To Cross or Not to Cross: Picket Lines and Employee Rights*

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As the law stands, employees who honor a picket line may be subject to employer discipline even though they lacked full information about the strike's legality when they decided not to cross. After a critical analysis of employee protections afforded by statutes and collective bargaining agreements, the author proposes that refusals to cross picket lines should be protected unless the employees knew or should have known that the underlying strike was unlawful.

INTRODUCTION

Respect for picket lines is one of the most fundamental tenets of trade unionism.1 When confronted with a picket line an employee must make a quick, often uncounselled decision which may have serious ramifications, including loss of employment. To make a rational decision, the employee must accurately assess the probable consequences of his action. Unfortunately, whether the employee may be lawfully disciplined or discharged for refusing to cross the picket line will depend on underlying legal considerations of which the employee is likely to have little knowledge.

This article will explore the division among the various courts of appeals and Board members over the qualifications to the right to honor picket lines, the circumstances justifying the permanent replacement of an employee who exercises the right and the various rules controlling contractual waiver of the right. A precise and uniform

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standard for determining when an employer may lawfully discipline or discharge an employee who honors a picket line is necessary to provide rational guidelines for both employers and employees responding to picket line confrontations. Employees who refuse to cross a picket line should never be lawfully discharged or disciplined unless they knew or should have known that such conduct was unprotected in the particular circumstances, since they are unlikely to be adequately apprised of the factual situation surrounding the picket line or the legal construction of their own collective bargaining agreement.

I

THE PROTECTED RIGHT TO ENGAGE IN SYMPATHY STRIKES

Section 7 of the National Labor Relations Act (the Act) gives employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Although section 7 does not expressly cover the right to honor picket lines, it is well settled that sympathy strikes come under its protection. An employer who interferes with this section 7 right by disciplining or discharging the sympathy striker therefore violates section 8(a)(1) of the Act, which prohibits interference with section 7 rights, and possibly section 8(a)(3), which prohibits discrimination to discourage union membership.

However, there are a number of qualifications to this general right to sympathy strike. The protected nature of a refusal to cross a picket line may be determined by a number of factors, including: (1) whether the right to engage in the sympathetic conduct was waived by the collective bargaining agreement; (2) whether the employee honored the picket line out of fear or out of principle; (3) whether the primary picket line was lawful; and (4) whether the primary picket line was on the premises of a common employer or a "stranger" employer. The right to honor picket lines may also be affected by the employer's right to

2. See Schatzki, Some Observations and Suggestions Concerning a Mismar—"Protected" Concerted Activities, 47 Tex. L. Rev. 378 (1969) (arguing employees should never be terminated for engaging in concerted activities unless they knew or should have known that their conduct was illegal).
4. This article will treat "refusals to cross picket lines" established by employees of a different bargaining unit as one form of "sympathy strike" and will use the terms interchangeably.
replace the employee if a legitimate business justification warrants such an action.

A. Picket Lines at the Premises of Stranger Versus Common Employers

Since 1962, the National Labor Relations Board (the Board) has consistently held that section 7 protects an employee's refusal to cross a picket line on the premises of a "stranger" or third party employer as well as at her own employer's work site. The Second, Fifth, Ninth, Tenth and District of Columbia Circuits have adopted the Board's position on this issue. Although other circuits have recognized the right to honor picket lines at the premises of a common employer, they have not yet directly addressed the question of refusals to cross a picket line established at a third party employer.

In *NLRB v. William S. Carroll, Inc.* the First Circuit expressed doubt that such activity would be protected, without actually deciding the issue. The court perceived division among other circuits on this question. Although the court found that the Seventh and Eighth Circuits concluded the honoring of a picket line at a stranger employer is not protected activity, it is questionable whether the cited authority actually supports this proposition. In *NLRB v. Illinois Bell Telephone Co.*, the Seventh Circuit held that a refusal to cross a picket line at the site of an employee's own employer is not protected activity. However, subsequent Seventh Circuit cases have recognized that such activity is protected. In *Montana-Dakota Utilities Co. v. NLRB*, the other case cited in *Carroll*, the Eighth Circuit assumed that employees had the right under section 7 to honor a peaceful picket line set up at another employer's premises. The case was decided on the issue of whether the

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15. 578 F.2d 1 (1st Cir. 1978).
16. *Id.* at 3.
union had contracted away this right.\textsuperscript{20}

The weight of authority, extending the Act's protection to refusals to cross picket lines at third party employer's premises, should be uniformly followed. A rule which distinguishes between picket lines at a common employer and stranger employer would encourage litigation over the question of whether the employer being picketed was in fact the same party as the employer of the sympathy strikers. For instance, if the employees of a manufacturing company were to go on strike and picket a subsidiary responsible for distribution, the right of the distributor's employees to honor the picket line would depend on a determination of whether the manufacturer and distributor were "common" employers.\textsuperscript{21}

In order to reduce the number of issues an employee must consider when faced with a picket line, unnecessary qualifications on the right to honor picket lines should be eliminated. The rule propounded by the NLRB which protects refusals to cross picket lines at both common and stranger employers should accordingly be adopted at all levels.

\subsection*{B. Refusals to Cross Out of Fear or Principle}

The Act protects a refusal to cross a picket line when such conduct is for "mutual aid or protection."\textsuperscript{22} Several circuits have held therefore that only refusals to cross picket lines out of principle, in contrast to refusals based on fear, are protected by section 7.\textsuperscript{23}

In \textit{NLRB v. Union Carbide Corp.}, the Fourth Circuit denied complete enforcement of the Board's decision that the employer violated section 8(a)(1) when it discharged three construction employees who refused to cross a picket line maintained by production and mainte-

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\textsuperscript{20} 455 F.2d at 1091.  \\
\textsuperscript{21} \textit{See} Coca-Cola Bottling Co., 72 Lab. Arb. 73 (1978) (Mikulang, Arb.).  \\
\textsuperscript{22} 29 U.S.C. § 157 (1976).  \\
\textsuperscript{23} However, such refusals may also be protected by section 502 of the Labor-Management Relations Act which states that "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 shall not be deemed a strike under this chapter." 29 U.S.C. § 143 (1976). Section 502 has been construed as possibly extending to potential labor violence as well as to occupational safety hazards. Plain Dealer Publishing Co. v. Cleveland Typographical Union No. 53, 520 F.2d 1220, 1228 (6th Cir. 1975), \textit{cert. denied}, 428 U.S. 909 (1976); Redwing Carriers, Inc., 130 N.L.R.B. 1208, 1209, 47 L.R.R.M. 1470, 1471 (1961), \textit{modified}, 137 N.L.R.B. 1545, 50 L.R.R.M. 1440 (1962), \textit{enforced sub nom.} Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), \textit{cert. denied}, 377 U.S. 905 (1964).

This recognition of a right to refuse to work provides a limited exception to an express or implied no-strike obligation. Gateway Coal Co. v. UMW, 414 U.S. 368, 385 (1974). Reliance upon section 502 must be supported by objective proof of abnormally dangerous working conditions. As the Board stated in \textit{Redwing Carriers}: "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.'" 130 N.L.R.B. at 1209. 47 L.R.R.M. at 1471.
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nance employees of the same employer. The Fourth Circuit ruled that "the purposes of the action must be in furtherance of collective bargaining or other concerted activities, for mutual aid or protection" to trigger section 7 protection. The court concluded that one who refuses to cross a picket line out of fear rather than principle "makes no common cause and contributes nothing to mutual aid or protection in the collective bargaining process."25

Thus, enforcement was denied to the third employee whose testimony revealed that his refusal was based solely on fear.26 The Board's order was enforced only to the two employees who honored the picket line out of principle.

The Union Carbide strict motivation limitation was relaxed in Virginia Stage Lines, Inc. v. NLRB.27 One of the employees discharged for refusing to cross a picket line claimed to have been motivated in his refusal by fear. Yet in a footnote, the court concluded that the employee's advocacy of the union distinguished his situation from that of the employee who was denied protection in Union Carbide.28 That refusal to cross had been based on "fear and nothing else."29 This distinction appears specious after reading the testimony of the Union Carbide employee who stated that fear was the "main reason"30 he refused to cross the picket line at issue.

Judge Bryan, dissenting in Virginia Stage, claimed that the majority had repudiated the Union Carbide holding.31 But more recently, in G&P Trucking Co. v. NLRB,32 the Fourth Circuit reaffirmed the Union Carbide motivation distinction. G&P is an intrastate trucking company which hauls goods between various factories and the terminal facilities of Pilot Freight Lines, an interstate trucking company. When the employees of Pilot went on strike, several G&P employees refused to cross the picket line, claiming that they were afraid to do so. However, when testifying to the administrative law judge [ALJ] they indicated their refusal was based on union sympathy. The court concluded that under Union Carbide, an employer is entitled to rely and act upon reasons given by employees for their refusal to perform work assignments. The court was concerned that employees might otherwise be able to gain section 7 protection by changing their story at a later date.

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24. 440 F.2d at 55.
25. Id. at 56.
26. Id.
27. 441 F.2d 499 (4th Cir.), cert. denied, 404 U.S. 856 (1971).
28. Id. at 502 n.3.
29. 440 F.2d at 56 (emphasis added).
30. Id. at 56 n.1 (emphasis added).
31. 441 F.2d at 504.
32. 539 F.2d 705 (4th Cir. 1976).
Thus, employees' motives can be determined by their statements at the time of discharge.

The Second\textsuperscript{33} and Sixth\textsuperscript{34} Circuits have agreed with the Fourth Circuit that absence from work due to personal reasons unrelated to the strike, or because of fear of violence, is not protected activity. Employees with the benefit of counsel may better recognize the situation, but the Hobson's choice still confronts them. For these reasons, an analysis based on a fear-principle distinction, rather than the nature of the conduct, denies rather than protects the rights of employees.

Moreover, the \textit{Union Carbide} line of cases unreasonably construes section 7 by stating that fearful employees contribute nothing to mutual aid or protection. Regardless of an employee's motivation, each refusal to cross has equal value in strengthening the picket line and thus fostering mutual aid and protection. Accordingly, the courts should reject \textit{Union Carbide} and instead apply the Board's analysis which focuses on the nature of the conduct in question rather than employee motivation. The Board has expressly rejected the fear-principle test.\textsuperscript{35} According to the Board, the "focal point of inquiry in determining whether [an employee's] refusal to cross a picket line to perform production work was a protected activity must of course be the nature of the activity itself rather than an employee's motives for engaging in the activity."\textsuperscript{36} Thus, contrary to the Fourth Circuit's holding in \textit{Union Carbide}, Board decisions regard an employee's motivations for honoring a picket line as irrelevant.\textsuperscript{37} The Board will, however, consider an admission that the refusal to cross was based on fear when there is evidence that the employee believed the sympathy actions would violate the applicable collective bargaining agreement.\textsuperscript{38} Thus, even under Board law employees would have reason to be guarded about their real motivations in honoring a picket line.

Conditioning protected status of a refusal to cross a picket line on the employee's expression of motivation places the employee in a dilemma and does nothing to promote the policies behind the federal labor laws. First, an employee will be influenced by many factors in a

\textsuperscript{33} Lodges 743 and 746, IAM v. NLRB, 534 F.2d 422, 445 n.39 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976).
\textsuperscript{34} Kellogg Co. v. NLRB, 457 F.2d 519, 523 (6th Cir.), cert. denied, 409 U.S. 850 (1972).
\textsuperscript{38} \textit{See} American Cyanamid Co., 246 N.L.R.B. 87, 102 L.R.R.M. 1443 (1979).
decision not to cross, such as union solidarity, fear of retaliation and violence by pickets, peer pressure and expectation of discipline. Imprecise psychological inquiries will, thus, take a larger role in litigation. Second, when employees are required to justify a refusal to cross a picket line, they may attempt to anticipate the correct legal response. Ironically, the employee with only a layperson’s appreciation of labor law would likely believe that a refusal based on fear would be more acceptable to an employer than one based on union solidarity. Moreover, the expression of fear will benefit the employee in other situations. Most arbitrators tend to be more lenient with employees who honored a picket line out of fear. Similarly, unemployment benefits are available only to those who acted out of fear. Consequently, the employee will have incentive to shape the reasons for refusal without understanding the full consequences.

C. The Legality of the Picket Line

It is often stated that sympathy strikers “stand in the shoes” of the strikers or picketers with whom they sympathize. Under this analysis, a refusal to cross an illegal picket line is deemed tantamount to participation in illegal activity and is thus unprotected. A primary strike receives special protection under the Act. Nevertheless, primary strikes, like all types of concerted activity, may lose this protection where the objective or means of achieving it is deemed improper or it


42. For purposes of this article, a primary strike is any work stoppage arising from a dispute with the strikers’ own employer. See R. GORMAN, BASIC TEXT ON LABOR LAW 240 (1976) [hereinafter cited as GORMAN].

43. Section 13 of the Act, 29 U.S.C. § 163 (1976), provides: “Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.” In addition, the proviso to section 8(b)(4)(i)(B) states “nothing contained in this clause (B) [the secondary boycott prohibitions] shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .” 29 U.S.C. § 158(b)(4)(ii)(B) (1976).

44. The Supreme Court long ago held that either an unlawful object or adoption of improper means of achieving a lawful object may deprive employees engaged in concerted activities from protection of the Act. UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245, 258 (1949). Thus, “partial strikes,” “slowdowns” and “sit-ins” have been held not protected though these activities may literally come under the term primary strike activity. NLRB v. Insurance Agents’ Int’l Union, 361 U.S. 477 (1960); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); Elk Lumber Co., 91 N.L.R.B. 333, 337, 26 L.R.R.M. 1493, 1494 (1950).

45. See R. GORMAN, BASIC TEXT ON LABOR LAW 240 (1976) [hereinafter cited as GORMAN].
violates a collective bargaining agreement.45 Under the Act, picket lines established to coerce or restrain a neutral employer with the object of forcing the employer to cease doing business with another person are illegal.46 According to prevailing caselaw, only concerted activity in sympathy with protected strikes and picket lines will receive the Act's protection.47

The Board, which has generally accorded liberal protection to sympathy strikers, has been fairly rigid in imposing this qualification of the right to engage in sympathy strikes. One of the early Board cases dealing with this question is Pacific Telephone & Telegraph Co.,48 which

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45. Section 8(d) expressly removes the Act's protection from any employee who strikes in violation of an extant bargaining agreement. 29 U.S.C. § 158(d) (1976).

46. 29 U.S.C. § 158(b) (1976) provides:

   (b) It shall be an unfair labor practice for a labor organization or its agents—

   (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

   (A) forcing or requiring any employer . . . to enter into any agreement . . . prohibited by [§ 8(e)],

   (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of [§ 9]. . . .

Thus most secondary pressure, though concerted activity, is both unprotected as well as illegal under the Act. However, a primary strike and picketing at the primary employer's place of business does not become an unlawful secondary boycott proscribed by the Act merely because such strike or picketing has a "secondary" effect of causing employers of uninvolved, or "neutral" firms, often delivering supplies to the primary employer, to respect the picket line and not enter the premises. NLRB v. International Rice Milling Co., 341 U.S. 665 (1951).

47. This conclusion, espoused by the Board and courts, does not readily spring from the specific provisions of the Act. The Act, as amended, expressly covers the right to honor another union's picket line. The Taft-Hartley amendments attached to section 8(b)(4), 29 U.S.C. § 158(b)(4), the following proviso:

   Provided, that nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act. . . .

Pub. L. No. 80-101, § 101, 61 Stat. 136, 142 (1947). One commentator correctly points out that this proviso merely indicates Congress' intent to recognize the legality of refusals to cross lawful primary picket lines; he notes "[t]here is no indication that Congress, in any sense, addressed itself to the question of refusals to cross unlawful picket lines." Getman, The Protection of Economic Pressure by Section 7 of the National Labor Relations Act, 115 U. PA. L. REV. 1195, 1229 n.143 (1967) [hereinafter cited as Getman]. Other commentators have argued that review of the NLRA and its legislative history establishes congressional intent to protect employees who honor both primary and secondary picket lines. In analyzing the Act's subsequent amendments outlawing most secondary activity, they conclude that employees' right to honor any picket line remains unchanged. Carney & Florsheim, supra note 1, at 944-46.

involved action by the Communication Workers of America (CWA). The CWA had embarked on a strategy of “hit and run” work stoppages and picketing. Before implementing this plan, the CWA issued a bulletin to a separate and uninvolved union, the Order of Repeatermen and Toll Testboardmen (ORTT) seeking support for its plan. The tollmen respected the CWA picket lines.

The strategy proved successful and whenever picket lines disappeared the tollmen returned to work. Upon return, however, many were informed that their jobs were already covered for the day by emergency crews and that they should return the next day. Thus they were denied a full day’s pay. Consequently, ORTT filed a complaint with the Board, alleging that by refusing to immediately reinstate each tollman upon his request to return, the employer discriminated against them for exercising their section 7 right to honor CWA’s picket lines.

The Board found that the sporadic and unpredictable strike and picket attacks by CWA were not protected activity. It therefore concluded: “Because they [ORTT] joined in the unprotected strike of the traffic employees [CWA] with knowledge of its planned intermittent and hit-and-run aspects, the tollmen also removed themselves from the protection of the Act.”

The record in Pacific Telephone indicates that, by their close contact before and during the disruptions, the two unions had engaged in a concerted effort to disrupt the business. Although the Board acknowledged that a few ORTT members might not have had personal knowledge of CWA’s intent, in this context, it refused to require the employer to “pause during the heat of the strike to examine into the degree of knowledge of each tollman.” It was thus sufficient that each was a participant in this strike strategy, whether “knowingly or unwittingly.”

In a more recent case, American Telephone & Telegraph Co., the Board adopted, without comment, the conclusions of the ALJ that the employer had not violated the Act by suspending thirty-one employees for refusing to cross a picket line in support of what was later deemed an illegal strike. The ALJ refused to distinguish Pacific Telephone, reasoning that the sympathy strikers there were fully aware of the primary strikers’ hit and run tactics, though perhaps ignorant of their illegality. The sympathy strikers in American Telephone, on the other hand, were

49. Id. at 1550, 1559-60, 33 L.R.R.M. at 1434-35.
50. The Board noted that CWA had widely publicized its intended hit and run strategy for the benefit of its members as well as those of ORTT. In addition, officials from both unions had discussed the plan at the union halls. Finally, the Board noted that the nature of the employees’ duties kept the tollmen in constant communication with members of the CWA regarding the progress of their strike activities. Id.
51. Id. at 1551-52, 33 L.R.R.M. at 1436.
52. Id. at 1552, 33 L.R.R.M. at 1436.
unaware of the factual circumstances behind the primary strike which rendered it illegal, i.e., that the strike was in violation of a labor contract. Rather than extend the knowledge requirement implicit in Pacific Telephone, the ALJ held: “Since derivative in nature, the rights of [sympathy strikers] are deemed to be those, and only those, with whom they sympathize.” Thus, by relegating the right to sympathy strike to a mere adjunct of the right to engage in primary economic strikes, the ALJ was not required to find that the sympathizers had some prior knowledge of the primary strike’s factual or legal nature before they too lost the protection of the Act.

In Roadway Express, Inc., the Board’s general counsel later interpreted the American Telephone decision as conferring a “right” upon employers to discharge an employee who engages in an unprotected strike. In Roadway, a member of a dockworkers’ bargaining unit was discharged for honoring a picket line established by another unit of the same Teamster local which was engaged in an unprotected strike. The dockworkers’ collective bargaining agreement specifically reserved the right to refuse to cross a primary picket line. This picket line clause was narrowly interpreted as protecting only employees who refuse to cross protected primary picket lines, in contrast to refusals to cross a primary picket line in support of an unprotected strike. The general counsel concluded that this picket line clause did not constitute a waiver of the employer’s “right” under American Telephone to discharge the sympathy strikers.

In Chevron U.S.A., Inc., a divided Board reaffirmed its position that the legality of the primary activity determines the protected status of the resulting sympathy strike. A picket line was erected at Chevron by a union representing only employees of a subcontractor working at the Chevron site. Several members of the Boilermakers’ Union refused to cross the picket line and were consequently discharged. Member Truesdale, writing the principal opinion, found that the Act protected the right to honor picket lines only to the extent that the picket line itself does not constitute illegal secondary activity. Referring to the American Telephone and Pacific Telephone decisions, he stated it is well-settled Board law that “honoring an unlawful picket line consti-

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54. Pacific Telephone could be read to hold that sympathy strikers’ ignorance of the primary strike’s illegality will not prevent removal of the Act’s protection of their sympathetic conduct when they sufficiently know the factual circumstances which render the primary strike illegal.
55. 231 N.L.R.B. at 561 (citations omitted).
57. Id. at 1418-19.
59. Id. at 1086, 102 L.R.R.M. at 1316. Member Penello concurred on this issue. Id. at 1089, 102 L.R.R.M. at 1318.
tutes unprotected activity per se.”

He also approved of the Pacific Telephone holding that sympathy strikers need not possess knowledge of the illegality of the primary strike for their conduct to be unprotected. Relying on statements made by an agent of the picketing union, he found the picketing to have an unlawful secondary objective, and thus concluded that honoring this picket line was not protected activity.

In his concurring and dissenting opinion, Chairman Fanning expressed difficulty with the majority’s analysis, noting that the Chevron employees’ status was ultimately based on a private comment from an agent of the picketing union. He was particularly concerned that the sympathy strikers, and their union officers, had no knowledge of this comment. Furthermore, since the remark was made in private, no amount of legal sophistication could have saved the sympathy strikers. Chairman Fanning also questioned the majority’s reliance on the American Telephone and Pacific Telephone decisions and attempted to distinguish them. He argued that, unlike those earlier cases, in Chevron the strike itself was lawful, though the picket line may not have been. Thus, he concluded that the Chevron employees were protected because they “stood in the shoes” of the primary strikers who were engaged in a lawful economic strike against their employer.

In response to this criticism, Member Truesdale argued:

To accept Chairman Fanning’s view would leave neutral employers helpless in such circumstances to discipline those who respect such illegal lines, and would, to a large degree, vitiate the protection afforded them by the statute’s secondary boycott provisions.

The courts have had little opportunity to develop law in this area. However, in Drivers Local No. 695 v. NLRB, the D.C. Circuit

60. Id. at 1086, 102 L.R.R.M. at 1316.
61. Id. In a prior case, a divided Board held that since the legality of the primary picket line was neither alleged nor litigated, it could not find discharged sympathy strikers’ conduct to be illegal. The majority, therefore, concluded that the discharges violated the Act. Congoleum Industries, Inc., 197 N.L.R.B. at 534, 548, 80 L.R.R.M. at 1679.
62. Chairman Fanning concurred with Member Truesdale in finding there was no contractual waiver of the right to honor picket lines. 244 N.L.R.B. at 1087, 102 L.R.R.M. at 1317.
63. Chairman Fanning observed that in Pacific Telephone the sympathy strikers knew of the unprotected planned tactics, yet they were not actually discharged. He would interpret Pacific Telephone as holding only that “an employer’s reasonable action to protect itself, not to punish concerted activity, is not unlawful.” Id. at 1087-88, 102 L.R.R.M. at 1317. He also pointed out that the American Telephone opinion did not rely on Pacific Telephone. Id. at 1088, 102 L.R.R.M. at 1317. In fact, the ALJ in American Telephone expressly declined to extend the Pacific Telephone rationale. 231 N.L.R.B. at 561.
64. 244 N.L.R.B. at 1087-88, 102 L.R.R.M. at 1316.
65. Most cases involving the scope of section 7 arise when an employee has been penalized in some way for exercising rights possibly protected by the Act. After a complaint is filed, the Board’s general counsel represents the employee who seeks to redress the alleged employer violations of the Act before the Board. Section 3(d), 29 U.S.C. § 153(d) (1976). If the Board rules
had the uncommon distinction of postulating its position on the legality of honoring unlawful picket lines. Writing for the court, Chief Judge Bazelon adopted the Board's finding that a refusal to cross an unlawful picket line is unprotected.\(^6\) The court relied on the legislative history of the proviso to section 8(b)(4) and the secondary boycott amendments in general, finding that Congress intended to protect sympathetic activity only in support of lawful primary activity.\(^6\) Discouraging observance of unlawful secondary picket lines, the court reasoned, best promotes the policy underlying the secondary boycott prohibitions to prevent the spread of labor disputes. The court rejected the argument that its holding would seriously undermine the right to honor lawful primary picket lines:

It is also said to be onerous to require a worker to determine whether a picket line is primary or secondary before he can exercise his right to refuse to cross a picket line when even lawyers and courts have great difficulty in making such a determination. A worker, the argument goes, must either cross all picket lines or gamble that those he refuses to cross will subsequently be held to be primary. However, recent decisions promise clarification. Moreover, employees and employers will generally be advised by counsel and will not have to rely upon their own judgment. Furthermore, it is perhaps no less difficult to decide when a strike has been “ratified or approved” and whether the union involved is one whom the “employer is required to recognize under this subchapter,” both necessary preconditions to reliance upon the 8(b)(4) proviso.\(^6\)

Both employers and employees face decisions surrounded by uncertainty. As Member Truesdale noted in his Chevron, U.S.A. opinion, an employer who disciplines employees for refusing to cross a picket line does so at his own risk. If the picket line is eventually determined to have been lawful, then the discipline may constitute an unfair labor practice.\(^7\) Employees face a more serious dilemma: they must choose

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either to forego their right to honor the line (even though the line may later be deemed lawful), or honor the picket line and thereby subject themselves to discipline if the picket line is later determined to be unlawful. Despite Chief Judge Bazelon’s comments in *Drivers Local 695*, it remains very difficult for an employee, ignorant of labor law’s subtleties, to assess the legality of another union’s picket line. Consequently, employees will be deterred from honoring any picket line, except, perhaps, those they feel certain are lawful or important enough to risk discipline or discharge. In such circumstances, the effectiveness of lawful economic strikes will be greatly diminished.

To retain the vitality of section 7, refusals to cross picket lines should be protected activity unless the sympathy striker knew, or should have known, the primary picket line was illegal. “Exposure to discharge is too harsh a sanction when the task of distinguishing between legal and illegal picketing is often a complex one and commonly forced upon the individual employee without benefit of counsel.”

Discharge is not too harsh, however, when the employee knew or should have known his conduct was unlawful. An injunction against the primary picket line, a prior judgment declaring similar activity by the same primary picketers to be unlawful or mass media coverage of the circumstances rendering the primary line unlawful may establish such constructive knowledge for which employees may lose their protected status.

II

LIMITATIONS OF THE RIGHT TO HONOR PICKET LINES—
THE EMPLOYER’S RIGHT TO REPLACE AND THE
EMPLOYEE’S COUNTERVAILING RIGHT
TO REINSTATEMENT

Sympathy strikers are said to “stand in the shoes” of the primary strikers with whom they sympathize and are therefore subject to replacement rules similar to those covering primary economic and unfair labor practice strikers. Thus, even where the honoring of a picket line

71. GORMAN, *supra* note 42, at 322. See Newspaper Prod. Co. v. NLRB, 503 F.2d 821, 829-30 (5th Cir. 1974), where the sympathy strikers’ right to reinstatement turned on whether the primary strikers were picketing in support of a mandatory subject of bargaining. See also Friel, *supra* note 1, at 791.

72. An employer may hire permanent replacements for economic strikers if replacements are needed to protect and continue the business. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378-79 (1967); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938); Laidlaw Corp., 171 N.L.R.B. 1366, 68 L.R.R.M. 1252 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). However, the employer generally must give strikers who apply for reinstatement first opportunity to fill openings in their jobs arising after the strike ends. In contrast, unfair labor practice strikers are entitled to unconditional reinstatement that displaces their replacements. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285-86 (1956).
is protected activity in certain circumstances, the picket line observers may be subject to permanent replacement.

In *Redwing Carriers*,\(^7\) the Board held that although a refusal to cross a picket line is protected activity, employers have a countervailing right to protect their business operations. Under the *Redwing Carriers* doctrine developed by the Board, employers must justify the replacement of a sympathy striker by showing (1) they acted solely to preserve the efficiency of business operations, and (2) the employees would be replaced "immediately or within a short time thereafter" with other employees willing to perform the scheduled work.\(^7\) The invasion of the employees' statutory right to respect a picket line is only justified when the employer's need to replace clearly outweighs the employee's right to engage in protected activity.\(^7\)

The following factors are considered in determining whether the *Redwing Carriers* business necessity justification for the permanent replacement of a sympathy striker has been satisfied: (1) whether the employee was actually replaced; (2) the availability of other employees to perform the refused work; (3) whether the refused work was part of the employee's routine job; (4) the percentage of the employer's work which the sympathy strikers were refusing to perform (availability of other work); (5) the urgency or unimportance of the refused work; (6) the existence of antiunion animus.\(^7\)

In *NLRB v. Southern Greyhound Lines*,\(^7\) the Fifth Circuit discussed the status of a Greyhound employee who refused to cross a picket line at the terminal in which she worked. The court found that since the picket line was established by a union engaged in a lawful *economic* strike, she had the status of an economic striker. Economic strikers are entitled to reinstatement unless there is an adequate business justification for not doing so. An employer has such justification when the employee's job is filled by a permanent replacement. Since the employee had not been permanently replaced, and no other justifications were apparent, the employee was entitled to reinstatement. The Fourth,\(^7\) Sixth\(^7\) and Ninth\(^8\) Circuits have concurred with the Fifth

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\(^7\) *137 N.L.R.B. 1545, 50 L.R.R.M. 1440 (1962), enforced sub nom. Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), cert. denied, 377 U.S. 905 (1964).*

\(^7\) *G&P Trucking Co., 216 N.L.R.B. 620, 88 L.R.R.M. 1479 (1975), enforcement denied on other grounds, 539 F.2d 705 (4th Cir. 1976), text reported at 92 L.R.R.M. 3652.*

\(^7\) *Id. at 624, 88 L.R.R.M. at 1480; Overnite Transp. Co., 154 N.L.R.B. 1271, 60 L.R.R.M. 1134 (1965).*


\(^7\) *426 F.2d 1299 (5th Cir. 1970).*

\(^7\) *NLRB v. Union Carbide Corp., 440 F.2d 54 (4th Cir. 1971).*

\(^7\) *Kellogg Co. v. NLRB, 457 F.2d 519 (6th Cir. 1972).*

\(^8\) *NLRB v. Swain & Morris Constr. Co., 431 F.2d 861 (9th Cir. 1970).*
Circuit. Narrowly construing the Redwing Carriers modification to the reinstatement requirement, the courts have concluded it is unlikely that an employer can establish a substantial, legitimate business justification in the absence of prompt, actual replacement.

In contrast, the Eighth Circuit has concluded that sympathy strikers do not have the same reinstatement rights as the economic strikers with whom they join cause, since their actions are "no more and no less than a refusal to work." 81 Unless the employer acts from antunion bias or intends to discriminate against the employees and discourage membership in the union, he has an absolute right to sever the employer-employee relationship. 82 A middle-of-the-road approach was taken by the First Circuit in NLRB v. William S. Carroll, Inc., 83 where an employee was discharged for refusing to cross a picket line at the premises of one of the employer's customers. The court rejected the Board's position that it is the employer's burden of proving a business necessity justification for replacement which clearly outweighs the employee's right to engage in protected activity. Instead, the court held that once the employer has demonstrated a legitimate business reason for the dismissal, the burden shifts to the Board to establish that the primary motivation for the discharge was to penalize the employee for conduct sympathetic to the picketers.

Several commentators have criticized the business necessity approach for its failure to enable the parties to accurately assess whether the employer would be justified in permanently replacing an employee who refused to cross a picket line. 84 Although the development of a clear test should be encouraged, it is virtually impossible to delineate all possible circumstances justifying replacement.

It is meaningless to grant employees the right to refuse to cross picket lines while liberally allowing employers to permanently replace those who exercise that right. Therefore the burden should fall on the employer to demonstrate that permanent replacement is essential to avoid a serious disruption of the business. The employer should also be required to show that the employee was in fact immediately replaced. If it is possible for the work to be completed by other employees or supervisors, then permanent replacement is not justified.

In addition, the employer should be obliged to show that the employee knew or should have known the factors which necessitate permanent replacement. Under this rule, when an employee informs the employer she intends to exercise her right to respect a picket line, the

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82. Id.
83. 578 F.2d 1 (1st Cir. 1978).
84. See Carney & Florsheim, supra note 1, at 959 n.81; Friel, supra note 1, at 1374-75; Haggard, Picket Line Observance as a Protected Concerted Activity, 53 N.C. L. Rev. 43, 86 (1974).
employer would be compelled to outline for the employee any special circumstances which would require that she refrain from honoring the line. Subsequent, after-the-fact justification advanced by an employer for replacing an employee who honors a picket line would thus be discouraged.

III

WAIVER OF THE RIGHT TO ENGAGE IN SYMPATHY STRIKES

A. The Standard of Proof

Since the 1952 Supreme Court decision of *NLRB v. Rockaway News Supply Co.*, the Board and circuit courts have recognized that the right to honor picket lines may be waived in collective bargaining agreements. They differ, however, as to the proper standard for determining such a waiver. The question often arises in the context of determining whether a general no-strike clause constitutes a waiver of the right to engage in sympathy strikes.

The Board requires that a waiver of a statutory right be "clear and unmistakable" before it is rendered effective. The Board is therefore extremely reluctant to infer a waiver of the right to engage in sympathy strikes from the mere presence of a no-strike clause.

The Board and the courts have repeatedly emphasized that a waiver will not be lightly inferred and must be shown by "clear and unmistakable" language. Thus a statutory right, such as the right to honor picket lines, exists unfettered and undiminished in the absence of some explicit language contained in the contract unmistakably waiving or in some manner limiting it, or language, warranting resort to consideration of collateral evidence of contractual intent, which evidence clearly and unequivocally establishes that the union understood and intended said language to waive or limit the statutory right, despite the lack of the reduction of this intent into clear and express language in the contract.

In *Local 18, Operating Engineers (Davis-McKee, Inc.)*, the Board discussed at length the standard to apply in determining whether the right to engage in sympathy strikes has been waived. A majority of

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85. 345 U.S. 71 (1952).
89. The case arose in the context of section 8(b)(1)(A) charges against a union which fined two members who performed work for Davis-McKee when it was unable to obtain the services of its regular employees who were engaged in a sympathy strike. If the union had waived the statutory right to engage in sympathy strikes, then the union would have violated the Act by fining members for refusing to participate in unprotected activity.
the Board continued to apply a strict standard in assessing alleged waivers of the fundamental right to strike in general, and the right to engage in sympathetic work stoppages in particular. A distinction was made between the waiver of a right to engage in an economic strike and a waiver of the right to refuse to cross another union's picket line. Therefore, the majority would require that the parties independently discussed the question of sympathy strikes, and, preferably, expressly embodied in their agreement any intent to extend a general ban on strikes to sympathy strikes. Accordingly, the majority declined to infer a waiver of the protected right to engage in sympathy strikes solely from the existence of a broad no-strike clause which prohibited all "stoppages of work because of any difference of opinion or dispute which arise [sic] between the union and the employer."90

While concurring in the conclusion that the union in *Davis-McKee* had not waived the right to honor the picket lines, Member Penello strenuously disagreed with the standard employed by the majority for determining when the right has been waived. He argued that a broad no-strike clause suffices to waive the right to engage in sympathy strikes unless other relevant evidence reveals a contrary intent.91

Following the Board's lead, the First,92 Third,93 Fifth,94 Sixth,95 Seventh,96 Eighth97 and Tenth98 Circuits also require a "clear and unmistakable waiver" of the right to refuse to cross a picket line. In these jurisdictions a broad no-strike clause alone will not constitute a waiver of the right to engage in sympathy strikes.

### B. Reliance Upon Extrinsic Evidence to Establish a Waiver

Several of the circuit courts and the Board disagree over the relevance of bargaining history in determining whether a union has waived its right to honor a picket line. The question often arises when an em-

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90. 238 N.L.R.B. at 655, 99 L.R.R.M. at 1310.
91. Moreover, he disagreed with the majority's interpretation of the Supreme Court's opinion in *Rockaway News*. The *Davis-McKee* majority found that the Supreme Court in *Rockaway News* had relied on bargaining history and a prior arbitration proceeding in concluding that the action of an employee driver who refused to cross a picket line to pick up newspapers at one of his scheduled stops violated a no-strike clause. Member Penello would interpret *Rockaway News* as holding that a broad no-strike clause is sufficient to waive the right to engage in sympathy strikes and that the other factors present in that case were not essential to the decision.
93. Delaware Coca-Cola Bottling Co. v. Teamsters Local 326, 624 F.2d 1182, 1184 (3d Cir. 1980).
95. Kellogg Co. v. NLRB, 457 F.2d at 525.
96. W-I Canteen Serv., Inc. v. NLRB, 606 F.2d 738, 743 (7th Cir. 1979); Gary Hobart Water Corp. v. NLRB, 511 F.2d at 287.
98. NLRB v. Gould, Inc., 638 F.2d at 164.
ployer seeks to introduce evidence that the union had unsuccessfully attempted to include a picket line clause preserving the right to honor picket lines. 99 The Supreme Court in Rockaway News considered relevant evidence that the union had acquiesced in the employer's rejection of its proposed picket line clause, which would have preserved the right to honor picket lines, in its determination that the union had waived this right. 100

The Board has generally considered such evidence capable of producing conflicting inferences and will not find a waiver based on inability to incorporate specific sympathy strike protection. In Keller-Crescent, 101 the Board addressed the significance of a union's unsuccessful attempt to include a clause in the collective bargaining agreement expressly preserving the right to honor picket lines. Several employees of Keller-Crescent, members of the Typographical Union, refused to cross a picket line established by members of the Pressmen Union. The employer suspended them for their refusal. The Typographers' collective bargaining agreement stated that "no employee covered by this contract shall be required to cross a picket line established by a strike by, or lockout of, any other subordinate union of the International Typographical Union." 102 The employer offered evidence that the union had been unable to secure a broader picket line clause which protected the right to refuse to cross the picket line of any union. 103 The Board refused, however, to infer from the union's acquiescence in this more limited picket line clause that it had waived the right to respect picket lines of other unions. The Board construed the bargaining history of the picket line clause as an attempt to memorialize an existing statutory right rather than an intent to limit it. 104

The Board has acknowledged that a union's unsuccessful attempt to add a clause allowing sympathy strikes is evidence the union interpreted the original no-strike provision to prohibit such action. 105 Such evidence is not dispositive, however. In Amcar Division, ACF Industries Inc., the Board found that the union may only have desired to clarify the existing rights of employees by proposing such a clause. The Board therefore concluded that it was unable to find that the union had un-

99. But see Gary Hobart Water Corp. v. NLRB, 511 F.2d at 289, where the union introduced evidence that the employer's proposal prohibiting refusals to cross picket lines was rejected by the union.
100. 345 U.S. at 79-80.
102. Id. at 685 n.2, 89 L.R.R.M. at 1203 n.2.
103. Id. at 688, 89 L.R.R.M. at 1205-06.
104. Id. at 689, 89 L.R.R.M. at 1206.
equivocally waived its statutory right to engage in sympathy strikes.\textsuperscript{106}

The First Circuit has adopted the Board's position that the inability of a union to obtain the employer's assent to a clause permitting sympathy strikes does not constitute a waiver of the right to engage in such activity.\textsuperscript{107} The court found that the reasonable inference to be drawn from this evidence is that "the parties left the 'no strike' clause to be interpreted according to existing principles of law in this area. . . ."\textsuperscript{108}

In \textit{Gary Hobart} the Seventh Circuit found it unnecessary to examine the bargaining history where the collective bargaining agreement did not "clearly and unmistakably" waive the right to engage in sympathy strikes. The court did observe, however, that the employer's unsuccessful attempt to include a provision expressly prohibiting sympathy strikes in its contract with another unit reinforced its holding: "In other words the Company knew how to deal specifically with the subject when it so desired."\textsuperscript{109} In a more recent Seventh Circuit case, evidence was introduced that the parties had considered, but rejected, a clause specifically reserving the right of employees to honor picket lines at the employer's premises.\textsuperscript{110} The court recognized the line of cases holding that a union's failure to gain express recognition of a right does not evidence a waiver when the collective bargaining agreement is silent on the issue. The court found that the clause was "sufficiently clear to preclude sympathy strikes,"\textsuperscript{111} but relied on this evidence of bargaining history to buttress its conclusion that the union had waived the right to honor picket lines at the employer's premises.

The Eighth Circuit has chosen a contrary position. In \textit{Montana-Dakota Utilities Co. v. NLRB},\textsuperscript{112} the applicable contract contained a picket line clause providing that "it shall not be cause for discharge . . . if any employee or employees refuse to go through any authorized picket line of any Union."\textsuperscript{113} During bargaining, the union had been unable to secure language to the effect that "it shall not be cause for

\textsuperscript{106} But see \textit{American Cyanamid}, 246 N.L.R.B. 87, 102 L.R.R.M. 1443 (1979), where a panel of Board members relied on a different type of bargaining history in finding that a union had waived the right to refuse to cross a picket line established by another union. There, the employer and union had discussed the possibility of a sympathy strike during negotiations leading to their first collective bargaining agreement, and the union had orally represented it had no intention of honoring another union's picket line. This evidence was interpreted as indicating an intent to waive the right to honor picket lines.

\textsuperscript{107} \textit{NLRB v. C.K. Smith & Co.}, 569 F.2d 162 (1st Cir. 1977).

\textsuperscript{108} \textit{Id}. at 167 n.2.

\textsuperscript{109} 511 F.2d at 289.

\textsuperscript{110} \textit{W-I Canteen Serv., Inc. v. NLRB}, 606 F.2d 738 (7th Cir. 1979).

\textsuperscript{111} \textit{Id}. at 746.

\textsuperscript{112} 455 F.2d 1088 (8th Cir. 1972).

\textsuperscript{113} \textit{Id}. at 1090.
discharge [or discipline] if any employee. . . .” 114 The court, relying on the union’s failure to obtain the modification, found that the employer had only waived its right to discharge an employee who refused to cross a picket line, but not to discipline the employee. 115

This opinion can be criticized on several grounds. First, the Eighth Circuit’s approach, which addresses the question in terms of whether the employer has waived its right to discipline or discharge an employee who honors a picket line, is contrary to the weight of authority which looks to whether the union has waived its right to honor picket lines. Second, it seems especially harsh under these facts to subject employees to discipline for the sole reason that a broader picket line clause was rejected during negotiations since it is unlikely they knew of the content of the negotiations. The inequity inherent in this approach is enhanced by the fact that the employees were expressly protected against discharge for refusals to cross any picket lines.

Reliance upon bargaining history as evidence of a waiver of the right to engage in sympathy strikes places an unfair burden on employees. The employee possesses the right by authority of statute. Inasmuch as it is the employer who seeks a waiver, employers should bear the responsibility of obtaining explicit language surrendering the right. Employees should not have to guard their rights closely in order to retain them. The bargaining history standard leaves employees in the dark as to when or why their right to honor picket lines is impaired. The employee should not be held responsible for knowledge of contractual clauses which were introduced in bargaining, but not included in the agreement.

A persuasive argument against relying on the bargaining history of proposed picket line clauses in determining whether there was a waiver of the right to respect picket lines was expressed by the ALJ in *W-J Canteen*:

In determining whether the right to strike has been waived in any given instance, the Board, Courts, and arbitrators have at their disposal lengthy evidentiary records, the research of the parties into the mists of bargaining history, the argument of counsel about conflicting inferences which can be drawn from the collateral words and deeds of con-

114. *Id.* (emphasis in original).

115. *Id.* at 1091. The Eighth Circuit in *Amcar Div., ACF Indus. Inc v. NLRB*, 641 F.2d 561 (1981) recently reaffirmed its willingness to inquire into bargaining history to determine whether the right to engage in sympathy strikes has been waived. In finding that the union had waived this right the court considered the following factors: (1) proposals by the union in prior contract negotiations which would have allowed for sympathy strikes; (2) conduct of union officials during a previous sympathy strike situation during which they urged employees to report to work; and; (3) the provision for an absence control program in the collective bargaining agreement which allowed for only four enumerated excusable absences, none of which would cover the sympathy strike situation. *Id.* at 567-69.
testing parties, and the leisure to reflect upon a whole host of cases which can be used as precedent for resolving divergent contract interpretations. 116

Employees do not have access to the same sources. Employees faced with a picket line should be able to refer to the collective bargaining agreement and rely upon the knowledge that unless it expressly prohibits sympathy strikes, their rights have not been waived.

There is likewise disagreement over the relevance of the union leadership's past conduct or its opinion as to the legality of a sympathy strike. In American Cyanamid, the Board found that an opinion expressed by the union's business manager that refusals to cross a picket line would violate the applicable collective bargaining agreement was "clearly . . . entitled to some weight in determining whether or not there was a waiver." 117 On the other hand, a union's encouragement of employees to cross the picket line did not indicate that the union believed their right to have the picket line was waived by the no-strike clause. 118 Furthermore, private statements by union agents that they believed employees were required to cross the line were of no effect when never communicated to the membership. 119

The courts of appeals take differing approaches to statements of union agents. The Sixth Circuit deemed the opinions of union officials irrelevant in determining whether the right to honor picket lines was waived. 120 The D.C. Circuit commented that it is unlikely that responsible, experienced and authoritative union leadership would lightly interpret their handiwork as barring the observance of picket lines. 121 Consequently, attitudes and opinions expressed by union leaders that a no-strike clause covered sympathy strikes were considered probative of the parties' intent to bar sympathy strikes. As the Eighth Circuit's opinion in Iowa Beef Processors, Inc. v. Meat Cutters 122 illustrates, however, the union's statements concerning the legality of a sympathy strike may be the result of the conflicting obligations it must consider. The court interpreted expressions by union officials that a sympathy strike by the meat cutters was unauthorized to indicate the union's belief that such action violated the collective bargaining agreement. The statements, therefore, were evidence of the parties' intent that sympa-

117. 246 N.L.R.B. at 90, 102 L.R.R.M. at 1446.
119. Id.
120. Kellogg Co. v. NLRB, 457 F.2d 519 (6th Cir. 1972). See also NLRB v. Difco Laboratories, 427 F.2d 170 (6th Cir. 1970).
122. 597 F.2d 1138 (8th Cir. 1979).
thy strikes were barred by the agreement. Yet the court also found the union liable for compensatory damages because it failed to fulfill its obligation to publicly declare that the sympathy strike was unauthorized and to promptly order its members to resume work. Thus, under Iowa Beef, if a union expresses the opinion that a sympathy strike is unauthorized, that opinion may be relied upon as indicating the illegality of the sympathy strike. However, if it fails to convincingly encourage members to return to work, it may be held liable for damages.123

In light of the unsettled nature of the law governing picket lines, and in the absence of an express waiver, the opinions of union officials whether employees may honor a picket line with impunity should not be determinative. The probative value of such opinions is compromised by the potential liability of the union for failing to discourage sympathy strikes. Depending on its scope, an arbitration clause in a collective bargaining agreement may be indicative of a waiver of the right to honor picket lines.

C. The Scope of the Arbitration Clause

It is well settled that where a collective bargaining agreement does not contain an express no-strike clause, an obligation not to strike over arbitrable disputes is inferred.124 The Supreme Court has held that, absent an express no-strike clause, "the agreement to arbitrate and the implied duty not to strike should be construed as having coterminous application."125

The theory of coterminous application presumes that a no-strike obligation is the quid pro quo of an arbitration provision in a collective bargaining agreement. As a result, a no-strike obligation will not bar a strike over a nonarbitrable dispute. Accordingly, the view holds that an implied no-strike obligation does not bar a sympathy strike since the underlying dispute cannot be arbitrated under the contract.126

The quid pro quo analysis is illustrated in the Board's opinion in Gary Hobart Water Corp.,127 involving a refusal by clerical employees to cross a picket line established by the production and maintenance employees. The Board found the no-strike obligation coextensive with

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123. The Eighth Circuit recently reiterated its willingness to consider past statements of union officials in determining whether the union waived its right to engage in sympathy strikes. See note 115 supra.
125. Gateway Coal Co. v. UMW, 414 U.S. at 382.
the grievance and arbitration procedures. Since the production and maintenance employees' dispute could not be arbitrated under the clerical employees' agreement, the refusal to cross did not violate the no-strike obligation.

While the Board generally continues to apply the principle that a no-strike obligation does not cover a sympathy strike where the underlying dispute is not subject to the sympathy striker's arbitration procedures, it has also demonstrated a willingness to look beneath the surface relationship between the no-strike provision and the arbitration clause and to find that the clauses are not "linked." In *American Cyanamid*, the grievance provisions prohibited work stoppages over "any differences or local trouble of any kind arising in the plant," in addition to a more traditional no-strike clause. The Board found that this language suggested that the broad no-strike provisions were not a quid pro quo for an agreement to arbitrate disputes, but rather an "independent undertaking by the Union in return for the [employer's] no-lockout pledge." Relying on the structure of the contract, bargaining evidence and the opinion of union officials, the Board concluded the union had clearly, unequivocally and consciously waived their right to honor the picket line.

Several Circuits have applied the *Gary Hobart* quid pro quo analysis. In *Delaware Coca-Cola Bottling Co. v. Teamsters Local 326*, the Third Circuit recently held that the union was not liable for damages to the employer under section 301 of the Labor-Management Relations Act for engaging in a sympathy strike allegedly in violation of the labor contract's no-strike clause. The court noted that absent evidence to the contrary, it is proper to presume that the no-strike clause is no broader than the arbitration clause. It concluded that where the employer and the sympathy strikers cannot arbitrate the subject matter of the primary dispute, a generally worded no-strike clause will not bar the sympathy strike. Concurring in the result only, Judge Rosenn strongly argued that the doctrine of coterminous application should not be used in cases where an express, as distinguished from an implied, no-strike clause is "functionally independent" from the arbitration clause.

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128. 246 N.L.R.B. at 89, 102 L.R.R.M. at 1446.
129. See note 105 supra and accompanying text.
130. See notes 117-20 supra and accompanying text.
131. 246 N.L.R.B. at 90, 102 L.R.R.M. at 1446.
132. See NLRB v. Gould, Inc., 638 F.2d 159 (10th Cir. 1980); Delaware Coca-Cola Bottling Co. v. Teamsters Local 326, 624 F.2d 1182 (3d Cir. 1980); NLRB v. C.K. Smith & Co., 569 F.2d at 168.
133. Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1976), provides that any party to a collective bargaining agreement may sue for damages in any federal district court for violations of the labor contract.
134. 624 F.2d at 1187.
clause.\textsuperscript{135}

Earlier, the Seventh Circuit applied similar reasoning in \textit{W-I Canteen Service, Inc. v. NLRB}.\textsuperscript{136} The underlying dispute giving rise to the sympathy strike of the Retail Clerks in \textit{W-I Canteen} was between the employer and the Teamsters, and therefore, not cognizable under the Retail Clerks arbitration machinery. Applying the doctrine that the duty to refrain from striking is no broader than the coverage of the grievance and arbitration machinery, the Board again concluded that the no-strike clause did not encompass sympathy strikes. The court, however, found the principle of coterminous application of the no-strike and arbitration clauses to be inappropriate.\textsuperscript{137} The court viewed the quid pro quo analysis as merely a rule of contract interpretation and found that the parties had by express language extended the no-strike obligation beyond the scope of the no-strike clause.\textsuperscript{138}

The quid pro quo analysis has been criticized for focusing on whether the sympathy strike was caused by an arbitrable grievance. The real issue, critics assert, is whether the work stoppage is prohibited by the no-strike clause.\textsuperscript{139} This latter issue concerns the interpretation of a collective bargaining agreement provision, and therefore is arbitrable under most conventional arbitration clauses. Since an arbitrable dispute exists over the legality of the sympathy strike, the argument continues, and the arbitration clause and no-strike provision are coextensive, the sympathy strike activities are embraced by the no-strike provision. An answer to this criticism may be found in the Board's comment in \textit{Davis-McKee} that sympathy strikers are not striking over the scope of the no-strike clause.\textsuperscript{140} The dispute between sympathy strikers and their employer is that between the original strikers and their employer, not whether the sympathy strike itself violates the agreement. The common arbitration provision would not provide jurisdiction over the wages, hours and other terms and conditions of employment for non-unit employees, and is usually limited to subjects of the collective bargaining agreement.

Other commentators have called wholly inappropriate the applica-

\textsuperscript{135} \textit{Id.} at 1192.
\textsuperscript{136} 606 F.2d 738 (7th Cir. 1979).
\textsuperscript{137} \textit{Id.} at 744.
\textsuperscript{138} The collective bargaining agreement provided that "[t]he Company and the Union agree that there will be no strike or lockout during the life of this Agreement so long as the Company and the Union abide by the terms of this Agreement or submit to arbitration any differences which may arise which are not covered by this Agreement." \textit{Id.} at 740. The Board acknowledged this language extending the coverage of the grievance and arbitration provisions to noncontractual disputes, but felt the phrase still restricted arbitration to the settlement of differences which might arise between the parties to the agreement. The underlying dispute in \textit{W-I Canteen} was between another union and the employer. 238 N.L.R.B. at 610, 99 L.R.R.M. at 1572.
\textsuperscript{139} Smith, \textit{supra} note 1, at 356.
\textsuperscript{140} 238 N.L.R.B. at 652, 99 L.R.R.M. at 1308.
tion of the quid pro quo analysis to the determination of whether the right to engage in sympathy strikes has been waived. When a union obtains the right to demand arbitration over a particular grievance, it makes sense to conclude that as a quid pro quo it has relinquished the right to strike over the grievance. Since the issues raised in sympathy strikes are not the sort of disputes to be resolved by a grievance procedure, the quid pro quo analysis used for primary disputes would not apply to these items.

The effect of the Supreme Court's *Buffalo Forge* decision on the issue of whether a broad no-strike clause waives the right to engage in sympathy strikes is disputed. The controversy revolves around the connection between the scope of the arbitration provisions and the extent of the obligation not to strike. In *Buffalo Forge* the Supreme Court held that a federal district court lacks jurisdiction under section 301 of the Labor-Management Relations Act to enjoin a sympathy strike pending an arbitrator's determination of whether or not a broad no-strike clause prohibits such strikes. The Court commented that the quid pro quo for the employer's promise to arbitrate is the union's obligation not to strike over issues that were subject to the arbitration machinery. Since the sympathy strike was not "over any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract," the Court held that the sympathy strike could not be enjoined under the *Boys Markets* doctrine. The Court also observed that although an obligation to refrain from striking may be inferred from the existence of a mandatory arbitration clause, a commitment not to engage in sympathy strikes may not likewise be implied from a mandatory arbitration clause.

*Buffalo Forge* has been cited both to support and to reject the application of the quid pro quo analysis to sympathy strikes. In *Davis-McKee*, a majority of the Board cited *Buffalo Forge* to reaffirm their unwillingness to construe no-strike obligations broader than the arbitration clauses for which they were bartered. It found support in *Buffalo Forge* for the quid pro quo analysis that a union's waiver of the

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141. Freed, *Injunctions Against Sympathy Strikes: In Defense of Buffalo Forge*, 54 N.Y.U. L. REV. 289, 325 (1979) [hereinafter cited as Freed]. *See also* Friel, *supra* note 1, at 786, suggesting that a union's offer to waive the right to honor picket lines in exchange for some concession by the employer is entirely separate from the promise to arbitrate.


144. 428 U.S. at 407.

145. *Id.* (emphasis in original).


147. 428 U.S. at 408-09 n.10.
right to strike in return for an arbitration clause is limited to disputes which are arbitrable. Member Penello, in his concurring opinion, strongly disagreed with the Davis-McKee majority. He interpreted Buffalo Forge as implying that an unrestricted no-strike clause is meant to prohibit sympathy strikes:

The majority in Buffalo Forge implicitly recognized that the scope of grievance-arbitration procedures and no-strike clauses should not be presumed to be coextensive in the context of sympathy strikes and respect for picket lines. . . . This suggests that, unless the agreement specifically so provides, an otherwise unrestricted express no-strike clause should not be construed as coextensive with the scope of grievance-arbitration provisions when the disputed issue concerns the permissibility of a sympathy work stoppage.148

The commentators149 and circuit courts also disagree over the impact of Buffalo Forge. The Eighth Circuit, relying on Buffalo Forge, held that the arbitration clause and no-strike obligation are analytically distinct. Thus, in Iowa Beef Processors, Inc. v. Meat Cutters, the Eighth Circuit found that the arbitrability of the issues underlying the sympathy strike was immaterial to a determination of whether the sympathy strike was barred by the no-strike clause.150

In Delaware Coca-Cola, the Third Circuit asserted that the Supreme Court expressly relied on the quid pro quo theory in Buffalo Forge:

[T]he Court carefully distinguished the arbitrability of the subject matter of the strike from the arbitrability of the application of the no-strike clause to the sympathy strike. . . .

The relevance of Buffalo Forge is the recognition that, absent some evidence to the contrary, the quid pro quo theory underlying coterminous application applies where there is an express no-strike clause in the contract.151

The Tenth Circuit recently adopted this interpretation.152

However, Judge Rosenn, concurring in Delaware Coca-Cola, took

148. 238 N.L.R.B. at 660, 99 L.R.R.M. at 1316 (Member Penello, concurring), citing Smith, supra note 1, at 357.
149. Freed, supra note 141, at 325 n.156 (Buffalo Forge suggests a presumption against including sympathy strikes within the meaning of an express no-strike clause); Lowden & Flaherty, Sympathy Strikes, Arbitration Policy, and the Enforceability of No-Strike Agreements—An Analysis of Buffalo Forge, 45 GEO. WASH. L. REV. 633, 651 (1977) (the key assumption of Buffalo Forge is that the union’s obligation not to strike over issues subject to arbitration is the quid pro quo for the employer’s promise to arbitrate); Smith, supra note 1, at 357 (Buffalo Forge implicitly recognizes the scope of the grievance/arbitration procedures and no-strike clauses are not presumed coterminous where sympathy strikes are at issue).
150. 597 F.2d at 1145.
151. 624 F.2d at 1186.
issue with the majority’s reading of *Buffalo Forge*, arguing that the Supreme Court’s opinion should not apply beyond its limited context:

I believe therefore that the relationship between the sympathy strikers’ right to strike and the arbitration clause of the contract in *Buffalo Forge* must be read in the context of the relief requested, namely an injunction. The nonarbitrability of the underlying dispute only relates to the availability of injunctive relief under *Boys Markets*, not to a suit for damages. I see nothing in *Buffalo Forge* to indicate that in a suit for damages, the relationship between the arbitration and no-strike clause is in any way germane to whether the strike is in violation of the no-strike clause. Indeed, a remedy in damages for the violation of an express no-strike clause becomes all the more necessary in light of the general unavailability of injunctive relief under the Norris-LaGuardia Act.\(^\text{153}\)

In *Keller-Crescent*, the Seventh Circuit similarly noted that even where injunctive relief is unavailable, it is possible for a strike to violate a contractual no-strike pledge.\(^\text{154}\) The Board had found that since the dispute giving rise to the initial picket line, honored by members of the typographers local, was not arbitrable under their collective bargaining agreement, the sympathy strike did not fall within the ban of the no-strike clause. The Seventh Circuit reversed the Board and distinguished *Gary Hobart* on the grounds that the typographers’ contract in *Keller-Crescent* contained a limited picket line clause: \(^\text{155}\) “no employee . . . shall be required to cross a picket line established because of a strike by, or lockout of, any other subordinate Union of the International Typographical Union.”\(^\text{156}\) In addition, disputes over the interpretation of the contract were found arbitrable. The court cited *Buffalo Forge* in support of the notion that courts should refrain from dealing with legal issues in a preliminary fashion in arbitrable disputes that are properly subjects for the arbitrator. The court concluded that the issue of the coverage of the picket line clause was arbitrable and that the sympathy strikers breached the contract by stopping work rather than taking their dispute to arbitration. Thus the Seventh Circuit reversed the Board’s holding that the employer had violated section 8(a)(1) by suspending the members of the typographical union who respected the picket line. The *Keller-Crescent* decision has been criticized as “effectively eras[ing] a significant portion of the employee rights enunciated in *Buffalo Forge*.\(^\text{157}\)

*Buffalo Forge* was also discussed by the First Circuit in *NLRB v.*

\(^{153}\) 624 F.2d at 1193 (emphasis in original).

\(^{154}\) 538 F.2d at 1296.

\(^{155}\) Id. at 1293 n.1.

\(^{156}\) Id. at 1300.

\(^{157}\) The court also distinguished *Gary Hobart* on the grounds that the Board decided that case only after the employer had refused to arbitrate, whereas in *Keller-Crescent* there was no
C.K. Smith & Co.,\textsuperscript{158} in adopting the principle that a no-strike provision is ordinarily coterminous with the duty to arbitrate.\textsuperscript{159} In answering the employer's contention that the applicability of the no-strike obligation to the sympathy strike is an arbitrable issue, the court acknowledged that under Buffalo Forge the scope of the no-strike clause may present an arbitrable question, although it doubted that the issue would be arbitrable in this case.\textsuperscript{160} The court noted, however, that even if the issue was arbitrable, the employer was in no position to complain because it had not demanded arbitration.\textsuperscript{161} Moreover, even assuming the scope of the no-strike clause was arbitrable, the court rejected the notion that under Buffalo Forge the union would be under a duty not to strike pending arbitration of the issue.\textsuperscript{162} Since Buffalo Forge barred injunctions against sympathy strikes even where the scope of the no-strike clause was arbitrable, the First Circuit doubted the union could have implicitly agreed not to strike pending arbitral resolution of the scope of the no-strike clause.

The rule that a waiver of the right to honor picket lines exists only when shown by explicit contractual language should be uniformly adopted. The quid pro quo analysis, which determines whether a sympathy strike is embraced by a general no-strike clause as defined by an arbitrable provision, would become unnecessary. Regardless of the scope of the arbitration provisions, a standard no-strike clause would be insufficient to waive the right to honor picket lines. This rule would also be more consistent with the requirements for waivers of other rights. Assuming, however, that this rule will not be uniformly implemented in the near future, the quid pro quo analysis as applied in Gary Hobart and Delaware Coca-Cola should be accorded greater currency.

Under this quid pro quo analysis a no-strike clause covers only strikes over disputes which are arbitrable. The dispute causing the picket line is grounded in a different contract and a different unit than those of the sympathy strikers, and thus is not generally arbitrable under the sympathy strikers' contract. Therefore, the sympathy strike is not barred by a no-strike clause in the same contract. Those who respect a picket line are not striking over an arbitrable dispute. Their refusal to cross the picket line may give rise to an independent arbitrable dispute over the interpretation of a picket line clause but should not

\textsuperscript{158} 569 F.2d 162 (1st Cir. 1977).
\textsuperscript{159} Id. at 168.
\textsuperscript{160} The contract did not provide for employer-initiated grievance procedures or arbitration. Id.
\textsuperscript{161} In Keller-Crescent, the Seventh Circuit placed the burden on the union to request arbitration over the coverage of the picket line clause. 538 F.2d at 1299.
\textsuperscript{162} 569 F.2d at 169.
render the sympathy strike subject to the no-strike clause. Although there is much uncertainty over the impact of *Buffalo Forge* in this area, the case does not refute the quid pro quo analysis.

### IV

**Conclusion**

Employees have a statutory right under section 7 to refuse to cross picket lines. The extent to which an employee may exercise this right with impunity should be made as clear as possible. An employee confronted with a picket line must be able to accurately assess the potential consequences of her actions. To force an employee to determine the legality of her conduct, when the Board and the courts disagree with one another, forces her to gamble.

Those circuit courts which qualify the right to refuse to cross a picket line by limiting section 7 protection to picket lines at the premises of a common employer, and to refusals based on principle, should abandon these distinctions. Although the case law protects solely refusals to cross *legal* picket lines, employees should not be subject to discipline or discharge unless they knew or should have known the picket line was illegal.

The circumstances triggering the employer’s countervailing right to permanently replace employees who choose to honor a picket line should be narrowly proscribed. Employers should be required to establish that: (1) permanent replacement was essential to avoid serious disruption of the business; (2) the employee was in fact immediately replaced; and (3) the employee had knowledge of the special circumstances justifying permanent replacement.

A union may contractually waive the right to honor picket lines. Since a waiver must be “clear and unequivocal,” a standard no-strike clause should not suffice as a waiver. Rather, the contract should contain explicit language prohibiting sympathy strikes for a waiver to exist. Were this standard uniformly applied, it would be unnecessary to resort to extrinsic evidence or to apply a quid pro quo analysis.

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163. Given the existing confusion concerning the right to honor picket lines, perhaps employees confronted with a picket line should be afforded a “*Weingarten*-type” right to have a union representative clarify the situation. In *NLRB v. J. Weingarten, Inc.* 420 U.S. 251 (1975), the Supreme Court held that employees have a section 7 right to union representation upon request at investigatory interviews where they risk discipline. In the absence of a uniform standard it would be difficult for anyone to predict the consequences of honoring a picket line. However, a union representative should be more familiar with the contents of the collective bargaining agreement, and better able to determine issues such as the legality of the picket line. The union representative should also counsel the employee as to whether, in that jurisdiction, a refusal to cross a picket line out of fear would be protected.