Union Waiver of Employee Rights
Under the NLRA: Part I*

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The author formulates a principle, based on the Supreme Court decision in NLRB v. Magnavox, to distinguish which employee rights protected by section 7 may not be waived by unions in collective bargaining agreements. In this article, the non-waiver principle is applied to the right to strike. In the next issue, Professor Harper will address application of the principle to Board deferral to arbitration, drawing on former Board Chairman Murphy’s swing vote opinion in General American Transportation Corp.

Inherent in the structure of the National Labor Relations Act (NLRA or the Act) is a tension between the protection of individual employee rights and the advancement of aggregate employee interests through a system of collective action. Section 7 of the Act broadly grants to individual employees rights “to self-organization,” “to bargain collectively,” and “to engage in other concerted activities for . . . mutual aid or protection.” Section 9 of the Act, however, provides that representatives “designated or selected” by a majority of employees in an appropriate unit shall be “the exclusive representative of all the employees . . . for the purposes of collective bargaining. . . .”

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1. The full language of the provision is:
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

2. The critical language is found in section 9(a):
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive
Exclusive bargaining agents may often have reason to attempt to advance the aggregate interests of the employees whom they represent by using section 7 rights as negotiable items. What follows is an essay discussing the extent to which the employees' exclusive representative, normally a "labor organization," should be permitted to waive the section 7 rights of individual employees in the interest of advancing their aggregate interests.

I
INTRODUCTION

The Supreme Court has on occasion encouraged the National Labor Relations Board (the Board) to permit unions to waive in collective bargaining agreements significant employee rights protected by the Act. For instance, the Supreme Court has made clear that unions may waive employees' rights to bargain over certain terms of employment, by agreeing to management function clauses which allow management to adjust these terms unilaterally during the tenure of the agreement. And although employees' rights to strike are clearly protected by section 7, the Court has affirmed that unions may waive this protection by negotiating no-strike clauses.

However, in NLRB v. Magnavox Co. the Supreme Court, affirming a line of Board decisions, held that a union cannot waive the section 7-protected rights of employees to distribute union-related literature in non-working areas of a plant during non-working time. While acknowledging that it had permitted contractual waiver of section 7 rights to strike, the Court stated that "a different rule should obtain where the right of the employees to exercise their choice of a bargaining representative is involved—whether to have a bargaining representative, or to retain the present one, or to obtain a new one."

Although the Board has applied the Magnavox non-waiver principle to a broad range of section 7-protected employee solicitations and representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

8. Id. at 325-26.
9. Id. at 325.
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distributions, it has not applied an absolute non-waiver rule to other employee statutory rights. Nor has the Supreme Court yet considered the application of the Magnavox principle to other types of protected employee activity.

Nevertheless, the implications of Magnavox cannot be ignored. These implications cut across a variety of NLRA cases. For instance, in the year following its Magnavox decision, the Court in NLRB v. J. Weingarten, Inc., approved the Board’s determination that section 7 affords an employee the right “to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline.” In a dissenting opinion, Justice Powell wondered in light of Magnavox whether the majority would permit a union waiver of this representational right in a collective bargaining agreement.

More significantly, then Board Chairman Murphy in her swing vote opinion in General American Transportation Corp. (G.A.T.) explicitly recognized that the limitations on permissible waiver suggested by the Magnavox decision may establish statutory limits on the Board’s discretion to defer decisions on unfair labor practice changes to arbitration processes authorized by a contract.

In this essay, I shall attempt to formulate and apply a principle which limits the authority of unions to waive employee section 7 rights. I shall answer the question raised by Justice Powell in Weingarten concerning the waivability of the representation rights established in that case, as well as questions about the waivability of the statutory protection of a wide range of other concerted employee activity.

In the last section of this essay, I will apply the non-waiver principle to one of the two most significant issues it raises: union waiver of section 7 protection for employee work actions through the inclusion of no-strike clauses in collective agreements. I will argue that Magnavox

10. See text accompanying notes 57-63 infra.
13. Id. at 269, 275 n.8.
15. 228 N.L.R.B. at 812, 94 L.R.R.M. at 1488.
should be read to modify the commonly expressed doctrines concerning the effect of no-strike clauses of the statutory protection of concerted work actions. More specifically, I will argue that there are statutory limits on the extent to which unions, even by clear and unequivocal signals, may waive the rights of employees to protest certain activities of their employers, or indeed of other employers. In a separate article to be published in the next issue of this Journal, I shall apply the non-waiver principle to the second critical issue it implicates: Board deferral of unfair labor practice changes to arbitration under collective bargaining agreements.

II

FORMULATION OF THE NON-WAIVER PRINCIPLE

A. The Authority of Exclusive Bargaining Representatives

Protecting if not encouraging the development and maintenance of freely chosen collective bargaining systems has been the primary function of the Act since its passage in 1935.16 Subsequent amendments to the Act17 have not altered the basic form of collective bargaining it facilitates: bargaining by majority and exclusive employee representatives with power to negotiate for wages, hours and other conditions of employment for all employees within the unit they represent. This form of bargaining is defined by section 9(a) of the Act and is protected by the bargaining commands of section 8(a)(5) and 8(b)(3) to employers and unions,18 as well as by unions’ implied duty of fair representation.19

The Supreme Court recognized early that collective bargaining by exclusive representatives may entail the sacrifice of the individual economic advantages which some employees might be able to extract separately from their employer.20 “The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice

go in as a contribution to the collective result." The union, in other words, may use individual advantages as leverage to extract benefits for the group, thereby possibly placing some employees in a worse position than they would have been in without the union.

A union's duty of fair representation imposes restraints of good faith and reasonableness on its authority to sacrifice individual employee interests to the collective good, but the Supreme Court has been concerned that these restraints not impede the effectiveness of collective bargaining. For instance, in *Ford Motor Co. v. Huffman*, the Supreme Court rejected an attack on union-negotiated provisions in collective bargaining agreements which granted seniority credit to pre-employment military service. The provisions disadvantaged the union-represented employees who brought the challenge because they lacked significant pre-employment military service. The court stressed that differences inevitably arise "in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. . . . A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents. . . ."

Similarly, in *Humphrey v. Moore* the Court held reasonable a union's successful efforts after a closure of one business to integrate the seniority list of that business' employees with the seniority list of the successor business' employees. Both sets of employees were represented by the union and the closure of the first business meant some employees would inevitably suffer. The union's application of an integrated seniority principle necessarily sacrificed the interests of some of those whom it represented.

Furthermore, the Court has long recognized that the very existence of an exclusive representative may affect the section 7 rights available to the employees. In the absence of an exclusive bargaining representative, any group of employees, whether or not a majority of a designated unit, may bargain with their employer or otherwise take protected concerted actions to extract desired terms and conditions of employment. However, in 1944, the Supreme Court held in *Medo Photo Supply Co. v.*

21. *Id.* at 339.


24. *Id.* at 338.


26. NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (holding protected a spontaneous protest of cold working conditions by several employees not represented by a bargaining agent). See text accompanying note 106 infra. See also Consolidated Edison Co. v. NLRB, 305
that after selection of an exclusive representative, an employer commits an unfair labor practice by bargaining with any group or representative of the employees other than the designated exclusive representative.27

Moreover, in a sensitive case decided the term after Magnavox, Emporium Capwell Co. v. Western Addition Community Organization,28 the Supreme Court reaffirmed that concerted employee activity intended to force an employer to bargain with a minority representative is not protected by section 7 as long as the employees have a legitimate exclusive representative.29 Emporium Capwell fired two black employ-

U.S. 197, 236-39 (1938) (upholding, in absence of designated exclusive bargaining representative, union-employer contracts covering only union members).

The decision in ILGWU v. NLRB (Bernhard-Altmann), 366 U.S. 731 (1961), should not be read to the contrary. In this decision the Court found an employer's good faith recognition of a minority union to be an unfair labor practice. In partial dissent Justice Douglas objected to the Board's enjoining the minority union from acting as an exclusive bargaining representative of "any of the employees." Id. at 740. The Justice was worried that the injunction contradicted the right of minority unions to take concerted action for their supporters when no exclusive representative has been selected. Although the majority did not address Douglas' concern, the order can be easily explained as a command to the employer to not recognize the minority union as an exclusive representative of even some of the employees. The employees could still bargain with the minority union concerning the union's adherents, but not to the exclusion of other possible representatives of even these adherents. The Act only provides exclusive status to majority representatives of all employees within a unit; it does not provide exclusive status to representatives of a minority of employees within a unit, even in the absence of a majority union. Thus while an employer can bargain with a minority union when no majority union exists, whenever an employer provides the minority union exclusive status even for the union's adherents, the employer violates section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2) (1976).

27. 321 U.S. 678, 683-85 (1944). "That the Act 'carries the clear implication that employees shall not interfere' with the right of collective bargaining 'by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all,' was recognized by the reports of the congressional committees recommending the adoption of the bill which became the National Labor Relations Act. . . ." Id. at 684 n.2. See also J.I. Case v. NLRB, 321 U.S. 332 (1944).


29. The courts and the Board have long held that concerted activity forfeits protected status whenever its objective is to compel an employer to violate the Act. See, e.g., Hoover Co. v. NLRB, 191 F.2d 380 (6th Cir. 1951); Thompson Prods., Inc., 72 N.L.R.B. 886, 19 L.R.R.M. 1216 (1947).

Though nothing in section 7 requires that concerted protected activity have legal objectives, this is a reasonable gloss to place on the Act. If an employer could not take disciplinary action against employees who attempted to force it through concerted activity to violate the Act, it could be required helplessly to withstand effective economic coercion in order to avoid committing unfair labor practices. Although section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization to attempt to cause an employer to discriminate against an employee in violation of section 8(a)(3), 29 U.S.C. § 158(b)(2) (1976), there are no labor organization unfair labor practices covering attempts to cause employers to engage in other unfair labor practices, including violating section 8(a)(5) by circumventing an exclusive bargaining agent. The Supreme Court has interpreted section 8(b)(1)(A)'s proscription of union coercion of employees to cover only tactics involving violence, intimidation, and reprisals or threats. NLRB v. Drivers Local 639, 362 U.S. 274, 290 (1960). Furthermore, some coercive concerted activities with an objective illegal under the Act may be engaged in by employees independent of any "labor organization" as defined by the Act, and therefore free of the provisions of section 8(b).
ees for picketing an Emporium store with the objective of compelling Emporium to bargain with them concerning the Company's treatment of its black workers. The Court did not question that the Act would have protected picketing by the black employees to force Emporium to bargain with them had there been no exclusive bargaining representative. Nonetheless, the Court approved the Board's decision that attempts to compel an employer to conduct separate bargaining are not protected after an exclusive representative for bargaining has been designated.

The Emporium Court stressed that since majority rule is "[c]entral to the policy of fostering collective bargaining, . . . the superior strength of some individuals or groups [sometimes must] be subordinated to the interest of the majority." 30 The Court concluded that the principle of collective bargaining through exclusive majority representation should not be undermined even by employees representing a racial minority and wishing to negotiate to advance the national policy of nondiscrimination. 31

The Emporium Capwell opinion recognizes several legal restrictions on the power of exclusive bargaining representatives to sacrifice minority employee interests: first, the limitation of appropriate bargaining units to groups of employees who share a significant common interest; second, the constraints of union self-government imposed by the Labor-Management Reporting and Disclosure Act; 32 and third, the implied duty of labor organizations to represent fairly and in good faith, within a broad scope of reasonableness, the interests of all the employees within their unit. But, in a footnote, the Emporium Capwell Court at least implicitly acknowledged that the Magnavox holding expresses another absolute restriction on the power of exclusive bargaining representatives, a limitation on the representatives' authority to bargain away certain employee statutory rights. 33 This essay focuses

30. 420 U.S. at 62. The Court also quoted liberally from its decision in NLRB v. Allis-Chalmers, 388 U.S. 175 (1967). In Allis-Chalmers the Court held that by imposing a fine on members who had crossed picket lines in violation of a legitimate membership strike vote, a union had not restrained or coerced employees in the exercise of their section 7 rights. The court had reiterated in Allis-Chalmers that "[n]ational Labor Policy . . . extinguishes the individual employee's power to order his own relations with his employees and creates a power vested in the chosen representative to act in the interest of all employees." 388 U.S. at 180, quoted in Emporium Capwell, 420 U.S. at 63.

31. Id. at 65-70. A comprehensive view of the legal and factual background and implications of the Emporium Capwell case is provided in Cantor, Dissident Worker Action After the Emporium, 29 Rutgers L. Rev. 35 (1975) [hereinafter cited as Cantor]. For a provocative criticism of Emporium Capwell, see Lynd, The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History, 50 Ind. L.J. 720 (1975).


33. "The Union may not, of course, bargain away the employees' statutory right to choose a new, or to have no, bargaining representatives." See NLRB v. Magnavox Co., 415 U.S. 322 (1974)." 420 U.S. at 64 n.14.
on this last restriction.\textsuperscript{34}

\section*{B. Non-waivable Statutory Rights}

\subsection*{1. Magnavox Revisited}

The \textit{Magnavox} decision forms the basis for a theory of non-waivable employee statutory rights to limit the authority of exclusive bargaining representatives. Magnavox had developed a rule which prohibited employees from distributing literature of any kind on company property even in non-working areas during non-working time. Under clear Board and Supreme Court precedent, an employer interferes with section 7 rights and commits a section 8(a)(1) violation when it restricts such distribution of union literature absent evidence of special circumstances indicating the rule is necessary to maintain production or discipline.\textsuperscript{35} The union serving as exclusive bargaining representative for the Magnavox employees therefore filed charges with the Board, asserting that Magnavox's no-distribution rule interfered with the employees' section 7 rights. In defense, the company argued that the exclusive bargaining representative had waived the section 7 rights of the employees by signing, in the face of the company's long-standing no-distribution rule, a succession of collective bargaining agreements which authorized the company to impose rules for the

\textsuperscript{34} The essay thus does not address any of the other three limitations. This exclusion in no way suggests that I view these other limitations as unimportant. Though qualified by decisions like Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), and Humphrey v. Moore, 375 U.S. 335 (1964), the union's duty of fair representation is especially significant, and has been the object of many definitional essays, both recent and venerated. \textit{See} Cox, \textit{The Duty of Fair Representation}, 2 VILL. L. REV. 151 (1957); Finkin, \textit{Limits of Majority Rule in Collective Bargaining}, 64 MINN. L. REV. 183 (1980) [hereinafter cited as Finkin]; Jacobs, \textit{The Duty of Fair Representation: Minorities, Dissidents and Exclusive Representation}, 59 B.U. L. REV. 857 (1979); Summers, \textit{The Individual Employee's Rights under the Collective Agreement: What Constitutes Fair Representation?}, in \textit{The Duty of Fair Representation} 60 (1977).

Arguably, any limitations on an exclusive representative's authority to waive rights protected by section 7 are within a subcategory of the duty of fair representation limitations. A union's attempt to waive a non-waivable statutory right could be termed a \textit{per se} violation of the duty of fair representation. On the other hand, if a bargaining representative does not have authority to waive a right and if the waiver is therefore ineffective, no represented employee can be harmed and no breach of a fair representation duty cause of action is either necessary or sensible. In any event, a non-waiver principle clearly protects individual employees in a different manner than does the duty of fair representation principle. Most employees who have been discharged by employers for engaging in activity protected by section 7, but supposedly waived by their union, would prefer a Board remedy against the employer presumably ordering reinstatement with back pay, \textit{see} 29 U.S.C. § 160(c) (1976), than either a court or Board remedy against the union.

\textsuperscript{35} In \textit{Republic Aviation Corp. v. NLRB}, 324 U.S. 793 (1945), the Supreme Court approved a Board ruling that an employer, absent a showing of special circumstances, cannot restrict union solicitation of employees by other employees on company property outside working hours. The Board has applied its \textit{Republic} presumption of illegality to employer restraints of employee distributions of union literature, as well as to oral solicitations, in non-working areas during non-working hours. \textit{See} Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 51 L.R.R.M. 1110 (1962).
"maintenance of orderly conditions on plant property." Affirming
the Board's rejection of Magnavox's defense, the Supreme Court did
not question that the Board could reasonably read the collective bar-
gaining agreements to approve the company rule restricting employee
rights to distribute literature. Rather, the Court held that the union
had no authority to effect such a waiver and that the employees' protec-
tion against employer restraints was therefore not affected by the provi-
sions in the agreement.

The Magnavox decision contrasts with the union's general author-
ity to control the advancement of the work-related interests of the em-
ployees it represents. The union's bargaining table acceptance of the
company's authority to impose no-distribution rules could be described
as a decision to trade off employee distribution rights in order to ad-
vance collective interests in better terms and conditions of employment.
Presumably, the union's acceptance of the company's authority over
employee distributional rights gave the union bargaining leverage for
the extraction of other benefits from the company. By denying an ex-
clusive representative the authority to exchange the employees' section
7 distribution rights for other benefits, the Court and the Board re-
duced the representative's bargaining flexibility and seemed to interfere
with a primary goal of the Act: the free process of collective
bargaining.

The Magnavox Court's approval of this restriction on a represen-
tative's collective bargaining flexibility cannot be explained simply by
citing the need to protect union dissidents or opponents from a possibly
unfair union leadership. The Board first announced its non-waiver
rule for protected solicitation and distribution rights in Gale Products, where the company had tried to use union waiver to justify the discri-

36. 415 U.S. at 323.
37. Both the Board and the Trial Examiner interpreted the agreements in light of the rule's
continuing existence from before the commencement of the parties' 16-year bargaining relation-
ship and the union's failure ever before to have challenged the rule at the bargaining or grievance
table. 195 N.L.R.B. 265, 79 L.R.R.M. 1283 (1972). This mode of interpretation was in no way
extraordinary.
38. 415 U.S. at 325-26. The Court's decision resolved a split in the circuits over the validity
of union waiver of employee solicitation and distribution rights. The Eighth and Fifth Circuits
had upheld Board non-waiver decisions. International Ass'n of Machinists v. NLRB, 415 F.2d
113 (8th Cir. 1969); NLRB v. Mid State Products, 403 F.2d 702 (5th Cir. 1968). However, the
Sixth and Seventh Circuits had denied enforcement of Board orders resting on rejections of em-
ployer waiver defenses. Magnavox v. NLRB, 474 F.2d 1269 (6th Cir. 1973); General Motors
Corp. v. NLRB, 345 F.2d 516 (6th Cir. 1965); Armoc Steel v. NLRB, 344 F.2d 621 (6th Cir. 1965);
NLRB v. Gale Prods., 337 F.2d 390 (7th Cir. 1964). See also Note, Contractual Waiver By Labor
Unions of Employees' Solicitation-Distribution Rights: Time For a Resolution, 49 Notre Dame
39. See text accompanying notes 16-19 supra.
40. 142 N.L.R.B. 1246, 53 L.R.R.M. 1242 (1963), enforcement denied, 337 F.2d 390 (7th Cir.
1964). Before Gale Products, the Board had permitted union waiver of employee solicitation and
pline of employees for distributing literature advocating the ouster of the union. In Magnavox, however, the complaint against the company's no-distribution rule was filed by leaders of the same exclusive representative which had acquiesced at the bargaining table to the company's authority over literature distribution. Nor can extension of the non-waiver principle to employees soliciting in support of the union rest merely on an equitable, "fair balance" consideration that union proponents must share all opportunities available to union opponents. Incumbent unions, like incumbent presidents or members of Congress, have advantages as well as disadvantages not available to their opponents. One advantage enjoyed by an incumbent union is the authority to show employees what benefits it can obtain for them. The "fair balance" explanation of the Magnavox extension of the non-waiver principle cannot explain why a union should be prevented from acting on a judgment that it can best maintain the support of the employees which it represents by sacrificing its rights to distribute promotional literature in exchange for some economic benefit.

The Magnavox decision is nevertheless correct for two interrelated reasons. First, an identity of interests and views cannot be assumed between the union leaders who negotiate a collective bargaining agreement and the union supporters who solicit or distribute literature in violation of the agreement. Some pro-union employees might generally support the local, but still feel that it should be more aggressive in promoting the causes of the union and of the bargaining unit. These employees indeed may have taken control of the union leadership since the waiver provision was negotiated. The union leaders who negotiated the provision may have been ousted, or they may have been con-

distribution rights. See Note, Employees' Solicitation-Distribution Rights Supersede Contract Waiver, 26 U. FLA. L. REV. 908 (1974), and cases noted therein.

41. Justices Stewart, Powell and Rehnquist dissented in Magnavox. Justice Stewart asserted that the "Gale Products Rule" should not be extended "to prevent the union waiver of the distribution rights of its supporters in the bargaining unit." 415 U.S. at 329.

42. Id. at 326. Although the Board's Magnavox opinion is not fully clear on this point, considerations of equity and fair balance seemed to provide the Board's rationale for extending the non-waiver principle to union supporters. 195 N.L.R.B. at 266, 79 L.R.R.M. at 1285. The Board relied on the Eighth Circuit decision in International Ass'n of Machinists v. NLRB, 415 F.2d 113 (8th Cir. 1969), which had expanded a Board order to protect union supporters as well as dissidents.

The Board, however, has generally not articulated why union waiver of section 7 rights is inappropriate in only certain situations. For instance the Board vaguely adopted an ad hoc balancing test to explain its original non-waiver decision in Gale Products. 142 N.L.R.B. at 1249, 53 L.R.R.M. at 1243-44.

43. Even the dissemination of literature fully supportive of the union could conceivably influence union strategies. "It is possible that the dissemination of spontaneous, supportive and semi-supportive literature, as well as literature that is blatantly critical, may give the union a more evenhanded sense of its strengths and weaknesses. Limiting the expression of views at the workplace to those of one persuasion would skew the impact of such expression." Finkin, supra note 34, at 190.
vinced, perhaps by shifting employee sentiment, that a more aggressive promotional strategy could best advance the bargaining unit's interests.

Second and more fundamentally, the statutory policies supportive of the assignment of authority to exclusive majority bargaining representatives do not support the suppression of the otherwise protected expression of employees' views, even views supported by the exclusive representative, and even in exchange for collective benefits for the bargaining unit. True, the authority of exclusive bargaining representatives rests on the Act's policy of "encouraging the practice and procedure of collective bargaining." But, as the Supreme Court stressed in *Mastro Plastics v. NLRB*, the Act has a "complementary" policy of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." The policies are complementary because the protection of the employees' freedom of association, self-organization and representative designation is the Act's primary means for insuring that employees freely accept and select responsive exclusive representatives. Moreover, assurance of "full freedom of association" is the "foundation" of both policies of the Act; without it the effectiveness and the democratic legitimacy of exclusive representatives are undermined. Restricting the authority of exclusive representatives to waive the free-association and free-expression section 7 rights of employees supports free and effective collective bargaining by insuring that economically strong employers cannot force unions to sacrifice at the bargaining table any of the rights upon which the unions' continued existence as effective bargaining agents may depend.

The importance of the preservation of free association and expression to the effectiveness and legitimacy of democratic institutions comports fully with contemporary democratic political theory. This theory, as expressed through interpretation of the constitution, restricts the authority of the government, the exclusive representative of the people, to sacrifice the capacity of individuals to associate or speak for the government's displacement or modification, or for its support or continuation. Applied to the labor-industrial setting, the theory demands that all employees, including those who generally support the exclusive representative, remain free to attempt to influence, through communications with other employees, the strategies and tactics of the representative. As did *Mastro Plastics*, our democratic political theory supports the *Magnavox* restriction on the authority of exclusive representatives to waive the freedom of represented employees to influence

47. 350 U.S. at 280.
through communications with each other both the formal identity of their agents, and equally important, the nature and type of agent the representative becomes or continues to be.\textsuperscript{48}

Furthermore, the chips which \textit{Magnavox} removed from the bargaining table in order to preserve its existence and legitimacy\textsuperscript{49} are unimportant to the system of exclusive bargaining. As long as the representative speaks with one voice to the employer and can balance the economic interests of its constituents, the exclusive bargaining system does not require that the representative control employee rights to influence the character and policies of that representative.\textsuperscript{50}

\textsuperscript{48} A further parallel might be drawn between a Board willingness to permit exclusive representatives to sacrifice employees' substantive interests as long as the representatives do not interfere with the free process of selection of the representatives and their strategies, and a Supreme Court willingness to permit legislatures to sacrifice citizens' substantive interests as long as the legislatures do not interfere with the free process by which the members of the legislatures do not interfere with the free process by which the members of the legislature are chosen and influenced. \textit{See} United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938) (legislation restricting political processes which can be expected to bring about repeal of undesirable legislation perhaps should be subjected to more exacting judicial scrutiny under fourteenth amendment); J. \textsc{Ely}, \textsc{Democracy and Distrust} chs. 4-5 (1980) [hereinafter cited as \textsc{Ely}].

One might even note a further parallel between the duty of fair representation qualification on bargaining representatives' authority to sacrifice employee substantive interests and the qualification placed by the equal protection clause on legislatures' authority to sacrifice the interests of political minorities. This parallel indeed suggests one way to limit the duty of fair representation doctrine. The Board and the courts should give close scrutiny to a fair representation charge only when there is reason to believe that the interests of the individual or group claiming discrimination would not have had full and fair consideration by the representative. \textit{See} Carolene Products, 304 U.S. at 152-53 n. 4 (suggesting that legislation which may indicate prejudice against a discrete and insular minority should be subject to more exacting judicial scrutiny); \textsc{Ely}, \textit{supra}, ch. 6. Such a limitation might do as much to protect the effective functioning of arbitration processes as the "discrete and insular" minority qualification on equal protection review would do to protect the effective functioning of political processes. Though I cannot embark upon an extended discussion of the duty of fair representation, it is worth noting here that some observers of arbitration believe that recent judicial expansions of the duty threaten collective bargaining. \textit{See}, e.g., \textsc{Jennings, The Crossroads of the Future}, 31 \textsc{Lab. L.J.} 498 (1980).

\textsuperscript{49} The \textit{Magnavox} Court recognized that the authority of bargaining agents to agree to the waiver of "economic" rights "[rests] on 'the premise of fair representation' and presupposes that the selection of the bargaining representative 'remains free.'" 415 U.S. at 325, \textit{quoting} Mastro Plastics v. \textsc{NLRB}, 350 U.S. at 280.

\textsuperscript{50} George Schatzki has argued that the principle of exclusivity may not be as socially desirable as indicated by the Congress, the Board, and the Court. \textsc{Schatzki, Should Exclusivity Be Abolished?}, 123 \textsc{U. Pa. L. Rev.} 897 (1975). A full consideration of Schatzki's suggestion that the tension between individual employee rights and exclusive bargaining be resolved by elimination of the latter would take us beyond any sensible limits for this essay. However, two points should be made.

First, adoption of Schatzki's proposal clearly would require congressional action and such action is improbable. Though I must agree with Schatzki that without a full test, the implications of non-exclusive collective bargaining are not fully clear, neither management nor organized labor is likely to embrace it. By permitting more skilled workers an absolute right to form separate unions, non-exclusive bargaining would probably increase inequalities in wages. Because unions would continually be concerned about losing employees to rivals, polarization and destructive posturing and rhetoric would likely increase. However, because divided workers have less total economic leverage, the augmented posturing would lead to more work stoppages, but not more
This analysis of the *Magnavox* decision provides adequate standards on which to base a comprehensive principle of non-waivable employee section 7 rights. In the following discussion, beginning with expressive and associational activity, and proceeding to other concerted activities, this analysis will be employed to distinguish between non-waivable and waivable statutory rights.

2. Non-waivable Expressive and Associational Rights

(i) An initial formulation

Based on the *Magnavox* decision, the following non-waiver principle can be formulated readily: *employees' section 7-protected rights to communicate with each other concerning the identity and strategies of their bargaining agents, to communicate with their employer concerning the identity of their bargaining agent and to associate with, lead or support a bargaining agent cannot be waived by any such agent*. These rights of expression and association, and their protection, are individual rights which remain under the control of the individual employees even after selection of an exclusive representative.51

The non-waiver principle must cover a variety of employee-to-employee communications. It most clearly insulates from waiver otherwise protected communications concerning whether a particular organization should be selected as an exclusive bargaining representative or should be authorized to continue in such capacity. However,

51. This formulation builds on that of the Fifth Circuit in NLRB v. Mid-States Metal Prods., Inc., 403 F.2d 702 (5th Cir. 1968), a decision relied upon by the *Magnavox* Court:

*The rights to distribute materials and solicit in organizing for collective bargaining are rights of individual employees, relating to their selecting (or choosing not to select) and constantly re-evaluating the collective bargaining agent. They are to be distinguished from rights which employees acting in concert, through the collective bargaining agent, may exercise in attempting to achieve economic advantage.*

*Id.* at 705. *Cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974) (distinguishing between rights "conferred on employees collectively to foster the processes of bargaining" which may be waived by unions in order to gain economic benefits, and rights such as those secured by Title VII of the 1964 Civil Rights Act which concern "not majoritarian processes, but an individual's right to equal employment opportunities"). *See generally* Brousseau, *Toward A Theory of Rights For the Employment Relation*, 56 Wash. L. Rev. 1, 38-39 (1980).
contrary to the suggestion of the Eighth Circuit in International Association of Machinists v. NLRB, the principle should not be limited to such communications.

In Machinists, the Eighth Circuit found employee rights to distribute literature opposing or supporting a collective bargaining agent non-waivable, but it reserved judgment on the enforcement of no-distribution rules during periods in which bargaining agents cannot be changed. This suggests that only employee rights to participate in the selection of a bargaining agent cannot be waived. This distinction presents a simplistic view of the Magnavox decision. To delegate to exclusive representatives authority to control employee efforts to influence how incumbent representatives deal with employers is not only unnecessary, but also inconsistent with, and destructive of, the legitimacy of majority representatives. Notwithstanding the distinction suggested by the Machinists court, employees may influence their representatives in many ways beyond active opposition or support in a certification contest.

Even the model of electoral politics suggests another employee activity to exert influence over how bargaining agents deal with employers: solicitations and other communications in union officer campaigns. Indeed, soon after the Magnavox decision, the Board in General Motors Corp. applied the non-waiver principle to the distribution and posting of union office campaign literature. The company had prevented certain employees from distributing and posting literature advancing their insurgent candidacies for union office. The Board found this an unfair labor practice, despite a contract provision granting the company prior approval authority over employee distributions. The Sixth Circuit enforced the Board's decision and expressed its understanding "that the election of officers has a significant bearing on the character of the union and hence contributes to the selection or rejection of the union as the employees' bargaining representative."

Analogies from electoral politics, however, do not exhaust the types of protected employee-to-employee communications which may

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52. 415 F.2d 113 (8th Cir. 1969).
53. Id. at 115-16. These periods of stability have been provided for by Congress and the Court. See, e.g., 29 U.S.C. § 159(c)(3) (1976) (precluding another election for 12 months after a valid election); Brooks v. NLRB, 348 U.S. 96 (1954) (upholding Board refusal, absent unusual circumstances, to permit employee rejection of agent in 12-month period after certification).
54. The Magnavox dissenters, Justices Stewart, Powell and Rehnquist, also wished to confine the Magnavox holding to "waivability of rights to distribute literature regarding the proposed selection, retention, or displacement of the collective bargaining agent." 415 U.S. at 329.
55. In many cases, of course, working within a union for a change of policy, rather than against a union for decertification, is the only realistic option for employees interested in reform.
56. See text accompanying note 48 supra.
58. General Motors Corp. v. NLRB, 512 F.2d 447, 448 (6th Cir. 1975).
influence exclusive bargaining agents. Employees may affect the strategies of their representative without changing either its identity or its leaders. In order for exclusive representatives to function in accord with the theory of the Act, they must be responsive to the views of the employees they represent. Union meetings provide one obvious non-electoral opportunity for employees to present their views to union leaders. The Board therefore has correctly held employee rights to solicit and urge other employees to attend union meetings non-waivable.59

Moreover, otherwise protected communication among employees intended to influence the strategies and policies of their exclusive representative should not be waivable by the representative. The Board has held that a representative cannot waive employee rights to distribute literature opposing an increase in union dues,60 criticizing the representative's manner of negotiation and the terms of a new contract61 or advertising a rally to “fight union busting.”62 The Board has also held a union cannot disavow and waive employee section 7 rights to hold informal meetings on non-working time to discuss union affairs.63 In addition, this formulation of the non-waiver principle furthers the national labor policy codified in section 101 of the Landrum-Griffin Act.64 Section 101 grants union members a “Bill of Rights” “to vote in [union] elections or referendums,”65 “to meet and assemble freely with other members”66 and “to express any views, arguments, or opinions.”67 A union violates section 101 by disciplining members for speaking about union policies68 or for campaigning for union office.69 Permitting the same union to waive the rights of its members to engage freely in the same activities would insert an unnecessary incongruity into the nation's labor laws.70

63. National Vendors, 244 N.L.R.B. 1023, 102 L.R.R.M. 1277 (1979), enforcement denied, 630 F.2d 1265 (8th Cir. 1980).
65. Id. §§ 411 (a)(1).
66. Id. §§ 411 (a)(2).
67. Id.
70. The Board has recognized that the national labor law policies expressed in the Landrum-Griffin Act, over which the Board has no jurisdiction, should inform its interpretation of the National Labor Relations Act. The Board has held that it will consider union violations of employee Landrum-Griffin § 101 rights to be section 8(b) unfair labor practices. E.g., Carpenters Local 22 (Graziano Constr. Co.), 195 N.L.R.B. 1, 1-2, 79 L.R.R.M. 1194, 1195-96 (1972). Where not fully congruent, a union's power to discipline its members should be broader, not narrower, than the union's power as an exclusive agent to waive employee section 7 rights. The union has a legiti-
The Board has not applied a strict Magnavox non-waiver rule to protected activities71 other than inter-employee oral solicitations and literature distributions concerning the identities and strategies of bargaining agents. Perhaps this is true because bargaining agents are not likely directly to waive Board protection of most of the other activities covered by the non-waiver principle. However, since agents sometimes waive protection of these rights indirectly,72 the implications of Magnavox must not be limited to employee-to-employee communications.

Employees' rights to make concerted73 communications to employers concerning the employees' views on the selection, retention or rejection of a collective bargaining agent should be no more waivable than similar communications among employees. While employees must present one voice in order to bargain effectively with their em-
They need not stifle their expression to their employer of various views on the desirability of sticking with or casting aside a bargaining agent. On the contrary, the free expression of such views may help insure that the employer only bargains with an agent which does enjoy the support of a majority of employees in the unit.

Of course employees are not likely to be penalized for the concerted expression of views to their employer. Employers have been known all too often to discipline workers for the content of their views regarding a union, but rarely for the expression of those views to the ears of the employer. However, when an incumbent union seeks to impel an employer to discipline employees who express opposition to the union's representative status, it may be the employees' expression of views to the employer as much as the content of the views which is the object of the union's animus. Proscribing the waiver of employee-to-employer communication is an important first step in expanding the sphere of non-waivable section 7 rights to its logical boundaries.

The next step is to include rights of association as well as expression in the class of non-waivable employee rights. Specifically, an employee's section 7 rights to lead, support, associate or refuse to associate with a labor organization should be no more waivable than the employee's rights to communicate views on such organizations to other employees or the employer. After Magnavox, the wisdom of this expansion should be clear. Bargaining agents may require economic support from those whom they represent, but assuming economic security, effective representation does not depend on the agent's control over the rights of these employees to decide whether otherwise to support a union. Moreover, agent control over employee associational rights, even more directly than agent control over employee rights of expression, would undermine the free choice which both the Magnavox and Mastro Plastics Courts described as the "foundation" of the Act's complementary policies. Indeed the Act's explicit prohibition in sec-

74. See text accompanying notes 20-33 supra.

75. An employer violates section 8(a)(2) of the Act by recognizing a labor organization as an exclusive representative when the employer knows or should have known that the representative is not supported by a majority of the employees in the unit. ILGWU v. NLRB (Benhard-Altmann), 366 U.S. 731 (1961). Furthermore, if its timing is appropriate, an employer may escape an existent bargaining obligation or secure a representation election that may eliminate an incumbent union if, but only if, it can demonstrate objective grounds for doubting the union's majority support. See Bartender's Ass'n, 213 N.L.R.B. 651, 87 L.R.R.M. 1194 (1974); United States Gypsum Co., 157 N.L.R.B. 652, 61 L.R.R.M. 1384 (1966).

76. The proviso to section 8(a)(3) of the Act of course exempts limited union security collective bargaining agreement provisions from the Act's general proscription of employer discrimination against employees "to encourage or discourage membership in a labor organization." 29 U.S.C. § 158(a)(3) (1976). Section 14(b) is the provision, understandably disliked by unions, which permits states to pass laws proscribing such provisions. 29 U.S.C. § 164(b) (1976).

77. See text accompanying notes 45-49 supra.
tion 8(b)(2) of union attempts to cause an employer to discriminate against employees to encourage or discourage union membership can scarcely be reconciled with any exclusive agent control over employee associational rights.78

(ii) A refinement of the formulation: Eastex, Inc. v. NLRB

The Supreme Court's most recent consideration of the scope of section 7 suggests the final expansion which should be made in the non-waiver principle's protection of employee expression. In *Eastex, Inc. v. NLRB*,79 the Court affirmed the Board's protection of employee distribution of literature advocating employee political action on issues over which the employer has no control, but which nonetheless are relevant to the employees' terms and conditions of employment. Eastex employees, officers of a recognized union, had tried to distribute newsletters advocating not only union solidarity, but also urging support of politicians who favor increases in the minimum wage. The newsletter also encouraged employees to write state legislators to oppose inclusion of a "right-to-work" anti-union shop provision in the state constitution. Rejecting the employer's attempt to prohibit distribution of these newsletters, the Court held: first, that because of the broad definition of employees in section 2(3) of the Act, section 7 protects employees' "concerted activities in support of employees of employers other than their own,"80 and second, that section 7 protects concerted employee activity directed at improving the employees' terms and conditions of

78. As was the case for the *Magnavox* pro-union solicitation extension of the *Gale Products* rule on dissident employee solicitations, a restriction on union authority to waive dissident employees' associational rights seems more compelling at first than a restriction on its authority to waive employee pro-union associational rights. But here, as with expressive rights, symmetry is necessary. A union bargaining agent does not require the flexibility to sacrifice some of its members' rights to take leadership positions in the union. To permit it to do so would be to permit the potential frustration of individual efforts to change, develop, or even simply maintain the union.

In any event, once the *Magnavox* Court's protection from waivability of pro-union expressive activity is accepted, so must be the non-waivability of pro-union associational activity. Expressive and associational activity are often too closely intertwined to protect expression without protecting association. A 1976 Board non-waiver case is illustrative. In *Hoerner Waldorf Corp.*, 227 N.L.R.B. 612, 94 L.R.R.M. 1613 (1976), the Board held that the employer could not condition its hiring of an avid union supporter on the supporter's willingness to refrain from discussing or supporting the union on company time. The Board found a no-solicitation rule to be an ineffective waiver of the employee's "right to engage in union solicitation" because "union solicitation is so basic to section 7 of the Act that a bargaining representative cannot waive that right, no matter what concessions are obtained in return." 227 N.L.R.B. at 612, 94 L.R.R.M. at 1614.

79. 437 U.S. 556 (1978). This time Justice Powell wrote the majority opinion and found no occasion to wonder about the waivability of the protection which his opinion affirmed.

80. *Id.* at 564-65. The Court thereby approved lower court and Board decisions, which had held that section 7-covered employee concerted work activities, such as sympathy strikes, to support a concerted activity of the employees of other employers. *Id.* at 564 n.13. See text accompanying notes 154-57 infra. The Court declined to express any opinion concerning which employer responses to such protected activities would constitute unfair labor practices. 437 U.S. at 564 n.13.
employment through channels other than collective bargaining or grievance adjustment. 81

Actually, the Board's opinion in Magnavox could be read broadly to encompass the non-waivability of the rights affirmed in Eastex. The section 7 right asserted by the Magnavox employees was the right to distribute literature in non-working areas during non-working time. Nothing in the Board's Magnavox opinion limits its non-waivability holding to literature concerning the employees' collective bargaining relationship with their employer. Indeed, the Board's order explicitly includes protection for "distributing literature . . . relating to the selection or rejection of a labor organization as the exclusive bargaining agent of employees in a unit appropriate for collective bargaining, or other matters related to the exercise by employees of their section 7 rights." 82

Nevertheless, an advocate of waiver could well argue that employee distribution of literature urging employee action other than collective bargaining or some other pressure of the employer does not fit within the rationale of non-waivability articulated in Magnavox and further formulated above. Such literature is in no way organizational; it has nothing to do with the selection or rejection of a bargaining agent. It also is not recognition; it has nothing to do with influencing the employer's acceptance of an agent as a majority bargaining representative. Finally, such literature does not address the strategies and policies of the agent as the exclusive representative of all the unit employees.

However, it is precisely this lack of relevance to the agent's responsibilities as exclusive representative which should place the Eastex-protected activity clearly outside the agent's waiver authority. Section 9 of the Act provides that representatives designated by a majority of employees in the unit shall be exclusive representatives of all the unit employees "for the purposes of collective bargaining." 83 Section 9 does not provide that the majority representative shall be the exclusive representative of all unit employees for all methods of bettering the employees' terms and conditions of employment or for all protected section 7 activities in which the employees might engage. The Board selects appropriate bargaining units with an eye toward their effective-

81. Id. at 565-67. The Court thereby rejected the dicta in several lower court cases, and the holding in at least one case, that employee activity directed at issues over which the employer has no control cannot be protected by section 7. See id. at 567 n.17, discussing, inter alia, G & W Elec. Speciality Co. v. NLRB, 360 F.2d 873 (7th Cir. 1966).

82. 195 N.L.R.B. at 267, 79 L.R.R.M. at 1285. In its supporting opinion, the Board somewhat enigmatically disclaimed protecting from waiver "the distribution of institutional—as distinguished from purely organizational—literature of a labor organization. . . ." Id. at 266 n.9, 79 L.R.R.M. at 1285 n.9. See note 71 supra.

ness and stability in a collective bargaining relationship. When choosing appropriate units, the Board does not consider the broad political issues, such as minimum wage or “right-to-work” legislation, recognized by the Eastex Board and Court as relevant to workers’ conditions of employment. Many such issues clearly transcend the broadest of all bargaining units. The exclusive authority of the majority agent must be limited to controlling efforts to obtain better terms and conditions of employment from the employer.84

The activity held protected in Eastex must be included within the ambit of the non-waiver principle. My prior formulation of the principle might be sufficiently general to do so; arguably, the Eastex newsletters concerned strategies of the employees’ bargaining agents, in this case strategies which transcend collective bargaining in the agent’s exclusive control, but strategies nevertheless.

The above analysis of the non-waivability of the Eastex rights cuts more broadly though. First, communications concerning efforts to obtain better conditions of employment from other than the employer should be protected whether or not they concern strategies of the bargaining agent to make such efforts. Surely the right of non-union employees to distribute newsletters advocating an independent, non-union campaign to affect minimum wage legislation should be no more waivable than the right of union officers to advocate such a campaign as part of a union strategy. The principle therefore must include as non-waivable employee rights to communicate with each other concerning the best strategies for improving their terms and conditions of employment from sources outside a bargaining relationship.85

84. This only means that the majority representative does not control employee efforts other than pressures on the employer to achieve better terms of employment. It does not mean that the majority representative cannot participate in efforts to improve terms and conditions of employment through non-collective bargaining channels or that employees who do so on behalf of the union are not engaging in section 7 protected activity. The Eastex holding is directly to the contrary. 437 U.S. 556 (1978).

85. Even this expansion of non-waivable employee communication rights protected by section 7 does not encompass all employee-to-employee communications. Employee rights to communicate with each other both concerning the identity and strategies of the bargaining agent and also concerning other strategies for improving terms and conditions of employment from outside the bargaining relationship should be non-waivable for the reasons expressed in text. However, employee rights to communicate with each other concerning extra-union strategies for improving terms and conditions of employment from the employer could be waivable. For instance, non-coercive employee solicitations of other employees to participate in extra-union activity directed at obtaining better terms and conditions of employment from the employer are presumably protected, even though that extra-union activity would not itself be protected under Emporium Capwell. See Armco Steel Corp., 232 N.L.R.B. 696, 96 L.R.R.M. 1325 (1977) (Jenkins, Member, concurring). Such communications presumably should be protected because they are concerted and for mutual aid, and unlike the actual Emporium Capwell picketing, do not in themselves pressure the employer to conduct illegal minority bargaining. However, since the communications both concern pressuring the employer for better terms and conditions, a matter over which the bargaining representative has exclusive control, and do not concern the representation
3. Additional Non-waivable Rights

Although employee expressive and associational activity are at the core of the non-waiver principle, expansion of the principle to other protected activity should be considered. The non-waiver principle should not be limited to the insulation of employee expressive and associational activity, because certain protected concerted activities go beyond simple communication or association. Two directions along which exclusion could occur are apparent.

One is suggested by the *Eastex* opinion. The scope of non-waivability should be greater for the right to engage in concerted activity to obtain benefits outside the collective bargaining relationship than for the right to act to obtain benefits from the employer. Because of the representative's exclusive control over collective bargaining, non-waivability of the latter right should be limited to certain inter-employee communications and to full participation in union political processes, both of which might influence the exclusive representative's collective bargaining strategies and policies. Employees thus have non-waivable rights to *advocate* concerted pressure to obtain benefits from their employer, but not actually to *engage* in such pressure. Because bargaining representatives do not have exclusive control over concerted activities directed beyond the bargaining relationship, the representative should not be able to waive employee rights to engage in *any* protected concerted activity aimed at gaining benefits outside the collective relationship, whether or not that action is limited to simple advocacy.

For instance, after *Eastex*, employees presumably have section 7 rights not only to urge their fellow employees to write their governor to urge him or her to veto “right-to-work” legislation but actually to write such a letter. Surely the right to write these letters should be no more waivable by the exclusive representative than the right to urge others to write.\(^{86}\) Therefore, the principle should be supplemented to include as

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\(^{86}\) Consequently the First Circuit was wrong to assert that provisions in collective bargaining agreements can narrow the employee rights confirmed by *Eastex* to resort to administrative and legislative forums to improve conditions of employment. NLRB v. Wilson Freight Co., 604 F.2d 712, 725 (1979). The fact that the employee whose rights were allegedly waived in *Wilson Freight* was a union steward should not be relevant to the union's authority over his protected

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non-waivable rights otherwise protected by section 7 to act to obtain better terms and conditions of employment from sources outside a bargaining relationship.87

Second, and more important, unions also should not be allowed to waive employee rights to engage in any otherwise protected activity, whether or not simply expressive or associational, which is directed at securing or maintaining employer recognition of an exclusive bargaining agent. While organizational activity is by its nature expressive or associational, recognitional activity often is intended to pressure as well as persuade, and therefore may not be limited to simple communications and affiliations. Nevertheless, the arguments for the non-waivability of employee rights to engage in union recognitional activity mirror the arguments for non-waivability of employee rights to engage in union organizational activity. Recognitional activity like organizational activity is directed toward securing placement of a selected exclusive representative in a position from which it can bargain for the best possible terms and conditions of employment for the unit. While the Act delegates to the selected representative exclusive control over employee efforts to achieve those terms and conditions of employment, it does not delegate control over employee rights to maintain the representative's position as an accepted bargaining agent. Such control is irrelevant to the agent's position as an effective and legitimate exclusive representative. Indeed, the efficacy of an exclusive representative rests on its continued recognition by the employer; without that recognition, bargaining is meaningless. Permitting the exclusive representative to control protected employee efforts to ensure recognition undermines the employees' freedom to select an agent, the premise of majority exclusive bargaining.

The non-waivability of protected employee recognitional activity does not subvert the exclusive bargaining representative authority confirmed in Emporium Capwell.88 The Emporium Capwell Court held that employee activity aimed at achieving employer acceptance or recognition of a minority employee bargaining agent and at undermining the exclusive bargaining authority of the certified bargaining agent unpro-

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87. This formulation of the non-waiver principle does not enlarge the actual protection given by section 7 to any particular concerted activities. Much protected employee concerted activity concerning issues outside the employer's control, such as a strike to demonstrate support of legislation before a governmental body, may not be insulated from all employer response. See Eastex, 437 U.S. at 568 n.18, quoting Getman, The Protection of Economic Pressure by Section 7 of the National Labor Relations Act, 115 U. PA. L. REV. 1195, 1221 (1967) [hereinafter cited as Getman].

88. See text accompanying notes 29-31 supra.
tected. The Court did not hold that the union could waive any otherwise protected recognitional activity. The Magnavox non-waiver principle only preserves individual employee control of otherwise protected activity.

Much concerted employee recognitional activity, like the dissident activity against Emporium Capwell, is of course unprotected. Some employee recognitional activity is unprotected because it constitutes an unfair labor practice violating section 8(b)(7) of the Act. However, the logical thrust of the Magnavox decision is that any employee recognitional activity which is protected by section 7 cannot be waived by exclusive representatives, whether or not that activity is simply limited to the expression of views. The non-waiver principle should therefore encompass any rights "to act to achieve employer recognition and acceptance of a bargaining agent." 

4. Limits of Nonwaivability: NLRB v. Weingarten

The non-waiver principle should not expand, however, beyond necessary, logical boundaries. An answer to the question raised by Justice Powell in his Weingarten dissent should illustrate that the boundary is not defined by a simple characterization of the rights as individual or collective. Rather, the limits of the non-waiver principle is that an exclusive representative should have power to waive the protection of any concerted activity of the represented employees to extract better terms and conditions of employment from their employer.

In NLRB v. Weingarten, the Supreme Court approved the Board's view that an employee has a section 7-protected right to the presence of a union representative at any employer interview which the employee reasonably fears could result in disciplinary action. The Court affirmed the Board's construction of "concerted activities for... mutual aid or protection" to include an individual employee's resistance to confronting his or her employer alone in a potentially adversary situation. The Court had no difficulty finding that an employee's resistance to a solitary interview could be for the "mutual" benefit of other workers; the Court recognized that the "representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain [the representative's] aid and protection if called upon to attend

90. Employee rights to engage in some protected concerted activities which are more than expressive or associational should also be covered by the non-waiver principle. In particular, rights to protect and to rectify the denial of other non-waivable statutory rights should be covered. Attempts to protect and rectify the denial of rights of course usually take the form of strikes. Such strikes are discussed below. See text accompanying note 116 infra.
91. 420 U.S. 251.
92. Id. at 260-64.
a like interview."93

In a dissenting opinion Justice Powell noted that the majority provided no indication whether a bargaining agent could waive the section 7 rights which it upheld.94 Justice Powell also noted that one Board member had suggested that such a waiver in a collective agreement would be permissible95 though the Board had not yet rendered a decision on the question.96

The Board developed its present view on employee rights to the presence of a representative at disciplinary interviews in two stages. The Board first relied on the employer’s duty to bargain, established in section 8(a)(5) of the Act.97 In the Board’s view, whenever the employer passes beyond general investigation to some focus on a particular employee against whom discipline is being considered, an interview with that employee constitutes the first session in the negotiation of an “inchoate grievance.”98 A section 8(a)(5) violation follows logically from the employer’s refusal to permit the exclusive bargaining representative’s presence at a meeting which could affect the continuing development of the collective agreement.99 The Board thus recognized that resolution of even an “inchoate grievance” could influence the conditions of employment of not only the interviewed employee, but also other employees who could later face a troublesome precedential application of the agreement.

Any such right to union representation based on protected em-

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93. Id. at 260-61.
94. Id. at 275 n.8.
95. Id.
96. In Western Elec. Co., 198 N.L.R.B. 623, 80 L.R.R.M. 1705 (1972), no employer unfair labor practice was found by two members of the Board who resisted assertion of a statutory right to the presence of a union representative at disciplinary interviews. The third member of the panel, then Chairman Miller, accepted an employee right to a representative’s presence, but argued that in this case the right had been waived by the union. Chairman Miller found the waiver in the union’s failure to change its collective bargaining agreement after an arbitrator had interpreted the agreement to give the employer power to reject a representative’s presence. Chairman Miller thus did not seem to require that the waiver be clear and unequivocal. However, in Georgia Power Co., 238 N.L.R.B. 572, 99 L.R.R.M. 1574 (1978), a post-Weingarten case, a three-member Board panel unanimously agreed that any waiver of Weingarten rights at the least would have to be consonant with the Board’s clear and unequivocal waiver standard. See note 11 infra. The panel found it unnecessary to reach the issue of whether Weingarten rights could ever be waived because there was, in any event, no clear and unequivocal waiver in that case.
98. See Erickson & Smith, supra note 97, at 30.
99. Compare the proviso to section 9(a) of the Act which accords bargaining representatives the right to be present at the adjustment of any grievance of an individual employee. 29 U.S.C. § 159(a) (1976). The Board expressly refrained from relying on this proviso, however. Texaco, Inc., 168 N.L.R.B. at 362 n.3, 66 L.R.R.M. at 1297 n.3.
ployee interests in collective, exclusive bargaining clearly should be waivable. The exclusive bargaining agent is delegated the authority to determine how to best advance the aggregate employment conditions of the unit employees. The agent should have authority to conclude that the protection it can afford employees by being present in disciplinary interviews is less important to the unit employees than some other benefit for which it can negotiate. The agent should be able to conclude that any future bargaining effectiveness which it sacrifices by giving up the right to be present in interviews is more than compensated for by obtaining, or retaining, some other benefit which it deems more important.

By the time the Supreme Court affirmed the Board's *Weingarten* decision, however, the Board had concluded that an employer's refusal to permit union representatives to be present at certain employee interviews could constitute a direct violation of section 8(a)(1), whether or not bargaining rights were affected. The Board reasoned that if an employee has reasonable grounds to believe that discipline may be an issue in an employer interview, the employee's insistence on the presence of a union representative is itself a section 7-protected concerted activity for employee mutual aid or protection. The Board thus distinguished its decisions relying on the bargaining agent's monitoring of inchoate grievances under a collective bargaining agreement. Because the employee's insistence itself, rather than merely the union's collective action, is protected by section 7, the right extends beyond interview sessions in which appropriate discipline under the collective agreement is determined. The right extends to an investigatory meeting which the employee reasonably fears could eventuate in discipline, and therefore, at which a representative's presence could provide important mutual aid or protection.

Initially, the Board's recognition that an employee's insistence on being accompanied to an investigatory interview is itself protected activity seems to affect the waivability of *Weingarten* rights. The Board's present section 8(a)(1) theory, as upheld by the Supreme Court, makes clear that *Weingarten* rights are rights of individual employees, not collective rights of the union. Nevertheless, these employee rights are among those which are delegated to the exclusive bargaining agent and therefore should be waivable by the agent. The Act delegates to exclusive bargaining agents complete control over the unit employees' efforts to obtain better terms and conditions of employment from the em-

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ployer. A disciplinary or investigatory interview is part of the conditions of the employee's employment; resistance to being interviewed alone is an effort to affect a condition of employment. An exclusive agent can decide that a "just cause" discharge or discipline provision in a collective bargaining agreement is less important than an additional wage bonus or fringe benefit. Similarly, the agent should also be able to decide that employee rights to protect themselves from unjust discipline through concerted action are less important than a wage bonus or a new fringe benefit.

To be sure, a bargaining agent's sacrifice of a "just cause" discipline provision in a collective bargaining agreement differs from its waiver of Weingarten rights: while employees have no statutory right to just discipline, they do have a statutory right to take concerted action to resist unjust discipline. Moreover, the existence of these statutory rights to take concerted action does not depend on the presence of an exclusive bargaining agent. Although the Weingarten majority did not directly reach the issue, Justice Powell in dissent surely assumed correctly that an employee's section 7 right "to act 'in concert' in employer interviews, also exists in the absence of a recognized union." In support of his assumption that an employee would have a right in the absence of a bargaining agent to insist on the presence of another employee in an investigatory interview Justice Powell cited NLRB v. Washington Aluminum Co. In that case, the Court effectively held that concerted activity which would be protected if organized by a bargaining agent is also protected in the absence of an agent. It did so by holding protected the spontaneous concerted refusal of unorganized employees to continue work in a plant which they felt was too cold.

Prior cases and the logic of the statute make clear, however, that the existence of section 7 rights independent of an exclusive agent and

102. See text accompanying notes 26-31 supra.
104. Indeed, employees have a statutory right to take concerted action to protest "just" discipline.
105. 420 U.S. 251, 270 n.1. The Board has indeed since held that an employee who does not have a union representative has a right to have a fellow employee present at an investigatory interview. Glomac Plastics, Inc., 234 N.L.R.B. 1309, 97 L.R.R.M. 1441 (1978). The Board, however, has also recently suggested that designated representatives have authority to sacrifice any right to non-union representation. Illinois Bell Tel. Co., 251 N.L.R.B. 932, 105 L.R.R.M. 1236 (1980).
107. The wording of section 7 and the rationale of Weingarten place some limits on employee representational rights. Inasmuch as section 7 requires mutuality, presumably an employee cannot insist on the presence of some friend who is not an employee as defined in section 2(3) of the Act. However, insistence on the presence of a representative of an unrecognized labor organization could carry the same promise of mutuality as insistence on the presence of a representative of a recognized union.
collective agreement does not *per se* preclude delegating those rights to the authority of an exclusive agent. For instance, in the absence of a recognized exclusive bargaining agent, a group of employees have the right to ask their employer to bargain with them as a group. Yet *Medo Photo Supply* makes clear that if an exclusive agent does exist, the employees may not bargain with the employer without the agent's permission.108 Furthermore, within the limits of recognitional picketing imposed by section 8(b)(7) of the Act,109 the concerted employee minority bargaining pressure held unprotected in *Emporium Capwell*110 because of the existence of an exclusive bargaining agent would presumably have been protected in the absence of any recognized agent. And there should be little debate that an exclusive bargaining agent could have sacrificed in a collective agreement the rights of the *Washington Aluminum* employees to take the independent concerted work action held protected in that case.111

There is nothing anomalous in a statutory scheme which grants employees not represented by an exclusive agent rights to engage in certain concerted activity which either must be (*Medo Photo Supply; Emporium Capwell*) or may be (*Washington Aluminum; Weingarten*) sacrificed after authority is delegated to such an agent. I attempted above to define limits on the extent to which the presence of a collective bargaining relationship can lead to the sacrifice of employee rights which would exist in the absence of such a relationship. However, the *Weingarten* rights are outside the limits delineated by the non-waiver principle formulated above. Employee insistence upon having a representative alongside in an investigatory interview has nothing to do with free communication among employees or with the employer concerning the identity or strategies of a bargaining agent. Such insistence also does not involve employee efforts to influence employer recognition of a bargaining agent. And as long as the employer is not free to use the denial of *Weingarten* rights to discriminate against union adherents,112 waiver of these rights does not sacrifice any employee rights to associate with or lead labor organizations of their choosing. Granting an agent power to waive *Weingarten* rights only fulfills its statutory role as final arbiter of the best strategy to get the collective terms and conditions of employment best for the employees under its charge.

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108. 321 U.S. 678 (1944), discussed at text accompanying note 27 supra.
110. 420 U.S. 50 (1975), discussed at text accompanying notes 28-31 supra.
111. See text accompanying note 116 infra.
112. Clearly an employer should not be able to use any asserted union waiver as a defense to a charge that it discriminatorily granted *Weingarten* rights only to employees who did not support a union. Cf., e.g., William L. Bonnell Co. v. NLRB, 405 F.2d 593 (5th Cir. 1969) (discriminatory enforcement against union of valid no-solicitation rule held unfair labor practice).
III
WAIVER OF EMPLOYEE RIGHTS TO STRIKE

Formulating the non-waiver principle to encompass some protected employee activities which are not merely expressive or associational raises questions about the authority of unions to waive the rights of employees to engage in concerted work stoppages, particularly strikes. No employee right is more clearly secured by the Act than the right to strike. Strikes for mutual employee aid or protection fit squarely within the language of section 7. Indeed, employee rights to strike are given special acknowledgement in section 13 of the Act. 113 Nonetheless the Court and the Board, stressing the encouragement of free collective bargaining and industrial peace, have permitted unions to waive the statutory protection of these employee rights by negotiating “no-strike” clauses in collective bargaining agreements. 114 The right to engage in strikes for certain purposes free of employer reprisal or restraint should not be waivable by any union agreement with, or promise to, an employer.

A. The Non-waivability of Board Protection of Recognitional and Certain Unfair Labor Practice Strikes

Many strikes, including strikes to support the negotiation of better contract terms and strikes to support employee grievances under an existing contract, are simply efforts to extract better employment conditions. If bargaining agents are to have exclusive control over efforts to achieve better conditions from the employer, the agents must control such strikes. Other strikes, however, have purposes which transcend the authority of exclusive agents and should not be controllable by those agents. Those non-waivable strikes can be placed in two categories.

First, strikes directed toward achieving or maintaining employer recognition of a bargaining agent should most clearly stand outside the control of any bargaining agent. As explained above, 115 any protected employee efforts to influence employer recognition or acceptance of a bargaining agent should not be within the control of any agent. The authority of bargaining agents derives from the requirements of exclusive collective bargaining. Exclusive collective bargaining does not require the potential sacrifice of employee rights to strike to insure employer recognition of a majority-designated agent. In fact, its very existence may be undermined by such sacrifices.

115. See text accompanying notes 76-90 supra.
The non-waiver principle also dictates that strikes to protest and to rectify the denial of non-waivable statutory rights should not be controllable by bargaining agents. To permit the waiver of employee rights to take any protected concerted action, including strikes, against infringements of other employee rights is to permit the partial waiver of the rights originally denied. For instance, absent union waiver by a "no-strike" clause in their collective agreement, the Magnavox employees had a statutory right to strike against the company's rule banning the distribution of literature on company property. Such a strike might be much more effective than pressing an unfair labor practice charge to get merely a prospective order which might be enforced only after years of litigation. Abrogation of the Magnavox employees' rights to strike the abridgment of their communication rights is thus an effective partial sacrifice of those communication rights.

The waivability of employee rights to engage in a particular strike should turn on the purpose of the strike, not its ultimate justification. For instance, if the Magnavox employees left work in response to the discharge of two employees after the two distributed union literature in violation of the company's invalid no-distribution rule, the strike should not be stripped of protection by a no-strike rule, even if the employer was able to prove to the Board that it had a legitimate business reason to discharge the activists. There is no reason for a union to control any otherwise protected employee action to defend non-waivable recognitional or organizational statutory rights, no matter how misguided. If a union does not require the authority to waive a particular right in order to function effectively as an exclusive agent, it also does not require and should not have the authority to waive employee rights to strike to protect that right.

I recognize that if the Board determines that the employer action which provokes a strike is not in fact an unfair labor practice, the Board will grant the strikers only the qualified reinstatement rights of economic strikers, regardless of the strikers' belief in the illegality of the employer's action and motivation. This is reasonable; the Board may balance employer interests in continuing production when defining the substantive employee rights protected by section 7, and these employer interests may weigh more heavily when the employer has in

116. Contrary to the suggestion of Professor Getman, therefore, Board acceptance of union waiver of non-waivable employee rights to strike is not necessarily compensated for by the Board's willingness to remedy any underlying unfair labor practices by ordering reinstatement of any strikers protesting the unfair practice. See Getman, supra note 87, at 1241.


118. See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
fact acted fully within the law. However, when determining the waivability by bargaining agents of the employee rights which the Board has defined, the Board should consider only the interests of individual employees and of bargaining agents, not of employers. An employer's actual culpability is irrelevant to a bargaining agent's control over particular employee rights. Therefore, the Board may compromise the reinstatement rights of the self-perceived, though misguided, unfair labor practice strikers, but the Board may not permit a bargaining agent to waive these compromised rights.

Although the Court and the Board have never expressed full appreciation of the proper limitations on union authority to waive employee rights to strike, they have sometimes come close. Justice Douglas' majority Magnavox opinion acknowledged that the non-waiver principle which it advances must be reconciled with Court and Board-approved union waivers of employee rights to strike. Justice Douglas cited and relied upon Mastro Plastics Corp. v. NLRB, in which the Court recognized that unions should not be considered to have waived employee rights to engage in strikes "against unlawful practices destructive of the foundation on which collective bargaining must rest." The employer in Mastro Plastics discharged workers for engaging in a strike in protest of the employer's previous unfair labor practices. These previous unfair labor practices included the discharge of employees for supporting an incumbent bargaining agent against a rival union's campaign to unseat the incumbent. The employer had actively supported the rival union's efforts. Since these unfair labor practices abridged employee organizational rights not under the control of a bargaining agent, the strike was an attempt to rectify the employer's denial of non-waivable employee statutory rights, and the right to engage in the strike was itself not waivable by the agent. The employer nonetheless asserted as a defense to his discharge of the striking employees a general and unqualified no-strike clause which promised restraint "from engaging in any strike or work stoppage during the term of this agreement." The Court affirmed the Board's rejection of this defense by interpreting the clause only to waive employee rights to participate in economic strikes, but not to waive employee rights to participate in unfair labor practice strikes. The Court held that the collective agreement was made in light of the policies of the Act, which

119. 415 U.S. at 325.
120. 350 U.S. 270 (1956).
121. Id. at 281, quoted in NLRB v. Magnavox, 415 U.S. at 325.
122. Id. at 272-76.
123. Id. at 281.
124. Id. at 279-83.
UNION WAIVER

include protection of the full employee freedom of association and self-organization which is the foundation of collective bargaining.\textsuperscript{125} It therefore read the agreement to advance these policies by prohibiting economic but not unfair labor practice strikes. Although reserving the question of whether the Board should honor an explicit waiver of employees' rights to strike against unfair labor practices, the Court clearly signalled that the Board should entertain a strong presumption that a union has not attempted such a waiver absent specific, express contractual language.\textsuperscript{126}

Furthermore, the Board has expressed appreciation that the non-waiver principle may be relevant to recognitional strikes which are not unfair labor practice strikes insulated with a non-waiver presumption by *Mastro Plastics*. In at least one case decided shortly after *Magnavox*, the Board suggested that unions may lack authority to waive employee rights to engage in recognitional strikes, even when those strikes are not in response to employer unfair labor practices. In *Suburban Transit Corp.*,\textsuperscript{127} the Board found that a no-strike clause in a collective agreement was not intended to cover employee strikes against the right of the incumbent union to continue as the bargaining agent. In an earlier decision in the same case, the Board had found that the employer had committed a section 8(a)(2) violation by negotiating a new contract with the incumbent union while there was a real question of the union's continuing majority status.\textsuperscript{128} However, when the finding of a section 8(a)(2) violation was set aside by the Third Circuit,\textsuperscript{129} the Board was forced on remand to consider whether the strike was covered by the no-strike clause in the new agreement. The Board not only held that it would not read a general no-strike clause to cover a recognitional strike in the absence of “clear and unmistakable” language,\textsuperscript{130} but also cited *Magnavox* for the proposition that “where the rights of employees to exercise their choice of a bargaining representative is in-

\begin{itemize}
\item \textsuperscript{125} Id. at 280. Chairman Murphy relied on the *Mastro Plastics* Court's analysis of the policies of the Act in her G.A.T. opinion. 228 N.L.R.B. at 811-12, 94 L.R.R.M. at 1487.
\item \textsuperscript{126} 350 U.S. at 283. See also NLRB v. Wagner Iron Works, 220 F.2d 126, 140-41 (7th Cir. 1955), cert. denied, 350 U.S. 981 (1956). The *Mastro Plastics* Court also held that a worker's participation in an unfair labor practice strike during the sixty-day waiting period for contract modification prescribed by section 8(d)(4) does not sacrifice the worker's status as an "employee" entitled to the Act's protection. 350 U.S. at 284-89.
\item \textsuperscript{127} 218 N.L.R.B. 1228, 89 L.R.R.M. 1471 (1975), enforcement denied, 536 F.2d 1018 (3d Cir. 1976).
\item \textsuperscript{128} 203 N.L.R.B. 465, 83 L.R.R.M. 1588 (1973), modified, 499 F.2d 78 (3rd Cir.), cert. denied, 419 U.S. 1089 (1974). Since the employees had filed a decertification petition with the Board and Suburban had knowledge of the petition, the negotiation of the new contract constituted a violation of section 8(a)(2) under the Board's doctrine of Midwest Piping & Supply Co., 63 N.L.R.B. 1060, 17 L.R.R.M. 40 (1945).
\item \textsuperscript{129} Suburban Transit Corp. v. NLRB, 499 F.2d 78 (3d Cir.), cert. denied, 419 U.S. 1089 (1974).
\item \textsuperscript{130} 218 N.L.R.B. at 1229, 89 L.R.R.M. at 1473.
\end{itemize}
volved . . . the Court would not sanction union waiver of such employee rights."

The Board has further refined the Court's *Mastro Plastics* presumption against the waiver of employee rights to engage in unfair labor practice strikes. In *Arlan's Department Store*, the Board stated that it would not apply the presumption to protect strikes protesting all unfair labor practices, but only those sufficiently serious to excuse the employee's refusal to rely on a grievance-arbitration procedure to resolve the dispute. The Board's unwillingness to apply the *Mastro Plastics* presumption to all unfair labor practice strikes is not inconsistent with the non-waiver principle. Not all employer unfair labor practices threaten non-waivable employee rights. A bargaining agent which is authorized to waive employee rights to be protected from certain unfair employer activity is also authorized to waive the employees' rights to protest such activity.

Nevertheless, the Board could and should have a much better understanding of the implications of the non-waiver principle for the meaning of no-strike clauses. In the few cases applying the *Arlan's* exception to the *Mastro Plastics* presumption, the Board has not articulated any definite test for when an unfair labor practice is sufficiently serious to warrant breach of a no-strike clause, let alone a test which is congruent with the non-waiver principle. In *Arlan's* itself, the Board majority merely stated that they used "experience, good sense, and good judgment" to find covered by a "no-strike" clause an unfair labor practice strike protesting the discharge of a union steward for circulating a decertification petition. Since the circulation of a decertification petition is organizational activity, its protection is not waivable by a bargaining agent, certainly not one whose status may be threatened by the petition. The result in *Arlan's* itself therefore cannot withstand the challenge of the non-waiver principle. Arlan's general neutrality in labor disputes and the seemingly isolated nature of the steward's discharge may have made arbitration seem a more attractive way to resolve the controversy, but these factors are irrelevant to the non-waivability of the rights which the striking employees sought to protect. Furthermore, neither in *Arlan's* nor in later cases has the Board indicated that there should be a presumption against waiver of

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131. *Id.* at 1231, 89 L.R.R.M. at 1473. Unfortunately, the Third Circuit reversed this Board decision as well. Suburban Transit Corp. v. NLRB, 536 F.2d 1018 (3d Cir. 1976). The Third Circuit opinion reflects no appreciation of any limitation on union power to sacrifice employee rights.


133. *Id.* at 807, 48 L.R.R.M. at 1734.

134. *Id.*

135. The Board would have done better to decide *Arlan's* in conformity with *Ford Motor Co.*, 131 N.L.R.B. 1462, 48 L.R.R.M. 1280 (1961). In *Ford* the Board held that a no-strike clause did
employee rights to engage in strikes which the employees sincerely believe to be in protest of serious unfair labor practices, regardless of the Board's later vindication of the employer. 136

On the other hand, in Dow Chemical Co., 137 a recent case reaffirming the Board's adherence to its Arlan's qualification of the Mastro Plastics presumption, the Board applied the presumption to a strike provoked by an employer's denial of waivable employee bargaining rights. Dow Chemical, in response to the loss of a large customer, unilaterally decided to reduce its shifts from seven days on-the-job, two days off, to five days on-the-job, two days off. Aggregate employee salaries suffered from the reduction of working hours, and the employees went on strike on the day the new schedule was to be placed in effect. The collective agreement provided that the union would only strike after exhausting a five-step grievance procedure and requesting the company to submit the dispute to arbitration; only the first four steps of the grievance process had been completed when the strike was commenced. A divided panel of the Board affirmed an administrative law judge's findings that while the company had violated section 8(a)(5) by unilaterally changing the shifts, this unfair labor practice was not sufficiently "serious" to warrant application of Mastro Plastics. 138 However, the Third Circuit remanded the decision, stressing the Board's lack of consideration of the company's failure to honor the union's request for accelerated arbitration. 139 On remand the full Board affirmed Arlan's, 3 to 2, but reversed the earlier panel decision and found Dow Chemical's unfair labor practices sufficiently serious to require application of a Mastro Plastics non-waiver presumption. 140

The Third Circuit also refused to uphold this second Board resolution of the case. 141 Consistent with my analysis of the non-waiver principle, the court correctly rejected the Board's application of Arlan's. Employee bargaining rights threatened by employer unilateral change

136. See text accompanying note 116 supra. Some commentators have noted that the exercise of protected employee rights is deterred by permitting employers to discipline employees for engaging in a strike which the employees cannot reasonably know is unprotected. E.g., Schatzki, supra note 117, at 396-402. I share this concern and concur in the suggestion that the Board protect any employee's strike activity which the employee cannot be presumed to know is illegal. See id. Short of the adoption of this suggestion, Board recognition that unions cannot waive employee rights to participate in strikes which the employees believe to be serious unfair labor practice strikes would at least alleviate some deterrence of important protected activity.


are delegated to exclusive bargaining agents and should be waivable by such agents, either totally by management rights clauses, or partially by arbitration or no-strike clauses. Dow asserted that it had power to change shifts unilaterally under a management rights clause, and in none of the opinions is there any suggestion that Dow intended its shift change to repudiate or undermine its longstanding collective bargaining relationship with the Steelworkers. The change seems to have been "serious" in its economic effects on the employees, but not in its effects on employee statutory rights. Perhaps Dow's failure to respond to the union's request for accelerated arbitration suggests that it wished to repudiate its agreement with the Steelworkers, but neither the collective agreement nor the labor laws made arbitration mandatory for the company.142

B. Implications of the Limitation on Union Authority
To Waive the Right to Strike

Significant clarification of several doctrines will follow upon a fuller understanding both of the absolute non-waivability of employee rights to engage in recognitional and certain unfair labor practice strikes, and of how unions may exercise the waiver authority which they do possess. Application of the non-waiver principle to two such doctrines is presented here.143

I. Unauthorized Employee Strike Activity

Board appreciation of the nature of union authority to waive employee rights to strike should lead to the clarification of the Act's protection of strike activity intended to affect bargaining, but not authorized by the bargaining agent. For much of the Act's history, the Board and the circuit courts have disagreed over its protection of such strikes. The courts have generally found that any strike not authorized by the strikers' bargaining agent inherently interferes with the system of exclusive collective bargaining established by section 9 of the Act and therefore should not be protected by section 7.144 The Board, in contrast, has generally attempted to provide protection for unauthor-

142. The first Third Circuit Dow opinion, 530 F.2d 266, manifests little recognition that individual employee rights may be protected by limiting the effect of no-strike clauses. But the second Dow opinion, 636 F.2d at 1360, does recognize that certain employee rights, such as those to choose freely a bargaining representative, may not be sacrificed in a collective agreement. Indeed, the second Dow opinion suggests that a limitation of union authority to sacrifice employee rights provides the best criterion for applying the Mastro Plastics "presumption of party intention." Id.

143. A third will be noted in an essay to be published in the next issue of this Journal concerning the relevance of the non-waiver principle to Board deferral to arbitration.

144. E.g., NLRB v. Sunbeam Lighting Co., 318 F.2d 661 (7th Cir. 1963); Plasti-Line, Inc. v. NLRB, 278 F.2d 482 (6th Cir. 1960); NLRB v. Draper Corp., 145 F.2d 199 (4th Cir. 1944). But see NLRB v. R.C. Can Co., 328 F.2d 974 (5th Cir. 1964). See Cantor, supra note 31, at 48-51.
ized employee strikes, as long as they are intended to advance the objectives of the bargaining agent and not to undermine the agent's exclusive bargaining status.\footnote{145} Consideration of the authority of bargaining agents to waive certain employee statutory rights makes clear that both approaches include a portion of wisdom.

On the one hand, the circuit courts have understood that any employee pressure on an employer to obtain better terms and conditions of employment may affect an exclusive agent's bargaining with the employer and therefore should be controllable by the agent. Even if the dissident employees' substantive objectives are the same as those of the union leadership, the dissidents' divergent tactics can disrupt the negotiation strategy which the exclusive agent has judged best for the collective interests of the employees it represents.

On the other hand, the Board has understood that an exclusive bargaining agent might reasonably elect to permit various groups of employees to pressure an employer independently without union control or support. An agent might determine that it can better satisfy employees by offering them some freedom of action, and that its negotiating position may even be enhanced by subjecting the employer to the potential of independent strike pressure. Unlike the employee pressure for minority bargaining held unprotected in Emporium Capwell,\footnote{146} independent employee strikes in support of substantive union positions may actually advance the system of exclusive collective bargaining.\footnote{147}

The wisdom of both sides of the debate can be realized by protecting all dissident employee strike activity aimed at influencing collective bargaining, though not at achieving minority representation, while at the same time making this protection waivable by the union. A union's waiver of the protection of dissident employee economic strikes might be expressed in several ways. A union waives the protection of many dissident employee economic strikes by negotiating a no-strike clause, or perhaps simply an arbitration clause,\footnote{148} covering all disputes arising


\footnote{147} See Getman, supra note 87, at 1244-45. See also Cox, The Right to Engage in Concerted Activities, 26 Ind. L.J. 319 (1951).

\footnote{148} Using the authority to develop a federal common law for the interpretation of collective bargaining agreements which it claimed in Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), the Supreme Court has directed all federal and state courts to presume that any arbitration clause includes a promise not to strike over disputes subject to arbitration. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962). It might be argued that an implied promise is not sufficient to satisfy the principle that employees' statutory rights should only be waived by "clear and unequivocal" language. However, unlike a principle restricting any union waiver of employee rights outside the union's authority, a principle requiring only clear and unequivocal waiver of waivable...
under the collective agreement. Normally such a clause applies only to bargaining under the existing agreement and not to strikes in support of negotiations of a new contract, but a union clearly has authority to give an express no-strike pledge covering negotiations, and in some instances might wish to do so for a period before impasse. A bargaining agent might also elect to waive employee rights to engage in a particular strike intended to influence negotiations. A union might respond to an employer's request to terminate a strike not only by stating that the strike is independent and unauthorized, but also by agreeing to waive the statutory protection of any strikers who did not then return to work. As long as the union did not make its waiver retroactive so that the strikers would have no opportunity to respond to the waiver by returning, such a particularized waiver should not be an automatic violation of the union's duty of fair representation. It should be considered simply as an exercise of the union's delegated control over bargaining tactics.

However, the courts and the Board should not confuse waivability with lack of protection, and thereby permit employer discipline of employee rights, while within the Board's discretion, is not mandated by the Act. The Court's doctrines for interpreting collective agreements are fashioned out of the Court's view of our total national labor policy to which the Board should presumably conform its discretion. Unions are fully aware by now of the implications of promises not to strike over disputes subject to arbitration. Since union promises may create rules to which employees must conform, see Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 797 (1973), it seems appropriate to view arbitration clauses as union agreements to waive certain employee rights to strike. But see R-W Service Systems, Inc., 243 N.L.R.B. 1202, 101 L.R.R.M. 1582 (1979) (Murphy, dissenting) (second company not lawfully entitled to refuse to hire employee who has breached a no-strike rule of another employer because second company was not part of original bargain and gave no concession to employees in exchange for no-strike rule).

149. The Board has recently held that the waiver effect of a union no-strike clause may extend beyond the terms of the collective agreement if the employer's duty to arbitrate disputes under the agreement also so extends. Goya Foods, Inc., 238 N.L.R.B. 1465, 99 L.R.R.M. 1282 (1978). The Board relied in *Goya* on Nolde Bros., Inc. v. Bakery Workers Local 358, 430 U.S. 243 (1977), in which the Supreme Court announced a rebuttable presumption that an employer's duty to arbitrate disputes arising under an agreement shall extend beyond the terms of the agreement. However, these cases are not relevant to strikes over the negotiation of new agreements.

150. For instance, in Kroger Co., 177 N.L.R.B. 769, 71 L.R.R.M. 1508 (1969), aff'd sub nom., Silbaugh v. NLRB, 429 F.2d 761 (D.C. Cir. 1970), the Board found that in consideration for the company's pledge to make any wage increases retroactive the union had agreed to an extension of a no-strike clause in an old contract through a negotiation period for a new contract.

151. In other contexts courts have used analysis, which would seemingly support the conclusion that a right was waivable, to conclude instead that employee activity exercising the right should not be protected at all. For instance, the D.C. Circuit has rejected the Board's protection of concerted employee activity to resist an employer's interview of union witnesses for a scheduled arbitration hearing. Cook Paint & Varnish Co. v. NLRB, 648 F.2d 712 (D.C. Cir. 1981). The *Cook Paint & Varnish* court stressed that the "method in which disputes are resolved through a grievance-arbitration process is a contractual matter to be determined by the parties." Id. at 721-22. This assertion is true, but it does not justify employer coercion of union efforts to achieve a method more advantageous to the employees; it simply supports union waiver of any rights which employees might have to resist employer pre-arbitration interviews. The determination of
employees for engaging in all unauthorized strikes, without some form of explicit union waiver. Some form of union waiver should be required even if the dissident employees' substantive bargaining objectives do not seem consistent with those of a union. As long as the dissidents are attempting to influence bargaining between the exclusive representative and the employer, rather than attempting to force the employer to bargain with a minority representative as in *Emporium Capwell*, their concerted activity should be protected. A union might judge employee freedom to bring pressure on the employer to be more important than the substantive goal, or a union might wish to use waiver of the employees' statutory rights as a bargaining chip in negotiations.\footnote{152}

Forcing an employer who wishes to discipline independent employee strikers to obtain union waiver of the employees' rights to engage in an independent strike is not unfair to the employer. An employer should be able to respond to an independent economic strike in the same manner that it can respond to a union-controlled economic strike, including the hiring of permanent replacements or the shutting down of operations. If a union does not like an employer's response, it may be more willing to waive minority employees' rights. As long as an employer does not negotiate directly with minority employees, the employer does not risk an unfair labor practice if it responds to the minority employees' pressure by bringing their minority views to the bargaining table with the exclusive representative. If an exclusive representative does not like the influence on negotiations of an independent strike, it can encourage its termination by waiving its protection.\footnote{153}

whether these rights exist at all should turn on a balancing of the employee interests protected by section 7 and legitimate employer business interests. This balancing should be done in the first instance by the Board. See the dissenting opinion of Judge Wright in *Cook Paint & Varnish*, id. at 726-36.

\footnote{152} The Board has correctly protected a dissident employee's efforts to spark concerted employee action to obtain renegotiation of a seniority system to which the union had recently agreed. *Armco Steel Corp.*, 232 N.L.R.B. 696, 96 L.R.R.M. 1325 (1977). The Board distinguished *Emporium Capwell* by stressing that the employee in *Armco* did not seek direct negotiations with the employer. Of course any strike to modify a contract during its term is rendered unprotected by the terms of section 8(d) of the Act, whether or not the strike is union-authorized. But assuming the *Armco* employee successfully organized a strike to pressure renegotiation of the union-advocated seniority system during a contract negotiation period, the strike should be given as much protection, albeit waivable, as given the employee's efforts to spark the strike.

\footnote{153} Professor Getman argues against the protection of independent employee activity which the union refuses to adopt as its own. See Getman, supra note 87, at 1245-47. I understand this argument to apply only to activity aimed at compelling minority bargaining. To the extent that the argument is so limited, I agree with it as well as with the decision in *Emporium Capwell*, which rendered this activity unprotected as inconsistent with the system of exclusive representation. See text accompanying note 29 supra. However, to the extent that the argument is meant to apply to independent activity aimed only at influencing negotiations between the employer and the exclusive representative, I believe that it is refuted in text.
2. **Non-waivable Employee Rights to Engage in Sympathy Strikes**

The most significant potential refinement of the *Mastro Plastics* decision to accord with the *Magnavox* non-waiver principle would be the full application of its rationale to insulate the protection of sympathy strikes from waiver. Sympathy strikes can be defined as employee refusals to cross picket lines established on behalf of employees in different bargaining units. Although some circuit courts have resisted inclusion of sympathy strikes within the compass of section 7 protection, the Supreme Court in its *Eastex* decision recently acknowledged that the Act protects employees' otherwise proper concerted activities in support of other employees not only in other bargaining units but also employed by other employers. However, the Board and the courts have not yet expressly held that unions lack authority to waive employee rights to engage in sympathy strikes.

Appreciating why unions lack this authority requires an understanding of why sympathy strikes are protected by section 7 of the Act. As explained by the Court in *Eastex*, "employees" who may engage in concerted activities for "mutual aid or protection" are defined by §2(3) of the Act, 29 U.S.C.A. §152(3), to "include any employee and shall not be limited to the employees of a particular employer, unless the Act expressly states otherwise . . . ."

This definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own.

Because of the possibility of reciprocal support in the future, employees hope that they eventually will benefit themselves by concerted activities on behalf of employees outside their bargaining unit. The rule against crossing the picket lines of any union has been a union principle throughout the history of American labor because workers have recognized that they may be assisted by later mutual respect for their own lines.

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155. 437 U.S. at 564 n.13, discussed in text accompanying notes 79-81 supra.

156. Id. at 564.

The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" . . . So too of those engaging in a "sympathetic strike" . . . the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased.\textsuperscript{158}

As Judge Hand also recognized, however, the American community might wish to limit the protection of extended mutual employee economic power,\textsuperscript{159} and in fact Congress did so by prohibiting secondary boycotts in the Taft-Hartley Act.\textsuperscript{160} Nevertheless, Congress has never expressly limited the force of section 7's protection of sympathy strikes.\textsuperscript{161} Certainly the delegation of power in section 9(b) of the Act to the Board to define limited appropriate units for the purposes of collective bargaining does not constitute such a limitation. The units selected by the Board are limited in size so that representative elections do not unnecessarily suppress large minority interests and so that bargaining agents may accomodate a manageable community of employee interests.\textsuperscript{162} The units are not limited to prevent employees and various units from working together for their mutual interest\textsuperscript{163} nor are the units limited because the Board has decided that such mutual activity would not be effective.

These considerations explain why unions should lack authority to waive the right of employees to engage in sympathy strikes. The exclusive authority delegated by the Act to designated bargaining agents is the authority to control all employee efforts to gain better terms and conditions of employment from their employer.\textsuperscript{164} The bargaining

\textsuperscript{158} 130 F.2d 503, 505-06 (2d Cir. 1942).
\textsuperscript{159} Id. at 506.
\textsuperscript{161} See the discussion of legislative history in Axelrod, The Statutory Right to Respect A Picket Line, 83 DICK. L. REV. 617, 627-31 (1979) [hereinafter cited as Axelrod].
\textsuperscript{163} It is not uncommon for employees in separate bargaining units to coordinate their bargaining tactics. See generally Goldberg, Coordinated Bargaining Tactics of Unions, 54 CORN. L. REV. 897 (1969).
\textsuperscript{164} In some cases bargaining units extend to more than one employer. Though section 9(b) does not expressly contemplate multiemployer units, the Board has long accommodated the reality of multiemployer bargaining by recognizing the appropriateness of such units for effective and stable collective bargaining. See 23 NLRB ANN. REP. 36-37 (1958). Whenever employees recognize the economic pickets of other employees within the same bargaining units, they are not engaging in a sympathy strike beyond the control of their mutual bargaining agent, even when the picketing employees have a different employer than those employees who wish to respect their pickets. As a formal question of semantics, I would not denominate as a sympathy strike any employee respect of pickets of employees within the same bargaining unit, regardless of the involvement of multiple employers. Others might disagree; for them, multiemployer bargaining units must provide a qualification to the general rule that the right to engage in sympathy strikes is
agent can therefore waive employees' rights to engage in economic strikes to pressure their employer to grant them better terms. To permit employees to engage in economic strikes against the agreement of their exclusive agent would be to permit the employees to disrupt the strategy adopted by the agent to secure them the most favorable aggregate terms. Control over achievement of the objectives of a sympathy strike, however, is not delegated to exclusive agents. The objectives of sympathy strikes transcend the authority of the sympathy strikers' bargaining agents, for the objectives of sympathy strikes by definition concern other bargaining units. The objectives can be met or resisted by any employer without consulting the sympathy strikers' bargaining agent. Sympathy strikes are protected activity not because they are part of a sympathy striker's collective bargaining efforts, but because they are concerted activities for the aid of other workers who might eventually assist the sympathy strikers.165

Of course, the assistance which the sympathy strikers might eventually obtain from other workers may help them to obtain better terms of employment from their employer. However, this may occur even after the termination of any agreement containing a no-strike clause or after a decertification of the agent which purported to waive the sympathy strikers' rights. More importantly, the sympathy strikers' later strike which the earlier-assisted workers might respect may itself be a non-waivable unfair labor practice or recognitional strike, rather than an economic strike under the control of the exclusive agent. Neither the sympathy strikers nor their union knows at the time of the sympathy strike what assistance might eventually accrue to the sympathy strikers. A sympathy strike is always intended to ensure future protection of the sympathy strikers' non-waivable rights. The sympathy strikers' bargaining agent may waive the sympathy strikers' rights to engage in a later economic strike and picketing and thereby frustrate their later call for assistance from the workers whose own strike was aided

never waivable by a bargaining representative. A fortiori, when a one-employer bargaining unit includes several union locals at different plants, a strike at one plant called in respect of an economic strike at another plant is also within the control of the bargaining agent.

165. To be sure, when both sets of strikers are employed by the same employer, achievement of the economic objectives of a sympathy strike might indirectly affect bargaining between the sympathy strikers' union and the employer. The sympathy strikers' union could use the primary strikers' improved economic package to argue for better terms of employment for its employees while the employer could argue that there are less company resources available for the sympathy strikers. However, these possible indirect effects do not justify union control over sympathy strikes any more than the potential effects of company marketing policy on the revenues available for wages justify making company marketing a mandatory topic of bargaining. See, e.g., NLRB v. Detroit Resilient Floor Decorators Local 2265, 317 F.2d 269 (6th Cir. 1963). Bargaining agents have exclusive authority over employee attempts to extract better terms of employment from their employers; they do not have any authority over activity which might indirectly affect the employers' ability to respond to the agents' bargaining efforts.
before; but the agent has no authority to waive the right of its principal employees to provide aid to the other workers.

The bargaining agent's lack of authority to waive employees' statutory rights to give assistance to other workers outside their own unit may be clearer when the other workers themselves exercise non-waivable statutory rights. Indeed a rule which would permit agents to waive their principal employees' rights to assist other workers' economic strikes, but not their rights to assist other workers' unfair labor practice or recognition strikes, has the strong surface appeal of symmetry.

Nevertheless, such a rule would be inconsistent with the non-waiver principle. A sympathy strike is protected by section 7 even if the workers assisted by the strike are themselves not "employees" under the Act and therefore have no statutory rights to consider waiving. As long as the sympathy strikers act in concert for their own possible future benefit, their sympathy strike is protected by section 7, regardless of whether they hope that their concerted action will obtain future aid entirely from workers outside the protection of the Act. Furthermore, the nature of the work action assisted by sympathy strikers has no logical correlation with the nature of any future strike which the earlier-assisted workers might aid in reciprocation. Sympathy strikers are as likely to obtain assistance in a future recognition strike by aiding an economic strike as by aiding another recognition strike. Permitting a bargaining agent to waive the right of employees to engage in any kind of sympathetic activity inevitably permits the agent to sacrifice non-waivable rights which should be outside its control.

The Board, to its credit, has gone as far to recognize the lack of authority of bargaining agents over sympathy strikes as the courts have

166. The assisted workers may for instance be supervisors, independent contractors, or agricultural workers, all excluded from the definition of employees in section 2(3) of the Act. See 29 U.S.C. § 152(3) (1976).

167. Judge Hand also explicitly recognized this in his Peter Cailor Kohler opinion, 130 F.2d at 506; and the Board has adhered to his view, e.g., General Elec. Co., 169 N.L.R.B. 1101 (1968), enforced, 411 F.2d 750 (9th Cir. 1969).

168. The insulation from waiver of employee rights to strike in sympathy with all other legal strikers, regardless of the waivability of the primary strikers' rights, also has the fortunate benefit of providing some relief from the sympathy strikers' traditional dilemma: an employee who confronts a picket line before another employer's premises can seldom determine exactly why the pickets have been posted. Employees would have tremendous difficulty applying a rule which protected from waiver their observance of legal recognition picketing, but not of legal economic picketing. Of course, as long as the Board continues to view the observance of illegal picket lines as unprotected regardless of waiver, see, e.g., Chevron U.S.A., Inc., 244 N.L.R.B. 1081, 102 L.R.R.M. 1311 (1979); American Tel. & Tel. Co., 231 N.L.R.B. 556, 96 L.R.R.M. 1144 (1977); Pacific Tel. & Tel. Co., 107 N.L.R.B. 1547, 33 L.R.R.M. 1433 (1954), a serious and unfair dilemma will remain for employees confronting stranger picket lines. I agree with those critics who have argued that employees wishing to exercise statutory rights should not be forced to stand before a picket line making difficult legal judgments with imperfect knowledge at best. See, e.g., Axelrod, supra note 161, at 638-40; Getman, supra note 87, at 1229-30.
permitted. Over the past several years, the Board has consistently held that employees' rights to engage in sympathy strikes are not waived by a broad and general no-strike clause in the absence of express contract language or unequivocal bargaining history evidencing an intent to waive the right to engage in sympathy strikes. The Board has even refused to defer to an arbitrator's interpretation of a broad no-strike clause to include a prohibition on sympathy strikes, finding such an interpretation repugnant to the Act.

The Board's presumption against implicit union waiver of the right to engage in sympathy strikes is not, however, as effective a prophylactic against the sacrifice of non-waivable rights as is the Mastro Plastics-Aralan's presumption against waiver of the right to strike against serious employer unfair labor practices. While no viable, self-respecting union is likely to agree to a contract provision which waives employees' rights to strike in protest of an unfair labor practice, an effective union might well agree to a prohibition of sympathy strikes.

The Board also has expressed some recognition that there may be limits to bargaining agents' authority over employee rights to engage in other, non-strike concerted efforts on behalf of employees in other units. In Yellow Cab, Inc., 210 N.L.R.B. 568, 86 L.R.R.M. 1145 (1974), a case cited by the Easter court, 437 U.S. at 564 n.13, the Board applied the Magnavox non-waiver principle to employees' distribution of literature in support of another employer's employees. In Rudy's Farm Co., 245 N.L.R.B. 43, 102 L.R.R.M. 1384 (1979), the Board refused to find union waiver of employees' rights to display bumper stickers supporting the organizing efforts of another employer's employees, though the administrative law judge did state that waiver "by the use of clear and unmistakable language" would be accepted. Id. at 49, 102 L.R.R.M. at 1385.


It is true that the Board has been willing to presume that even no-strike clauses which cover sympathy strikes are not meant to encompass strikes in sympathy with unfair labor practices. Pilot Freight Carriers, Inc., 224 N.L.R.B. 341, 342, 92 L.R.R.M. 1338, 1339 (1976). See also C.K. Smith & Co., 227 N.L.R.B. 1061, 1072-73, 95 L.R.R.M. 1617, 1618, enforced, 569 F.2d 162
Furthermore, while several circuit courts have accepted the Board's presumption against implicit waiver of employees' rights to strike in sympathy with other employees, some reviewing courts have been willing to find unequivocal union waiver in less than explicit language or fully unambiguous bargaining history.

Both the Board's and the courts' unwillingness to insulate fully the right of employees to engage in sympathy strikes from union waiver is traceable to an old Supreme Court case, *NLRB v. Rockaway News Sup-

(1st Cir. 1977), cert. denied, 436 U.S. 957 (1978); Laconia Shoe Co., 215 N.L.R.B. 573, 577-78, 88 L.R.R.M. 1427 (1974). However, this willingness may not abide because the Board's logic for the presumption, that sympathy strikers should always have the same protection as those with whom they are in sympathy, is not compelling. While any protection, such as a right to reinstatement, which the Board gives to sympathy strikers, may be the same as the protection which it gives primary strikers, two different unions with different interests may decide differently whether they wish to waive that protection for the two sets of employees. The union representing the primary strikers may be unwilling to waive its employees' rights to strike in protest of employer unfair labor practices against them, while the union representing the sympathy strikers may be willing, if it has the authority, to waive its employees' rights to engage in any sympathy strike. Even if the Board does adhere to its *Pilot Freight* rule, I suspect many employers who would not be able to obtain no-strike clauses explicitly covering primary unfair labor practice strikes, would be able to obtain no-strike clauses explicitly covering unfair labor practice sympathy strikes.


Even worse, in *NLRB v. Keller-Crescent Co.*, 538 F.2d 1291 (7th Cir. 1976), the Seventh Circuit held that employees violated their obligation under a collective agreement by refusing to cross other employees' picket lines without first taking to arbitration a dispute over the meaning of a clause in the contract which only arguably waived the employees' rights not to cross the lines. Decisions like *Keller-Crescent* are the best evidence that the Board's labor-law expertise is something more than a myth. Timing is of the essence for most strikes. If employees must wait for an arbitrator's decision before they can exercise a statutory right, that right has been substantially eroded.

Furthermore, the arbitrator may not utilize the Board's clear and unequivocal waiver rule to interpret the contract. *Keller-Crescent* thus accepts waiver of employee rights to engage in sympathy strikes by an arbitration clause and an ambiguous no-strike clause. The circuit court's insistence that employees wishing to exercise their statutory right first proceed to arbitration is also inconsistent with section 10 of the Act's clear authorization of Board jurisdiction over unfair labor practice charges regardless of alternative means of dispute resolution. *See NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 425-30 (1967). The concern about the preemption of arbitration expressed in *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976), does not support *Keller-Crescent* because the Seventh Circuit was reviewing the Board's consideration of whether the union attempted to waive statutory rights; it was not determining whether to grant an injunction which might obviate arbitration over the meaning of the no-strike clause. Indeed, by permitting employers to discipline sympathy strikers, the law suggested by the *Keller-Crescent* court probably would effect the precise inequitable result which the *Buffalo Forge* decision seems to avert; sympathy strikers would be effectively prevented from protesting a dispute which could not be resolved by utilization of the arbitration process in their contract. *See* text accompanying note 201 *infra*. For further criticism of *Keller-Crescent*, see Axelrod, *supra* note 161, at 645-47.
ply Co.,\textsuperscript{175} which has been implicitly rejected by the force of the Court's later decisions in \textit{Mastro Plastics} and \textit{Magnavox}. The Rockaway Court found unprotected a delivery employee's refusal to cross a legal union picket line at another employer's plant where the employee was to pick up newspapers. The Court agreed with an arbitrator that in light of bargaining history a general no-strike clause should be read to cover sympathy strikes like that of the complainant employee.\textsuperscript{176}

The Rockaway opinion stood on shaky ground even before \textit{Mastro Plastics} and \textit{Magnavox}. The Rockaway Court rested its conclusions that an employer may with impunity discharge an employee for breach of his union's agreement to prohibit sympathy strikes on \textit{NLRB v. Sands Manufacturing Co.}, an often misconstrued 1939 opinion.\textsuperscript{177} \textit{Sands} is frequently cited for the proposition that strikes in breach of no-strike clauses are not protected by section 7.\textsuperscript{178} However, the \textit{Sands} case did not even present a strike in breach of a no-strike clause; a strike was threatened, but the strike presumably would have been in accord with an explicit provision in the contract permitting strikes after 48 hours notice.\textsuperscript{179} The \textit{Sands} Court found the strike threat to be a repudiation of the contract, not because of any waiver of rights in a no-strike clause, but because the employees insisted on a modification of the seniority terms of the contract as a condition on their continuing work. The Court concluded that this employee repudiation of the substantive provisions of the contract during its term warranted the employees' discharge.\textsuperscript{180} The Court's conclusion was reasonable. Employee refusals to accept substantive terms and conditions of employment negotiated by a bargaining agent advance no statutory purpose. Such refusals undermine the agreements which collective bargaining is intended to produce\textsuperscript{181} and they do not involve the exercise of employee freedom of association and self-organization which is the foundation of collective bargaining.\textsuperscript{182} However, many strikes have purposes other than the modification of the terms of collective agree-

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\item \textsuperscript{175} 345 U.S. 71 (1953).
\item \textsuperscript{176} \textit{Id.} at 79-80.
\item \textsuperscript{177} 306 U.S. 332 (1939).
\item \textsuperscript{178} \textit{E.g., A. Cox, D. BOK & R. GORMAN, LABOR LAW, CASES AND MATERIALS, 935-36 (8th ed. 1976).}
\item \textsuperscript{179} 306 U.S. at 343.
\item \textsuperscript{180} \textit{Id.} at 342-45.
\item \textsuperscript{181} \textit{See Cox, The Right to Engage in Concerted Activities, 26 IND. L.J. 319, 328 (1951).} Professor Cox, however, fails to make the distinction which follows in text between employee efforts to modify the substantive provisions of a collective agreement during its term and breaches of a no-strike clause for purposes other than modification of the substantive terms of the agreement.
\item \textsuperscript{182} \textit{Mastro Plastics}, 350 U.S. at 282.
\end{enumerate}
\end{footnotesize}
ments, and as stressed above, many of these strikes do involve the exercise of fundamental employee rights to freedom of association and self-organization. The _Sands_ Court simply did not address whether unions may waive the protection of these latter strikes.

Nor can the _Rockaway_ decision's acceptance of union waiver of employee rights to engage in sympathy strikes find support in the proviso to section 8(b)(4)(D), which clarifies that work actions respecting pickets which violate the secondary boycott proscriptions of the Act are not themselves unlawful. The _Rockaway_ majority apparently misread this proviso as merely permitting unions and employers to establish contractual rights for employees wishing to honor picket lines before other employers. However, the proviso on its face preserves the legality of employees' sympathy strike activities; it delegates no authority to the employees' bargaining agents to control sympathy strikes.

Perhaps the majority was confused by the last clause of the proviso which limits the proviso's force to work actions in sympathy with secondary strikes which are ratified, not by the sympathy strikers' agent, but by a representative of the picketing strikers whom the employer of the picketing strikers is required to recognize under the Act.

Furthermore, the authority of the _Rockaway_ decision has been subsequently eroded by the _Mastro Plastics_ rationale and the labor practice, and also that any worker's participation in a strike for such purposes removed that worker from any protected status under the Act. See 29 U.S.C. § 158(d)(4) (1976).

Professor Schatzki has argued persuasively that protection should be granted even to employees who strike for a modification of the terms of a contract unless those employees have actual knowledge that their goals are inconsistent with their contract. See Schatzki, _supra_ note 117, at 401. In _Sands_, the employees were repeatedly warned by the employer. Schatzki would treat the last sentence of section 8(d) as covering only strikes occurring during the sixty-day notice-negotiation period before the expiration of a contract. _Id._


184. The full language of the proviso is:

[N]othing 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 employee whom such employer is required to recognize under this Act....

_Id._ No elaboration of Congress' intent in including the clause can be found in the legislative history. One non-illuminating reference to the proviso has been noted. See S. REP. NO. 105, 80th Cong., 1st Sess. (1947). The three _Rockaway_ dissenters argued that the proviso "reserved to each employee" the decision whether to respect an authorized picket line. 345 U.S. at 81, 82 (Black, J., dissenting).

185. This clause should not be read to make illegal or to even eliminate the protection of work actions in sympathy with all strikes not authorized by the designated bargaining agents of the picketing strikers. The clause simply limits a proviso which assures the protection of employee action in respect of even secondary picket lines, as long as those lines are authorized by a designated bargaining agent. Since the proviso only limits the force of section 8(b)(4), the limiting clause in the proviso should be relevant only to employee work actions in respect of picket lines which otherwise violate section 8(b)(4). In any event, even a broad reading of the limiting clause would in no way increase the authority of bargaining agents to waive employee rights to strike; it would merely confine the scope of these rights.
Magnavox holding. Sands simply cannot stand for the broad proposition that any employee activity in breach of a collective agreement is unprotected; the Magnavox holding is directly to the contrary. The teaching of Magnavox is that there are at least some statutory rights which cannot be sacrificed in collective agreements. To determine which rights cannot be sacrificed, the Board and the Courts must turn to the analysis of fundamental employee rights of free association and self-organization suggested by Mastro Plastics and affirmed by Magnavox. The Rockaway opinion contains no such analysis, and therefore seems to sanction a bargaining unit's waiver of employees' statutory right to respect the picket lines of fellow workers who might someday help them to protect their own organizational and associational rights.

C. Judicial Enforcement of No-Strike Clauses and Non-waivable Employee Rights

The limitation on the authority of bargaining agents to waive employee rights to strike should also restrict judicial enforcement of any unauthorized attempts at waiver. Courts should not enjoin employees from exercising their right to strike, which while possibly covered by a no-strike clause, is not within the control of the agent who negotiated the clause.186

Prohibiting federal and state courts from enjoining the exercise of protected non-waivable rights is fully consistent with the Supreme Court's refusal to apply its San Diego Building Trades Council v. Garmon187 preemption doctrine to the enforcement of collective agreements. In Garmon, the Court held that the NLRB has primary jurisdiction, exclusive of both state and federal courts, to control activity which is either arguably protected or arguably prohibited by the Act.188 However, the Court has since made clear that the strong federal policy in favor of encouraging collective bargaining agreements requires that state and federal courts not be preempted from enforcing

186. Indeed, a strong case could be made that an employer's attempt to enlist judicial aid against strikers whose statutory protection is not waivable should be itself an unfair labor practice. Cf. Booster Lodge 405, IAM v. NLRB, 412 U.S. 84 (1973); NLRB v. Granite State Joint Bd., 409 U.S. 213 (1972) (both holding that union suits to collect fines against strikebreakers who resigned from union were unfair labor practices). However, the filing of a civil law suit generally has been held not to be an unfair labor practice, see, e.g., Associated Gen. Contractors v. NLRB, 637 F.2d 556 (8th Cir. 1980); Bergman v. NLRB, 577 F.2d 100, 103 (9th Cir. 1978); Retail Clerks Local 770, 218 N.L.R.B. 680, 89 L.R.R.M. 1407 (1975); Clyde Taylor Co., 127 N.L.R.B. 103, 45 L.R.R.M. 1514 (1960), except where there is evidence of bad faith, see, e.g., Power Systems, Inc. v. NLRB, 601 F.2d 936 (7th Cir. 1979); Masters, Mates & Pilots v. NLRB, 575 F.2d 896 (D.C. Cir. 1978).
188. Id. at 245.
The Supreme Court has indeed affirmed that the jurisdiction of federal and state courts to enjoin strikes in breach of contract which are also arguably union unfair labor practices is not preempted by the jurisdiction of the Board. The Court has never suggested, however, that state or federal courts are free to ignore rights established by the Act when enforcing collective agreements. In actions to enforce bargaining agreements as well as federal courts must apply a federal common law fashioned from the policy of our national labor laws, which surely includes the protection of fundamental non-waivable employee rights established by the Act. A court can enjoin activity prohibited by the Act without in any way contravening the statute; but a court cannot enjoin activity protected by the Act without detracting from that protection. State and federal courts therefore have jurisdiction to consider enjoining all violations of no-strike clauses, but they must recognize that no-strike clauses cannot waive certain employee rights and that any injunction of the exercise of these rights would be contrary to federal law.

Since timing is usually critical for strikes and a strike once enjoined is often a strike never rekindled, the courts ideally would apply a prophylactic rule against the injunction of any strike which arguably represents the exercise of non-waivable employee rights. However, such a prophylactic rule would impinge upon the countervailing federal labor policy in favor of encouraging peaceful arbitral resolution of bargaining disputes between unions and employers. If the Supreme Court's repeated analysis is correct, judicial hesitancy to enforce no-strike clauses might discourage employer negotiation of arbitration clauses in return for union no-strike promises. The tension between protecting free employee association and self-organization and encouraging peaceful collective bargaining thus may preclude a rule preventing the injunction of employees' exercise of arguably as well as, in the court's view, actually non-waivable rights. The non-waiver prin-

193. In Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978), the Court held that a state court may have jurisdiction "to enforce state trespass laws against picketing which is arguably—but not definitely—prohibited or protected by federal law." Id. at 182 (emphasis supplied). However, the Court expressly acknowledged that state court interference with conduct "actually protected by the Act" would raise even constitutional supremacy clause problems. Id. at 199.
194. See F. Frankfurter & N. Greene, The Labor Injunction 201 (1930) [hereinafter cited as F. Frankfurter & N. Greene].
ciple is sufficiently straightforward\(^{196}\) so that it should not be abused even by a judiciary historically unsympathetic to any collective employee economic coercion.\(^{197}\)

To a great extent, this limitation on the authority of courts to enjoin strikes simply extends to state courts part of the Norris-LaGuardia Act's restrictions on federal court injunctions of strikes. The Supreme Court has of course recognized an important exception to the general prohibition of federal court strike injunctions included in section 4 of the Norris-LaGuardia Act.\(^{198}\) In *Boys Markets, Inc. v. Retail Clerks Local 770*,\(^{199}\) the Court held that federal courts may enjoin strikes over grievances which the bargaining agent has agreed should be settled by an arbitration process. The *Boys Markets* Court stated that the literal words of section 4 had to be accommodated to the general policy of the Labor-Management Relations Act to encourage collective bargaining. The Court concluded that framers of the Norris-LaGuardia Act did not intend to prohibit the injunction of strikes over grievances that might be resolved through peaceful arbitration.\(^{200}\) Several years later in *Buffalo Forge Co. v. United Steelworkers*, the Court emphasized, albeit in a closely divided decision, that the *Boys Markets* exception to section 4's prohibition of strike injunctions was a narrow one dependent on the enjoined strikers having an alternative grievance mechanism for resolving their dispute.\(^{201}\) The *Buffalo Forge* Court held, in effect, that federal courts could not enjoin sympathy strikes, because sympathy strikers by definition never strike over disputes which the sympathy strikers could not resolve through arbitration with their employer.\(^{202}\)

The *Buffalo Forge* majority did state in dictum that had the em-

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196. A rule against union waiver of employee rights to engage in any sympathy strike is of course particularly easy to apply. A rule dividing types of unfair labor practice rights is admittedly more slippery, but the non-waivable employee rights involved in close cases would presumably be relatively insignificant.

197. To the extent that any such prejudices are localized in state courts, they can be readily countered by the removal power affirmed by the Court in *Avco Corp. v. Lodge 735, IAM*, 390 U.S. 567 (1968).


200. *Id.* at 253-54.

201. 428 U.S. 397 (1976). This limitation on the accommodation of the Norris-LaGuardia Act to the Labor Management Relations Act is compelling. The framers of Norris-LaGuardia must have wished both to restrain judges from arbitrating labor disputes on the basis of their personal social-economic philosophy rather than in accord with definite legal standards, and also to prevent judicial power from vitiating the natural economic power of striking, united employees who have no alternative means to counter employers' natural economic power. *See* S. REP. No. 669, 72d Cong., 1st Sess.; F. Frankfurter & N. Greene, *supra* note 194, at 203-05. A no-strike clause may provide judges with a definite legal standard to enforce, but unless striking employees may resolve their disputes through arbitration, an injunction still asserts judicial power against employees who have no alternative to the strike and thus still vitiates the employees' only natural economic advantage.

202. 428 U.S. at 405-09.
ployer first obtained an arbitral decision that the no-strike clause covered the sympathy strikers' conduct, the District Court could have issued an injunction against further striking. Nevertheless, this dictum is inconsistent with the major rationale of the decision. No arbitration decision rendered under the sympathy strikers' contract with their employer could have resolved the dispute which triggered the sympathy strike. An arbitration decision could only resolve whether the no-strike clause in the contract covered the sympathy strike. If federal courts would simply defer consideration of injunctions until after arbitration decisions have been rendered, the Buffalo Forge Court's concern that a court not preempt an arbitrator's interpretation of a no-strike clause could be met. However, deferral would not insure that strikes only be enjoined when the strikers have an alternative mechanism to obtain their goals.

Strict application of the narrow Boys Markets-Buffalo Forge exception to the Norris-LaGuardia Act also should insure that relatively few primary strikes involving the exercise of non-waivable employee recognitional or associational rights would be enjoined. An employer which provokes a strike by refusing or withdrawing recognition from a union usually is not able to point to an extant arbitration process which could resolve the recognitional dispute. In addition, as long as federal courts apply the Mastro Plastics presumption against the coverage of unfair labor practice strikes by general no-strike clauses, few strikes generated by employer threats to non-waivable employee organizational rights can be enjoined.

Nevertheless, the non-waiver principle provides an important supplement to the present doctrine on strike injunctions. First, notwithstanding the power to remove collective bargaining actions from state to federal courts, the importance of limiting state as well as federal court injunctions should not be underestimated. Buffalo Forge, standing alone without support from a non-waiver principle, would permit

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203. Id. at 405.
204. Id. at 411-12.

It can be argued that the Buffalo Forge Court's concern about the effect of pre-arbitration injunctions on arbitration processes was in any event inconsistent with the Court's earlier decision in Gateway Coal Co. v. UMW, 414 U.S. 368 (1974), that a court could enjoin a primary strike over an issue which the court found arbitrable, notwithstanding the union's claim that the issue was not arbitrable. See Smith, The Supreme Court, Boys Markets Labor Injunctions, and Sympathy Work Stoppages, 44 U. CHI. L. REV. 321, 339 (1977). But the Supreme Court earlier made clear that questions of arbitrability, unlike most contract interpretation questions such as the meaning of a no-strike clause, are to be decided in the first instance by courts, not arbitrators. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 n.7 (1960). See Buffalo Forge, 428 U.S. at 408 n.10. I agree, however, that the arbitration preemption rationale for Buffalo Forge is not as compelling as the Norris-LaGuardia alternative-to-the-strike rationale.

205. See text accompanying note 88 supra.
state court injunctions of some sympathy strikes. Even courts in states
which have mini-Norris-LaGuardia anti-injunction statutes might in-
terpret those statutes differently than the Supreme Court has inter-
preted Norris-LaGuardia itself. The Buffalo Forge Court's expressed
concern that courts should not preempt arbitrators' contract interpreta-
tion responsibilities applies as much to state as to federal courts. How-
ever, this concern is not applicable to post-arbitration injunctions; nor
is it applicable to the enforcement of no-strike clauses which the con-
tract provides are to be interpreted by courts rather than arbitrators.

Second, some employer threats to non-waivable employee rights
present disputes which may be arbitrated under no-strike contracts.
Without the non-waiver principle, courts might enjoin strikes pro-
testing such threats. For instance, an employer's discharge of particu-
lar employees for distributing literature supporting or attacking a union
would threaten the employee rights which Magnavox directly pro-
claimed to be non-waivable. Yet such a discharge would present arbi-
tral issues under most collective agreements and a strike protesting the
discharge could be enjoined by an unsympathetic court. Indeed, a dis-
trict court in Texas rejected an argument that unfair labor practice
strikes should not be enjoined.\(^2\) The strikers' defense in that case
could not have been assisted by the non-waiver principle because the
strike concerned an alleged employer unilateral change in working
conditions which did not constitute a repudiation of the collective bar-
gaining relationship. However, in the absence of the non-waiver prin-
ciple, it is likely that at least this court would have enjoined even a
strike protesting the discharge of several union leaders for distributing
union campaign literature.

Third, the dicta in Buffalo Forge approving the injunction of a
sympathy strike after an arbitration decision which interprets a no-
strike clause to cover the strike cannot be dismissed easily by lower
courts. Some long sympathy strikes may be enjoined.\(^2\) Furthermore,
the narrow Buffalo Forge majority might not hold up without addi-
tional support from the non-waiver principle. Neither the majority nor
the dissenting opinions in Buffalo Forge reflect any recognition that a
bargaining agent's authority to sacrifice the right to strike may be lim-

\(^2\) Southwestern Bell Tel. Co. v. CWA Local 6222, 343 F. Supp. 1165, 1171-72 (S.D. Tex.
1972) (expressly viewing no-strike arbitration clauses as "waiver of access to the Board").

\(^2\) See New Orleans Steamship Ass'n v. ILA Local 1418, 626 F.2d 455 (5th Cir. 1980), cert.
30, 1981). The Steamship Ass'n court affirmed injunctions of strikes because of prior arbitration
awards finding the strikes in violation of no-strike clauses. Although these strikes against the
shipment of grain to Russia may not be protected by section 7, the court failed to understand the
full implication of the Buffalo Forge Norris-LaGuardia Act arbitration alternative rationale.
The major thrust of the long dissenting opinion is, indeed, that the union should be held to its bargain.

Yet, even the dissenters must agree that the Norris-LaGuardia Act was intended to protect "labor's ability to organize and bargain collectively."209 The insulation of individual employee rights to free association and self-organization which are the foundation of collective bargaining is precisely the purpose of the Magnavox non-waiver principle. Full understanding of that principle would preclude enjoining sympathy strikes by employees who may be concerned about obtaining future assistance in their own organizational and recognition efforts. As explained above,210 every sympathy strike protects labor's ability to organize and bargain collectively.

Some might argue that strict application of the non-waiver principle to prevent the injunction of a broad class of strikes would discourage flexible bargaining by employers because none would be able to obtain the greatest potential employer benefit of a collective agreement, a maximally effective no-strike clause.211 However, this contention simply restates the argument supporting the authority of agents to waive employee rights. Bargaining agents can be most effective if they have more chips to trade with employers. In the short run this is of course true. Nevertheless, the teaching of Magnavox and of Mastro Plastics is that the encouragement of collective bargaining is only one of two complementary policies of the Act, and the long-run success of collective bargaining rests on the advancement of the second policy, the protection of employee freedom of association and organization.

The short answer to those who might fear that the non-waiver principle will discourage arbitration is that some such discouragement is not necessarily bad. Only certain employee rights should be relegated to an employer-union arbitration process. Strict application of the non-waiver principle will not discourage employers from negotiating broad arbitration clauses covering all matters appropriate for bargaining between the employer and the union. Even after the refinement of the Buffalo Forge holding suggested by the non-waiver principle, employers surely would have every incentive to accept broad arbitration clauses so that they might be assured that any strike concerning a bargainable topic could be enjoined.

Employers may also argue that strict application of the non-waiver principle will leave them completely defenseless against sympathy

209. 428 U.S. at 416.
210. See text accompanying notes 163-68 supra.
strikes. Proponents of the Buffalo Forge decision have defended its bar on sympathy strike injunctions by noting that employers are free to discharge employees for engaging in sympathy strikes in breach of no-strike clauses in their collective agreement.\textsuperscript{212} Application of the non-waiver principle would make the legality of such discharges questionable and this alternative-remedy defense of Buffalo Forge unavailable.

However, I for one am not prepared to shed tears for the employers. The non-waiver principle does not create an imbalance in labor relations. An employer may stop those employees who respect pickets around the employer’s own business by directly stopping the picketers, either by self-help or injunction if the picketing is illegal, or by negotiation if it is not. Sympathy strikes do compound the impact of legal strikes, but this effect is fully consistent with an Act which protects employees assisting each other beyond any artificial bargaining unit lines.

When an employer’s employees respect primary picket lines around the premises of a second employer, the first employer may be without recourse to stop the picketing. However, any impact of the picketing on the first employer’s business will probably be relatively marginal. Stoppages of delivery will hurt the picketed employer much more than the deliverer and the deliverer can normally count on the picketed employer to take necessary action to stop the pickets. Moreover, the protected status of employee activity does not prevent an employer from taking steps to avoid any impact on its business caused by the activity. The Board has made clear that an employer may hire replacement for those employees who refuse to make deliveries through picket lines, just as the employer can hire replacements for protected primary strikers.\textsuperscript{213} Furthermore, in order to make room for replacements, an employer may actually be justified in dismissing sympathy strikers who refuse to perform aspects of their jobs, unlike general strikers who stay completely away from work and do not collect pay.\textsuperscript{214} The employer must only show that any dismissal of an employee who refuses to cross a picket line was motivated by the necessity of hiring a replacement to do the delivery rather than by animus against the employee and his or her protected activity.\textsuperscript{215} The Board’s balance of em-

\textsuperscript{214} \textit{Id.} at 1547. The dismissed strikers would nonetheless have the same right of reinstatement as the strikers with whom they were in sympathy. For instance, economic strikers have the right to be placed on preferential hiring lists and a right to reinstatement when vacancies occur. See Torrington Constr. Co., 235 N.L.R.B. 1540, 98 L.R.R.M. 1135 (1978).
ployees’ rights with employers’ business interests is vulnerable to criticism, but it is nonetheless the law.

In addition, an employer may extract enforceable agreements from the employees’ union not only to not organize or sanction sympathy strikes, but also to compensate the employer for any losses caused by any sympathy strike, perhaps even one which it did not cause or sanction. A union’s inability to waive employee rights to strike should not prevent it from sacrificing its own capabilities, although any union agreement either not to organize or to compensate an employer for a primary recognitional strike or serious unfair labor practice strike should constitute a breach of the duty of fair representation. Union agreements to compensate the employer for sympathetic strikes are certainly not unprecedented. See, e.g., Kellogg v. NLRB, 457 F.2d 519 (6th Cir. 1972), cert. denied, 409 U.S. 850 (1972) (contract provision stating “no sympathy strikes shall be caused or sanctioned by the Union”). In order to conform with the non-waiver principle, however, any injunction enforcing such an agreement should run against only the union and any union leaders who are not themselves employees protected by the Act. Unions have no special authority over the rights of their employee leaders. See note 85 supra.

216. See, e.g., Schatzki, supra note 117, at 393-95.

217. Sympathy strike provisions which restrain unions, but not employees, are certainly not unprecedented. See, e.g., Kellogg v. NLRB, 457 F.2d 519 (6th Cir. 1972), cert. denied, 409 U.S. 850 (1972) (contract provision stating “no sympathy strikes shall be caused or sanctioned by the Union”). In order to conform with the non-waiver principle, however, any injunction enforcing such an agreement should run against only the union and any union leaders who are not themselves employees protected by the Act. Unions have no special authority over the rights of their employee leaders. See note 85 supra.

218. The non-waiver principle of course bars employer damage actions as much as injunctive actions against individual employees for exercising non-waivable rights, quite apart from the interpretation given section 301 of the Labor-Management Relations Act by the Court in Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962) (prohibiting damage actions against individual union members and officers when union is liable), and Complete Auto Transit, Inc. v. Reis, 49 U.S.L.W. 4472 (May 5, 1981) (forbidding damage actions against individual employees even for unauthorized strikes for which union could not be liable).

219. Strict union liability agreements do not seem to be precluded by the Supreme Court’s recent refusal to hold a union liable for damages caused by a strike which the union did not authorize, encourage, or in any way support. Carbon Fuel Co. v. UMW, 444 U.S. 212 (1979). The Carbon Fuel Court interpreted section 301 of the Labor-Management Relations Act to preclude reading into an arbitration and implied no-strike clause a union duty to prevent and end unauthorized strikes. Id. at 216. The Court did not hold that a union could not by a sufficiently express provision accept even strict liability for damages caused by unauthorized strikes. But see Complete Auto Transit, Inc. v. Reis, 49 U.S.L.W. at 4477 (“Congress deliberately chose to allow a damages remedy for breach of the no-strike provision of a collective bargaining agreement only against unions not individuals, and as to unions, only when they participated in or authorized the strike,” citing Carbon Fuel).

220. Courts may nonetheless insist that any union promise to compensate an employer for sympathy strike damages be clear and unmistakable. See Delaware Coca-Cola Bottling Co. v. Teamsters Local 326, 624 F.2d 1182 (3rd Cir. 1980).

221. Presumably a union should have no more authority, pursuant to section 8(b)(1)(A) and its proviso, to discipline employees for exercising a non-waivable right to strike, than for refusing to join a union strike. Therefore, a union might be able to fine a union member for exercising a non-waivable right to strike, cf. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967), but it should not be able to discipline non-member employees for exercising the same right, cf. NLRB v. Granite State Joint Bd., Textile Workers Local 1029, 409 U.S. 213 (1972), except perhaps by suspension from future membership, cf. NLRB v. District Lodge 99 IAM, 489 F.2d 769 (1st Cir.

for innocent employers to carry. Moreover, the First Circuit has held that the burden of proof at least in part must rest with the Board, see NLRB v. William S. Carroll, Inc., 578 F.2d 1 (1978), and the Board may now agree, see Wright Line, 251 N.L.R.B. No. 150, 105 L.R.R.M. 1169 (1980), enforced, 108 L.R.R.M. 2513 (1st Cir. 1981).
losses caused by sympathy strikes may be reasonable.

If after consideration of the complete situation and rights of employers and employees, Congress decides that employers affected by sympathy work refusals are unfairly treated, it can extend the Act's proscriptions of secondary strikes to cover the observance of picket lines at other employers' premises. But any right to observe extra-bargaining unit picket lines remaining after such an extension should not be waivable.

IV

CONCLUSION

Though it has been several years since the Magnavox decision, many of its implications have not been fully confronted. Neither the Board nor the courts have developed a full statement of those employee rights secured by the Act which cannot be waived by exclusive bargaining representatives. In these pages I have attempted to formulate such a comprehensive non-waiver principle. That principle would insulate from union waiver the following employee rights: to communicate with each other concerning the identity and strategies of their bargaining agent; to communicate with their employer concerning the identity of their bargaining agent; to associate with, lead or support a bargaining agent; to act to achieve employer recognition and acceptance of a bargaining agent; to act to obtain better terms and conditions of employment from sources outside a bargaining relationship; to assist individuals outside the protected employees' bargaining unit; and to act to protect or to rectify the denial of other non-waivable rights.

Union negotiation of "no-strike" clauses in collective bargaining agreements presents the most important challenge to this non-waiver principle. Application of "no-strike" clauses to recognitional strikes, certain unfair labor practice strikes and sympathy strikes cannot be reconciled with the principle. The Magnavox decision demands a reconsideration of the long-accepted unlimited authority of unions to waive employee rights to strike.

As past Chairman Murphy recognized, the Magnavox decision also demands a reconsideration of Board deferral of its decisions on unfair labor practice charges to arbitration processes authorized by col-

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1974). The proviso to section 8(b)(1)(A) preserves a union's control over the acquisition or retention of its own membership.

222. See text accompanying notes 51-78 supra.
223. See text accompanying notes 88-90 supra.
224. See text accompanying notes 79-87 supra.
225. See text accompanying notes 154-67 supra.
226. See text accompanying notes 115-18 supra.
lective agreements. In the next issue, I shall argue that Board deferral of unfair practice charges to private arbitration effectively constitutes an acceptance of partial union waiver of statutory protection of the allegedly violated rights. I shall explain that Chairman Murphy's application of the Magnavox non-waiver principle to Board deferral was insightful and appropriate, but that the statutory limitations on Board deferral are more complicated than she suggested. Notwithstanding these complications, analysis of Board deferral to arbitration as an acceptance of union waiver of employee rights will enable me in the later essay to lay a solid foundation and rationale for more definite deferral rules.