarely faced the issue and concluded that § 502 “strikers” cannot be permanently replaced.

371. *TNS*, 309 N.L.R.B. at 1452.

372. Under § 7, employees who strike over safety and health issues need only

work stoppage protesting abnormally hazardous conditions are not engaged in an economic strike and may not be permanently replaced.³⁷³ In reaching this result, the judge noted that the *Mackay Radio* decision, which gave employers the right to permanently replace economic strikers, was based on a weighing of “two equally valid interests of parties engaged in a purely economic struggle. . . .”³⁷⁴ The judge found that the “same equities” did not apply to a work stoppage under § 502 because “economic peace” is not at issue.³⁷⁵ The judge concluded that “when a work stoppage results from abnormally dangerous conditions, an employer may not resort to the same weapons available in an economically motivated work stoppage,” since “the very nature of the two types of work stoppages (economic and Section 502) are entirely different.”³⁷⁶ The judge reasoned that permanent replacement would leave employees in the very “dilemma that section 502 was meant to prevent,” i.e., having to risk their lives for fear of losing their jobs.³⁷⁷

In his dissent, Member Devaney agreed with the A.L.J. and concluded that as a matter of “labor policy, the appropriate choice is to ensure that employees' job rights are protected when they leave their jobs” because of abnormally dangerous working conditions.³⁷⁸ Like the A.L.J., Member Devaney saw the *Mackay Radio* doctrine as

demonstrate a reasonable belief in the existence of the conditions that prompted the strike. The striking employees do not have to demonstrate that they were correct in their belief. LMRA, 29 U.S.C. § 157 (1988). Under § 502, of course, employees must demonstrate a good faith belief in the existence of abnormally dangerous working conditions which must be proved correct on the basis of “ascertainable objective evidence.” LMRA, 29 U.S.C. § 143 (1988).

373. *TNS*, 309 N.L.R.B. at 1452.

374. *Id.* at 1453. The A.L.J. saw these interests as the employer's right to continue running its business against those of the employees who voluntarily chose to strike over the terms and conditions of their employment. Whether or not these are equally valid interests is the subject of much debate, but this debate is beyond the subject matter of this Article.

375. *Id.*

376. *Id.* (quoting *Clark Eng'g & Constr. Co. v. United Bhd. of Carpenters*, 510 F.2d 1075, 1079 (6th Cir. 1975)); see *Philadelphia Marine Trade Ass'n v. NLRB*, 330 F.2d 492 (3d Cir. 1964) (finding that employer may not use lockout, an otherwise lawful economic weapon, in response to employee work stoppage over abnormally dangerous conditions). The A.L.J. in *TNS* noted that if “a lockout . . . is an illegitimate weapon when used against employees in a § 502 work stoppage, it follows, *a fortiori*, that permanent replacement also is . . . [unavailable] to an employer in such circumstances.” *TNS*, 309 N.L.R.B. at 1453.

377. *TNS*, 309 N.L.R.B. at 1453.

378. *Id.* at 1372 (Devaney, Member, dissenting).

limited to those instances where “the parties are engaged in economic warfare during an economic strike.”³⁷⁹ Analogizing to situations involving unfair labor practice strikes, where to allow the replacement of strikers would only serve to perpetuate the employer's unlawful conduct, Member Devaney would find:

the employer's right to wield economic weaponry as set forth in *Mackay* should not extend to a Section 502 work stoppage. When employees quit the workplace because they believe that abnormally dangerous conditions prevail, they are not using the work stoppage as an economic weapon. Rather, they . . . leave the workplace for fear of injury or death.³⁸⁰

The dissent further noted that the policies underlying § 502 are best served by denying companies the right to permanently replace employees engaged in a § 502 walkout.³⁸¹ According to the dissent, in spite of § 502's “scanty” legislative history its “broad and positive language establishes one basic and profoundly significant fact: a Section 502 work stoppage is not an economic action . . . because the express language of Section 502 states that this type of work stoppage is *not a strike*.”³⁸²

C. Employees Who Cease Work Because of Abnormally Dangerous Working Conditions Should Not Be Subject to Either Permanent or Temporary Replacement

One must conclude that § 502 protects employees from permanent replacement. Fundamentally, § 502 would be superfluous if workers who cease work under that provision could be permanently replaced, since § 7 already gives them the dubious option of walking out over safety and health issues at the risk of losing their jobs to replacements.³⁸³ Nevertheless, to describe a § 502 walkout as a purely

379. *Id.*

380. *Id.* at 1372–73.

381. *Id.* at 1373.

382. *Id.*

383. “If, as [TNS] asserts, a work stoppage addressed to abnormally dangerous conditions may be treated exactly as an economic strike involving health and safety issues, Section 502 would have no independent purpose. . . . It cannot be presumed that Congress would have engaged in a meaningless, redundant gesture in enacting Section 502.” *Id.* at 1452 (citing 2A SUTHERLAND STATUTORY CONSTRUCTION § 45.12 (1992)).

non-economic action (since a § 502 work stoppage is removed from the definition of a strike under NLRA) ignores a practical reality of the effect of the walkout on the employer.

A § 502 work stoppage can be seen as involving two separate but related objectives: the first and legally operative one being to escape “abnormally dangerous” working conditions, and the second being to protest those “conditions of employment” (as that phrase is traditionally used to describe a variety of economic subject matter in the workplace)³⁸⁴ and to exert pressure on the employer to improve those conditions by eliminating the abnormal danger. To observe that this pressure is, in part, economic in nature is a concession to the natural and hoped-for consequence of the work stoppage. By withholding their labor until the abnormally dangerous conditions in the plant are remedied, the work stoppage allows employees to protect themselves from the abnormal danger while at the same time inflicting economic harm upon the employer to coerce it to abate the workplace dangers.³⁸⁵ By denying the employer a right to permanently replace § 502 “strikers,” a justifiable policy choice is being made to elevate the rights of such “strikers” to at least the same status as unfair labor practice strikers.

The question remains, however, whether this is a sufficient form of coercion, given that a threat to life and health caused by an employer's maintenance of abnormally dangerous working conditions is decidedly more serious than the commission of unfair labor practices.³⁸⁶ What happens, for example, if the employer hires temporary replacements, as the employer is free to do in an unfair labor practice strike or economic lockout?³⁸⁷ In those instances, an em-

384. The duty to bargain in good faith imposed by § 8(d) of the NLRA encompasses “wages, hours and other terms and conditions of employment.” National Labor Relations Act, 29 U.S.C. § 158(d) (1988).

385. This argument also contextualizes the motive behind the strike. *See infra* pp. 104–08.

386. The dissent addressed this point when it noted that the “case for protecting [§ 502 strikers] against permanent replacement is even stronger . . . than when unfair labor practices have caused or contributed to a strike.” *TNS*, 309 N.L.R.B. at 1373 (Devaney, Member, dissenting).

387. *See Harter Equip., Inc.*, 280 N.L.R.B. 597 (1986) (stating that employer may hire temporary replacements for employees whom employer has lawfully locked out during collective bargaining negotiations because such conduct is not “inherently destructive” of § 7 rights), *enforced*, 829 F.2d 458 (3d Cir. 1987). In finding the hiring of temporary replacements lawful, the *Harter* Board noted that “[t]here can be no more fundamental employer interest than the continuation of business operations.” *Id.* at 599.

ployer is free to continue operating its business, albeit with temporary workers who must be discharged to make room for the returning unfair labor practice strikers or locked out employees. If, however, as noted by the A.L.J. and the dissent, it was Congress' intent to create a special status for a § 502 work stoppage by taking it out of the definition of a strike altogether, should § 502 "strikers" be analogized to unfair labor practice strikers at all, or should they be treated in a unique way consistent with this expression of congressional intent?

It is not enough to confer the same rights on § 502 "strikers" as those given to unfair labor practice strikers. While this would be a minimum standard, the Board also should adopt a standard that prohibits an employer from hiring even temporary replacements if it is found that a work stoppage by its employees was in response to abnormally dangerous working conditions. Such a measure would implement congressional intent to treat a § 502 work stoppage in a way distinct from ordinary strikes under the LMRA, and it would be consistent with the removal of such work stoppages from the definition of a strike itself. Furthermore, the conferring of this special status would be a very effective way of implementing national labor policy aimed at providing employees with a safe and healthful workplace, or at least a workplace that is not an imminent threat to their safety and health.

This proposal is not as draconian as some would claim. Rather, it is a measured response to hazardous workplace conditions which are under the employer's control and thus within its ability to prevent and remedy. The rule requires only that an employer avoid the creation or maintenance of "abnormal" danger in the workplace. The existence of such abnormally dangerous conditions would still be evaluated on the basis of objective evidence even if the Board ultimately adopts a less stringent test than the insurmountable one it created in *TNS*.

Such a rule would also provide a more level playing field in the struggle between production and employees' safety and health. There can be no policy justification for tolerating the existence of abnormally dangerous working conditions, which employees can escape only by meeting a stringent test but which employers need not remedy if they can find other workers to accept such condi-

tions.³⁸⁸ The hiring of replacement workers could leave § 502 “strikers” in the position of having to abandon their strike and return to work under the very same conditions that led to the work stoppage.³⁸⁹ What incentive, then, would there be for an employer to

388. There is a strong likelihood that temporary workers could be hired to work under the same conditions as those abandoned by the § 502 “strikers.” This scenario is even more likely at companies like TNS where the exposure to carcinogens and toxins carries a longterm and not immediately noticeable liability. Indeed, the record evidence established that there were more than fifteen hundred applications from individuals seeking to replace the approximately one hundred TNS strikers. *TNS*, 309 N.L.R.B. at 1455; H.R. REP. NO. 102, 97th Cong., 1st Sess. 76 (1981); see *infra* note 389.

389. Under such circumstances, the temporary replacement of employees engaged in a § 502 work stoppage would be “inherently destructive” of “important employee rights” and, therefore, a violation of the LMRA. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). In *Great Dane*, the employer denied vacation benefits to striking employees which it had paid to non-strikers. *Id.* The Court found that discrimination had taken place which discouraged union activity but went on to address “several principles of controlling importance,” including motive and burden of proof. *Id.* The Court stated that “if it can reasonably be concluded that the employer’s discriminatory conduct was ‘inherently destructive’ of important employee rights, no proof of an [unlawful] motive is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. . . .” *Id.*; see *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) (holding that the award of super seniority to employees who worked during a strike was inherently destructive, discriminatory conduct); *Local 825, International Union of Operating Eng’rs v. NLRB*, 829 F.2d 458, 461 (3d Cir. 1987) (emphasis added) (noting that the use of temporary replacements “was a measure reasonably adapted to the effectuation of a *legitimate business end*”).

However, there is no legitimate business end achieved by the hiring of temporary replacements to work under abnormally dangerous conditions. Furthermore, if an employer, motivated by business considerations, hires temporary replacements to continue production without abating the “abnormally dangerous” working conditions, the right to engage in a § 502 work stoppage would be nullified.

The need for such an approach is real. As noted above, while the ability to hire temporary replacements would not ordinarily arise in instances of emergent “abnormally dangerous” workplace safety hazards, situations involving exposure to carcinogens and toxins, which are less visible but just as, if not more, dangerous, would create greater opportunity for the hiring of replacements. And there would be a strong likelihood that replacements can be induced to work under the poisonous conditions. This is directly related to the job market, the often unskilled nature of hazardous work, and the educational level, training, and socio-economic class of the individuals who accept such work.

As noted by James Robinson in commenting on a study of worker perceptions of workplace hazards, “[t]he fact that one-third to one-half of laborers report no significant health and safety hazards, despite the high rates of disabling injuries and illnesses in [the subject] occupation, may reflect ignorance or apathy due to low levels of education and few alternative job options.” ROBINSON, *supra* note 259, at 21. Furthermore, according to Robinson, “[w]orkers are often not aware of the risks they face” and “this is particularly true in the case of subtle, long-term hazards to health.” *Id.* at 77. The abundance of applicants willing to risk their health and replace the “strikers” at TNS is testament to the accuracy of these observations.

remedy the abnormal danger? Indeed, there would be a disincentive to abate the danger, since by failing to do so the employer could potentially rid itself of the strikers. However, a strong incentive exists if the employer is not permitted to operate until the abnormal danger is eliminated.

It is also noteworthy that such interruptions in production need not necessarily last for an extended period. As seen above, abnormally dangerous conditions historically have involved emergent hazards on the job that were temporary in nature but of sufficient magnitude to justify employee flight.³⁹⁰ Admittedly, in a situation such as TNS, dealing with the longterm effects of workplace carcinogens and toxins caused by variety of conditions that are not susceptible to a “quick fix,”³⁹¹ lengthier shutdown periods will occur. This is balanced, however, by the risk of serious illness and death faced by the employees working under such conditions — conditions which are clearly within the employer's control to avoid.³⁹²

390. *See, e.g.*, Richmond Tank Car Co., 264 N.L.R.B. 174 (1982) (involving runaway boxcar); Combustion Eng'g, 224 N.L.R.B. 542 (1976) (involving threat of violence from co-workers); Roadway Express, Inc., 217 N.L.R.B. 278 (1975) (involving dangerous truck).

391. “In TNS, no quick fix was available.” TNS, Inc., 309 N.L.R.B. 1348, 1384 n.60 (1992) (Devaney, Member, dissenting).

392. Certainly, some changes in administrative process or an amendment of the statute itself would be necessary to implement the proposal advanced in this Article. When faced with a work stoppage over “abnormally dangerous” working conditions, the NLRB's processes would be triggered by the filing of an unfair labor practice charge alleging that the employer has unlawfully hired replacement workers, an act that is inherently destructive of the statutory right embodied in § 502. In order to provide any meaningful restraint on the employer's ability to hire replacements, the NLRB's investigation of the charges and subsequent administrative deliberations would have to be expedited.

It is proposed that the Board utilize § 10(j) of the LMRA in such instances. Section 10(j) injunctive relief is appropriate upon a showing that there is reasonable cause to believe that LMRA has been violated and that injunctive relief would be “just and proper.” *See* *Pascarell v. Vibra Screw, Inc.*, 134 LRRM 2458, 2459 (3d Cir. 1990) (citing *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076 (3d Cir. 1984)); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047 (2d Cir. 1980).

Based on a reasonable cause showing that the walkout was caused by abnormally dangerous working conditions, and based on the “substantial, non-frivolous” legal theory that the hiring of replacements is inherently destructive to an important statutory right, the Board's General Counsel would seek an injunction in the U.S. District Court to restrain the employer from hiring the replacements. A § 10(j) injunction would be “just and proper” under these circumstances, because the Board would not be vindicating purely private rights but, rather, the public interest reflected in § 502 to provide employees with a safe and healthful work environment, a statutory policy that would be negated if the employer were allowed to operate with temporary replacements until the Board's lengthy administrative processes were exhausted.

D. A Work Stoppage Should Be Deemed Protected by § 502 If
Caused in Whole or in Part by Abnormally Dangerous Working
Conditions

An issue which was not addressed by the plurality, but on which the concurring and dissenting Board members disagreed, is the standard of causation that should be used to determine if a work stoppage is in response to abnormally dangerous working conditions.³⁹³ The concurring opinion adopted a “sole” motive test based on the language of § 502, which refers to a work stoppage called “because of” abnormally dangerous conditions, and on Supreme Court dicta in *Gateway Coal* stating that “a work stoppage called *solely* to protect employees from immediate danger is authorized by Section 502.”³⁹⁴ The dissent argued that the appropriate test of causation is one in which the work stoppage would be protected by § 502 if “the employees would not have stopped work *but for* the abnormally dangerous conditions.”³⁹⁵

In applying the “sole” motive test, concurring Board Member Raudabaugh focused on economic issues that remained unresolved upon the expiration of the collective bargaining agreement and start of the strike.³⁹⁶ He concluded that the work stoppage was caused, at

393. The TNS strike occurred after expiration of the collective bargaining agreement between TNS and the Oil, Chemical and Atomic Workers International Union. The question of what caused the strike is connected to the collective bargaining negotiations that preceded it and the subjects that remained unresolved at the time of the strike. There were nine bargaining sessions held prior to the work stoppage. *TNS, Inc.*, 309 N.L.R.B. 1348, 1430 (1992). Despite some open economic issues, the A.L.J. concluded that the “overwhelming” weight of the evidence established that “the employees rejected [TNS]’ final proposal and voted to strike because they believed that the working conditions . . . were endangering their health.” *Id.* at 1432.

394. *TNS*, 309 N.L.R.B. at 1368 (Raudabaugh, Member, concurring) (citing *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 385 (1974)). The concurring opinion allowed that a work stoppage could be protected by § 502 “if it is caused almost entirely by abnormally dangerous conditions, i.e., the other causes are *de minimus*.” *Id.* at 1371 n.9.

395. *Id.* at 1384–85 (Devaney, Member, dissenting).

396. According to the concurring opinion, these “significant” bargaining issues, which were unrelated to safety and health and were opposed by the union, included the length of the probationary period, a proposed change in the layoff provision, a proposal to terminate employees on medical leave for more than six months, management rights, checkoff, shift assignments, and vacation scheduling. *Id.* at 1369 (Raudabaugh, Member, concurring). The dissent had a different view of the evidence and concluded that of the remaining bargaining issues, “the differences as to probation, layoff, termination when on

least in part, by “a desire to achieve a satisfactory collective bargaining agreement.”³⁹⁷ The concurring opinion rejected “the lenient test of causality applied in the unfair labor practice situation.”³⁹⁸ While recognizing that a work stoppage can be an unfair labor practice strike even if only one of its causes was employer misconduct, Member Raudabaugh found a significant difference between that situation and a § 502 work stoppage.

According to the concurrence, a fundamental purpose of the LMRA is to prevent and remedy unfair labor practices. Therefore, it would be inconsistent with that purpose to allow an employer, whose unlawful conduct caused the strike, to benefit from its wrongdoing by being permitted to hire permanent replacements and deny the strikers reinstatement. On the other hand, “the Board has no statutory obligation to prevent and remedy an abnormally dangerous working condition,” since “[s]uch a condition, however deplorable, is not within the remedial province of the Board.”³⁹⁹

However, Member Raudabaugh's focus was misplaced. The Board's remedial authority in § 502 cases is admittedly not directed at curing the abnormal danger leading to the work stoppage, but is directed at protecting employees who “strike” because of such conditions from employer retaliation and the loss of their jobs. Thus, the Board's remedial authority runs to the reinstatement rights of § 502 “strikers” in the same way that its remedial authority runs to the reinstatement rights of unfair labor practice strikers.

Nor is the concurring opinion's sole motive test required by the Supreme Court's dicta in *Gateway Coal*. As aptly pointed out by the dissent, the Court's use of this language arose in the context of commenting on the Court of Appeals' finding that a work stoppage based on “a good faith apprehension of physical danger is protected activity and not joinable. . . .”⁴⁰⁰ While finding that § 502 did not bar an

medical leave, and the management-rights clause were integral to the dispute over what to do about the facility's hazards.” *Id.* at 1386–87 (Devaney, Member, dissenting). In addition, although the concurring opinion alluded to an open wage issue, the A.L.J. and dissent concluded that wages were not a decisive factor in the work stoppage since substantial agreement had been reached on this issue. *Id.* at 1430, 1432; *id.* at 1387 (Devaney, Member, dissenting).

397. *Id.* at 1369 (Raudabaugh, Member, concurring).

398. *Id.* at 1369 n.6.

399. *Id.*

400. *Id.* at 1385 (Devaney, Member, dissenting) (citing *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 385 (1974)).

injunction against the strike because the basis for the claim of abnormal danger had been eliminated, the Court stated that it agreed with “the main thrust of [the court of appeals’] statement — that a work stoppage called solely to protect employees from immediate danger is authorized by Section 502.”⁴⁰¹ As noted by the A.L.J. and the dissent, the Court’s language was not necessary to a resolution of *Gateway Coal*, a point conceded by the concurrence. As stated by the dissent, the Court in *Gateway Coal* did not set “a standard applicable to all fact situations in which the statute is invoked” but only indicated its agreement with the court of appeals concerning the operation of § 502 in a limited factual context.⁴⁰²

The issue of causation, as urged by the dissent and ultimately acknowledged by the concurrence, really turns on the question of policy. The concurrence saw strong policy reasons supporting its sole cause test. According to the concurring opinion, “[i]f a work stoppage is within the ambit of Section 502, it can occur in the face of a no-strike clause and it can occur without 8(d) notices, waiting periods, and opportunities for mediation. *This kind of disruption should be tolerated only in limited situations*, i.e., only if it is caused solely by abnormally dangerous conditions.”⁴⁰³ Member Raudabaugh was also concerned that a more lenient test of causation would allow employees to use § 502 as a “sword” to “accomplish other objectives,” rather than as a “shield” that protects them from abnormal danger.⁴⁰⁴

The dissent rejected this approach, arguing that the language of § 502 itself establishes that “[o]nce employees have shown that they are working in abnormal danger . . . their safety, and their jobs, should take precedence . . . even if other matters are undecided between the parties.”⁴⁰⁵ The dissent believed that “[t]his analysis is consistent with the statute and also represents the appropriate policy choice.”⁴⁰⁶ Indeed, a policy choice should be made that protects employees who stop work over abnormally dangerous conditions, even if other unresolved issues remain between the parties or if “some employees [entertain] simultaneous yearnings for a multiplic-

401. *Id.*

402. *Id.* at 1386.

403. *Id.* at 1368 (Raudabaugh, Member, concurring) (emphasis added).

404. *Id.*

405. *Id.* at 1385 (Devaney, Member, dissenting).

406. *Id.*

ity of things both tangible and intangible.”⁴⁰⁷

The concurring opinion's sole motive test collapses from the weight of shared motives and objectives that exist in any strike situation, even while a legal standard is being satisfied in order to categorize the nature of the strike. The more flexible “but for” causation standard urged by the dissent incorporates this very principle. The dissent's standard is straightforward and analogous to (but stricter than) that used in determining whether a strike is caused “in whole or in part” by an employer's unfair labor practices. However, the dissent's test is not consistent with its earlier observation that the maintenance of abnormally dangerous working conditions is more serious than the commission of unfair labor practices. If this is so, as it appears to be, the standard that should be used for causation should at least be the same as that used to determine if a strike was caused by an unfair labor practice.

The adoption of this test of causation does not, as feared by the concurring opinion, turn a § 502 work stoppage into a sword rather than a shield. It is a sword only to the extent that an employer creates or maintains abnormally dangerous conditions in the workplace. Even if other economic reasons for the strike exist and are advanced during a § 502 work stoppage, the strike could be converted to a purely economic one at that point in time that the struck employer abates the abnormal danger.

Thus, the fear that adoption of an “in whole or in part” test will excessively loosen the statutory reins on the right to strike is misplaced. The trigger to a § 502 work stoppage is still in the hands of management. The overriding need to protect employee safety and health and to lend teeth to statutory provisions aimed at achieving that goal are strong policy reasons for the adoption of a less stringent causation standard.

Furthermore, the concurring opinion's real concern appeared less related to the use of § 502 as a subterfuge for an economic strike and more related to maintenance of management prerogatives of production. Thus, the concurrence would “tolerate” the disruption to statutory limits on the right to strike and to production only where the sole reason behind the work stoppage is abnormal danger. Yet, as noted by the dissent, this reasoning harks back to the

407. *Id.* at 1387.

paradigmatic § 502 situation involving employee flight from impending disaster. In those instances, it is clear that the sole motive behind the work stoppage is the abnormal danger. But what of those situations, like *TNS*, where the threat to health and safety is due to long acting workplace carcinogens and toxins? In those situations “it may well be virtually impossible to prove sole causality, as employers and employees frequently have unresolved differences, even outside the context of collective bargaining.”⁴⁰⁸

Historically, the protections of § 502 have been underutilized and unduly restricted. The *TNS* case presented the Board with its first opportunity to interpret the statute in the context of long acting workplace carcinogens and toxins, but it will not be the last. Recently, there has been a heightened awareness of the threat posed to employee health and safety from these sources and the occupational illnesses that follow. Given the nature of this emergent workplace threat, § 502 must be interpreted in a way that broadens its reach to the fullest extent possible, given the animosity of decisionmakers to independent employee judgments. The correct policy choice is to adopt a more lenient causation standard, which will help liberalize the use of § 502 and make it an important source of protection from workplace dangers.

VI. CONCLUSION

The evidence in *TNS* compels a finding that the working conditions which caused the work stoppage were abnormally dangerous. The Board's interpretation of that evidence failed to appreciate the “beneficent” purposes underlying § 502 and the basic morality it represents. That provision was enacted as a concession to the right of employees to be free from servitude that endangers their lives, and access to its protections must be broadened rather than restricted.

The test created by the plurality, which effectively shut off access to the protection of § 502 for employees facing longterm health threats from workplace carcinogens and toxins, was not based on a reasonable interpretation of the LMRA and must be abandoned. By requiring employees who face such longterm health threats to prove that point in time when continued exposure becomes “abnormally

408. *Id.* at 1384.

dangerous,” the Board created a standard that not even the most sophisticated of scientists, versed in the subject, can meet.

The Board's creation of a presumption of regulatory efficacy was equally flawed, as it failed to appreciate the nature of regulatory policy and bureaucratic discretion as well as the economic, social, and political influences that shape the regulatory landscape. Furthermore, by looking to the judgment of an oversight agency as dispositive of whether abnormally dangerous working conditions exist, the Board impermissibly shifted the inquiry from whether the employees had a good faith belief in the existence of those conditions to whether the oversight agency had such a belief. The formulation of such a standard was not a reasonable interpretation of the NLRA because it was not rooted in the principles underlying § 502, whose interpretation is the responsibility of the NLRB and not the Tennessee Department of Radiological Health or any other regulatory body. The Board not only abdicated its responsibility to interpret and apply the LMRA, it failed to perceive its important role in implementing national labor policy aimed at providing employees with safe and healthful working conditions. The Board's decision also served to penalize and undermine the many employers that comply with regulatory standards and provide a safe and healthful work environment.⁴⁰⁹

Fundamentally, though, the Board's decision reinforced a vision of the workplace as a hierarchical construct, where the voice of employees is of least importance even where their safety and health is concerned.⁴¹⁰ Yet, in order to create a safer and healthier workplace, it is essential that greater deference be accorded to the judgment of employees, especially when it is based on a good faith understanding of the risks involved in the work they perform. By re-conceptualizing the nature of the employment relationship, by making it more sub-

409. Ironically, TNS itself became an example of how a company can provide improved safety and health conditions and still maintain production. However, in TNS' case, it was only *after* the strike, *after* the strikers lost their jobs to permanent replacements, and *after* the union that represented the workers was eliminated that the company somehow managed to bring its workplace more in line with regulatory standards. By some measure then, the TNS strikers achieved their aim, but at a cost that modern day labor relations and a progressive society should not require.

410. It is also contrary to the thrust of legislation currently pending to deal with workplace safety and health which seeks to give employees a greater voice in the workplace by requiring their inclusion on mandated safety and health committees. *OSH Act Reform*, Labor Relations Week (BNA), at 1062 (Nov. 3, 1993).

jective to the worker and emphasizing the intrinsic dignity that meaningful work can provide, and by placing the interests of labor ahead of capital, the status of workers will be transformed. When “ascertainable objective evidence” is viewed through the lens of the workers exposed to the risk, as it should be, instead of through the hindsight of decisionmakers, and when workers are no longer the servants, but the equals of capital in matters affecting their safety and health, greater deference to their judgments must follow.

In his annual message to Congress, on December 3, 1861, as civil war was breaking out, President Lincoln had occasion to address the relationship between capital and labor. His eloquent statements perhaps best reflect some of the themes of an “alternative” employment relationship articulated herein. In the process of rejecting what he perceived as “the effort to place *capital* on an equal footing with, if not above *labor*, in the structure of government,” and in debunking the claim that “all laborers are either *hired* laborers or . . . slaves,” Lincoln stated as follows:

Labor is prior to, and independent of capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration. Capital has its rights, which are as worthy of protection as any other rights. Nor is it denied that there is, and probably always will be, a relation between labor and capital, producing mutual benefits.⁴¹¹

411. ABRAHAM LINCOLN, Annual Message to Congress, in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 35, 52 (Roy P. Basler ed., 1953).