

3-1-2019

Undermining Worker Safety and Health Protection through Statutory Interpretation

James A. Gross

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/hlej>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Gross, James A. (2019) "Undermining Worker Safety and Health Protection through Statutory Interpretation," *Hofstra Labor & Employment Law Journal*: Vol. 36: Iss. 2, Article 3.
Available at: <https://scholarlycommons.law.hofstra.edu/hlej/vol36/iss2/3>

This document is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Labor & Employment Law Journal by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

UNDERMINING WORKER SAFETY AND HEALTH PROTECTION
THROUGH STATUTORY INTERPRETATION

*James A. Gross**

A. INTRODUCTION

Workers now and throughout the history of work, here and around the world and in a wide-range of employment settings, commonly face a life-changing dilemma when confronted with serious hazards: the choice of continuing to work and thereby risking their lives and limbs or refusing to work and thereby risking their jobs and income.

In the United States there are certain laws that *appear* to protect workers from having to make that choice.¹ In 1935, the National Labor Relations Act (“NLRA”),² particularly Section 7, promised workers protection of their right to engage in concerted activity for their mutual aid, and the right collectively to negotiate terms and conditions of their employment—including workplace safety and health.³ The Taft-Hartley amendments to the NLRA in

* Professor of Labor Relations at the ILR School, Cornell University. He authored a multi-volume study of the NLRA and the NLRB as well as other books and articles dealing with worker rights as human rights, including: *A SHAMEFUL BUSINESS: THE CASE FOR HUMAN RIGHTS IN THE AMERICAN WORKPLACE* (Cornell University Press, 2010) and *RIGHTS, NOT INTERESTS RESOLVING VALUE CLASHES UNDER THE NATIONAL LABOR RELATIONS ACT* (Cornell University Press 2017). The author also extends special thanks to Alison Woody and Stasia Skalbani (former Cornell Worker Institute Fellows) and my Cornell colleague Rhonda Clouse for their research assistance and insights during the preparation of this article.

¹ National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1935).

² 29 U.S.C. § 151.

³ Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-197 (1947).

1947⁴ also promised workers in Section 502 that, if they ceased work “in good faith because of abnormally dangerous working conditions,” their work stoppage would not be deemed a strike.⁵ In another unprecedented action, Congress stated that its intent in enacting the Occupational Safety and Health Act (“OSHA”) in 1970⁶ was “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”⁷

This paper discusses how decision-makers who have interpreted the apparently protective and preventive language of the NLRA and OSHA have created a system of rules and requirements that make it extremely difficult, if not impossible in many situations, for workers to secure these statutory protections.⁸ Consequently, rather than freeing workers from the workplace safety and health dilemma, decision-makers have chosen to perpetuate the dilemma by keeping the risk of refusal high.⁹

The right of workers to refuse work for reasons of safety and health is central to this discussion. Decision-makers have made choices concerning how much control, if any, workers have over their own health and safety at their workplaces by stifling employee self-help efforts. By interpreting NLRA Sections 502 and 7 and OSHA to protect employer interests rather than employee rights, they have resolved the clash between an asserted right to work in safe and healthful conditions on the one hand and economic considerations such as the maintenance of production and profits, costs, labor relations “stability” and management authority on the other.¹⁰

In the process, decision-makers have treated the right to refuse work that threatens health and safety as an ordinary labor-management issue concerning typical economic subjects such as

⁴ 29 U.S.C. § 143 (4).

⁵ *Id.*

⁶ Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (1970).

⁷ 29 U.S.C. § 651.

⁸ *See TNS, Inc., v. NLRB*, 296 F.3d 384, 392 (6th Cir. 2002).

⁹ *Id.*

¹⁰ 29 U.S.C. § 143(4); *see also* 29 U.S.C. § 651.

wages, hours, seniority, and vacations.¹¹ That is in sharp contrast to finding something extraordinarily different about worker safety and health because the right to life is being asserted—once described by former Secretary of Labor Willard Wirtz as placing “the absolute priority of individual over institutional interests and of human over economic values.”¹²

This paper proposes new rules based on different values and standards of judgment than those underlying the current state of workers’ right to refuse work that they believe threatens their health and safety. The process of dislodging established mindsets by creating new perspectives¹³ cannot be accomplished without a thorough review and understanding of the values and standards of judgment currently being applied to Sections 502 and 7 of the NLRA and to OSHA.¹⁴

More specifically, the proposal here is to use OSHA’s Article 5(a)(1), often referred to as the General Duty clause—which obliges employers to provide work and workplaces “free from recognized hazards that are causing or are likely to cause death or serious physical harm”¹⁵—as the standard to be used in establishing the nature of workers’ right to refuse work that is unsafe or unhealthful.¹⁶ This statutory language, requiring affirmative action, expresses a fundamentally different philosophy concerning workplace safety and health and a recognition that employees had the right to work free of serious dangers to their health and safety and a recognition that it was the responsibility of their employers to provide and maintain safe and healthful workplaces.¹⁷ This helps explain why decision-makers have ignored the General Duty

¹¹ James A. Gross, *The Broken Promises of the NLRA and the Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice*, 73 CHI. KENT L. REV. 351, 353 (1998).

¹² *Id.*

¹³ But see Diane Carter Maleson, *The Historical Roots of the Legal System’s Response to Nuclear Power*, 55 S. CAL. L. REV. 597, 617 (1982).

¹⁴ 29 U.S.C. § 143(4); see also 29 U.S.C. § 651.

¹⁵ 29 U.S.C. § 654(a)(1).

¹⁶ 29 U.S.C. § 655(a).

¹⁷ *Id.*

clause in refusal to work cases and rarely used it in other safety and health situations.

This paper demonstrates that application of OSHA Article 5(a)(1), the General Duty clause, and its principles would eliminate the key elements of the current interpretations of the NLRA and OSHA that have perpetuated and worsened the workers' dilemma. The use of the General Duty clause in refusal to work situations, moreover, would not require any legislative changes.

This paper ends with a caveat which deserves emphasis at the outset as well: One should never underestimate the ability of decision-makers in the legal system to interpret words to mean what they want them to mean.

B. WHAT IS ABNORMALLY DANGEROUS WORK? THE TNS CASE

Tennessee Nuclear Specialties ("TNS") produced uranium ingots that were shipped to other facilities for further processing.¹⁸ The ingots were returned to TNS where they were turned into armor-piercing projectiles sold exclusively to the United States Air Force. In the production process, the employer used uranium tetrafluoride called "greensalt" because of its green flour-like texture.¹⁹ At every phase of the production process radioactive particles or dust from greensalt, uranium oxides, and uranium metals were released into the air in the plant.²⁰ Depleted uranium is a radioactive carcinogen that can cause cancer in those consistently exposed to even low levels, Uranium also has the potential to poison kidneys.²¹

The workers claimed that they were consistently overexposed to this radioactive and chemically toxic substance which posed a serious threat to their health.²² When TNS did not respond to their union's health and safety demands during collective

¹⁸ See TNS, Inc., 309 N.L.R.B. 1348 (1992).

¹⁹ *Id.* at 1391.

²⁰ *Id.*

²¹ *Id.* at 1376 n.17.

²² *Id.* at 1390.

bargaining or otherwise, they refused to return to what they considered a hazardous worksite.²³

At midnight on April 30, 1981, approximately 100 men and women employees of TNS, Inc. in Jonesboro, Tennessee, stopped work in what is believed to be the first concerted protest against abnormally dangerous working conditions in the nation's history.²⁴ Over the next 20 years a congressional hearing,²⁵ two NLRB decisions,²⁶ and two Circuit Courts of Appeals rulings²⁷ determined the fate of those TNS workers and their attempt to protect their own safety and health.²⁸ Those political, judicial and quasi-judicial deliberations, moreover, also demonstrated the nearly insuperable impediments that confront workers everywhere when they try to assert control over their own safety and health.²⁹ This case is discussed at length because it lays out the essential reasoning used by decision-makers that is at the core of the current rules and values governing workers' refusals to work for reasons of safety and health—rules that have perpetuated the workers' dilemma.³⁰

The protesters were women and men, mainly young (70 percent under 30 years of age,) and many were illiterate.³¹ None had more than a 12th grade education (TNS did not require a high school diploma for employment).³² None had previously worked

²³ TNS, Inc., 309 N.L.R.B. at 1390.

²⁴ *Id.*; John W. McKendree, *TNS, Inc., and Oil Chemical and Atomic Workers: Labor Section 502 and Workplace Safety*, 17 N. KY. L. REV. 195, 196 (1989).

²⁵ *Health Hazards at TNS, Inc.: Hearing before the Subcomm. on Investigations and Oversight of the H. Comm. on Sci. and Tech.*, 97th Cong. 3 (1981) (statement of Robert Smith Walker, Ranking Minority Leader) [hereinafter *Gore Hearings*].

²⁶ TNS Inc., 309 N.L.R.B. 1348 (1992); TNS Inc., 329 N.L.R.B. 602 (1999).

²⁷ *Oil, Chemical & Atomic Workers Int'l v. NLRB*, 46 F.3d 82 (D.C. Cir. 1999); *TNS, Inc. v. NLRB*, 296 F.3d 384 (6th Cir. 2002).

²⁸ *See supra* notes 25-27.

²⁹ *See supra* notes 25-27.

³⁰ *See* TNS Inc., 309 N.L.R.B. 1348 (1992).

³¹ *Id.* at 1398.

³² *Id.*

with hazardous material.³³ They were poorly trained and not prepared to understand the precautions against exposure to dangerous substances.³⁴

C. CONGRESSIONAL HEARING

The workers and their situation received national attention when they told their stories on the television program “60 Minutes.”³⁵ One month later, the subcommittee on Investigations and Oversight of the House Committee on Science and Technology conducted a hearing into what “at first blush” appeared to be a “classic labor dispute with each side exploiting any issue to get the best settlement possible” as described by subcommittee Chairman Albert Gore of Tennessee.³⁶ As Gore stated, what was different here was a recognition that no employer, even Aerojet (“TNS”), intent on staying within cost estimates in pursuit of excellence in national defense, “has the right to endanger the health of the citizens who work for it.”³⁷

In Tennessee at the time, two governmental agencies shared responsibility for the regulation of safety and health at TNS.³⁸ The Nuclear Regulatory Commission (“NRC”) had sole jurisdiction over radiation exposures which, after 1965, was delegated to the Tennessee Division of Radiological Health (“TDRH”) subject to regular NRC evaluations.³⁹ After 1970, the Tennessee Occupational Safety and Health agency (“TOSHA”) had jurisdiction over exposures such as noise pollution, toxic dusts, and mechanical safety hazards.⁴⁰ The Director of TDRH told the House Subcommittee that there was “only occasional interaction” between the two agencies.⁴¹

³³ TNS, Inc., v. NLRB, 296 F.3d 384, 387 (6th Cir. 2002).

³⁴ *Id.* at 397, 399.

³⁵ Gore Hearings, *supra* note 25.

³⁶ *Id.* at 1.

³⁷ *Id.* at 2.

³⁸ *Id.* at 82.

³⁹ *Id.* at 259.

⁴⁰ *Id.* at 232-233, 250.

⁴¹ *Id.* at 229.

The TDRH had conducted an investigation of TNS on September 20-21, 1979, three years after Aerojet had purchased TNS and 19 months before the work stoppage.⁴² The TDRH reported “several disturbing aspects of their [TNS] overall radiological safety program,” including: a “general lack of [a] radiation safety program,” a failure to report overexposures; the absence of any procedure for assessing individual intakes of radioactivity by exposed workers; the improper use of respiratory equipment in areas of high concentration of airborne radioactive material; and the absence of a well-defined respirator program.⁴³

In a follow-up letter on December 3, 1979, TDRH also advised TNS that employee training to minimize radiation exposure was “inadequate” as were personnel radiation monitoring records—pointing out that TDRH had brought those same “deficiencies” to the company’s attention five years previously.⁴⁴ The letter concluded: “it appears that a severe laxity in your facility’s radiation safety program has developed. Immediate attention should be given to the upgrading of this program.”⁴⁵

During another inspection of TNS on November 18-20, 1980, TDRH found many of the same violations including inadequate training of employees concerning radiation exposure.⁴⁶ TDRH told the company on January 29, 1981, three months before the work stoppage: “it appears that sufficient effort is not being exerted to prevent the reoccurrence” of “items of non-compliance” that previous inspections had cited.⁴⁷

When pressed by Gore to evaluate his agency’s performance given the lengthy persistence of the same violations, the Director of TDRH replied that none of the violations were “imminent health hazards.”⁴⁸ When asked by Gore if TDRH’s finding that TNS lacked a radiation safety program “wasn’t a hazard to the employees,” the Director replied, “possibly those words were a lit-

⁴² Gore Hearings, *supra* note 25, at 122, 288, 308.

⁴³ *Id.* at 137, 140.

⁴⁴ *Id.* at 140-142.

⁴⁵ *Id.* at 142.

⁴⁶ *Id.* at 159-160.

⁴⁷ *Id.* at 161.

⁴⁸ *Id.* at 280.

tle strong.⁴⁹ We found indications that the safety program could be improved.”⁵⁰ The Director added that his agency did not have the authority “to levy civil penalties” and that the TNS situation demonstrated the need for additional authority to achieve compliance with regulations.⁵¹

The Director of TDRH did acknowledge that over the years the most persistent violation was the company’s failure to provide engineering such as a ventilation system to remove toxic dust.⁵² The TOSHA Director testified that his agency, which did not conduct its first health inspection of TNS until January 1981, found in one area of the plant airborne concentrations of uranium dust 13 times above the “standard limit” considered safe.⁵³ TOSHA told the subcommittee that it could not evaluate exposure records because TNS did not have any data concerning worker exposure to uranium dust.⁵⁴

TOSHA characterized its toxic dust finding as “non-serious”, however, because TNS employees were wearing respirators.⁵⁵ TOSHA and TDRH permitted respirators only as a temporary measure to reduce exposures.⁵⁶ Neither TDRH nor TOSHA was aware that in January 1981 TNS had made full-time wearing of respirators mandatory for workers in certain work areas.⁵⁷ TDRH did not discover that until after the work stoppage began.⁵⁸

Gore said that he was “forced to conclude” that TNS “viewed the employees in the nature of another raw material in the production process and so long as you could get by with lax inspections not holding you accountable, you were willing to do so.”⁵⁹ The TNS workers testified that they had to take company

⁴⁹ Gore Hearings, *supra* note 25, at 280.

⁵⁰ *Id.*

⁵¹ *Id.* at 228, 296.

⁵² *Id.* at 280.

⁵³ *Id.* at 262.

⁵⁴ *Id.* at 252.

⁵⁵ *Id.* at 262-263.

⁵⁶ *Id.* at 263.

⁵⁷ *Id.* at 228.

⁵⁸ *Id.* at 228-229.

⁵⁹ *Id.* at 108.

officials at their word when they said the plant was safe because, as one worker put it, “I don’t know what the levels [of radiation] are and stuff like that.”⁶⁰ One worker who expressed concerns about rumors of cancer and sterility, testified that the personnel director told him there was nothing in the plant “to hurt you” and added, “I’ve got children.”⁶¹ There’s nothing wrong with them and nothing wrong with me.”⁶² When the same worker brought his same concerns to the “health and safety man” he said he was told that if he was “so worried about this place . . . why don’t you go hunt another job?”⁶³ When the employee said he was too old, the personnel director “just laughed.”⁶⁴ Another employee who asked what to do about his “high uranium count” in his urine sample testified that the “Health and Safety Department” advised him to drink beer to flush his kidneys.⁶⁵

There was no on-the-job instruction of health and safety, one worker said, “only go out there and do your work.”⁶⁶ He added, “production came over human life.”⁶⁷ Another worker told the company, “you think we’re just a bunch of dumb hillbillies” but “we’ve got bodies and we got hearts and we’ve got feelings.”⁶⁸

An internationally respected expert, Dr. Carl Morgan, who, among other positions, had been director of the health physics laboratory at Oak Ridge National Laboratory for 29 years, also testified that working conditions at TNS were “among the worst of any” he had seen in the “past 38 years” of examining and evaluating radiation programs.⁶⁹ He concluded that some TNS employees had been subjected to serious health hazards, and that appropriate measures had not been taken to remove or lessen the risks of those hazards or the “fatal diseases which can be expected as a conse-

⁶⁰ Gore Hearings, *supra* note 25, at 20.

⁶¹ *Id.* at 7.

⁶² *Id.*

⁶³ *Id.* at 8.

⁶⁴ *Id.*

⁶⁵ *Id.* at 5-6, 46-47.

⁶⁶ *Id.* at 6.

⁶⁷ *Id.*

⁶⁸ *Id.* at 12.

⁶⁹ *Id.* at 168.

quence.”⁷⁰ He also testified that TNS had “ignored” the “most elementary principles of good health and safety.”⁷¹

Dr. Morgan could not understand how “[TNS] plant management could be so oblivious to the seriousness of continuous and persistent extremely high levels of uranium and thorium in the urine of its employees.”⁷² He also expressed disappointment with TDRH’s lack of enforcement of NRC regulations.⁷³ The Director of the NRC’s Office of State Programs testified that TNS was not operating even “technically within the bounds of the applicable regulations” but also that in regard to industry practices not many “do things similar to this.”⁷⁴

After the work stoppage began, TNS hired a consultant, Radiation Management Corporation (“RMC”), to determine for Aerojet TNS if it was “in compliance with the state of Tennessee regulations.”⁷⁵ In its report to the company on May 29, 1981, RMC, “observed many areas of non-compliance” which “coupled with the past history of whole body and extremity over exposure should be of great concern to management.”⁷⁶

Among other criticisms, RMC cited a “lack of management commitment to a radiation safety program.”⁷⁷ The RMC report called for the installation of “engineered control solutions” to address airborne toxic dust concentrations and said that the company’s decision to wait months to do that was “not acceptable.”⁷⁸ The report also criticized the company for not having a written policy for respirator use, or adequate medical surveillance for respirator users: “It is too much to expect a person to wear a respirator day in and day out without experiencing physiological and mental strains.”⁷⁹

⁷⁰ Gore Hearings, *supra* note 25, at 168.

⁷¹ *Id.* at 168, 73.

⁷² *Id.* at 170.

⁷³ *Id.* at 173.

⁷⁴ *Id.* at 304.

⁷⁵ *Id.* at 126.

⁷⁶ *Id.* at 134.

⁷⁷ *Id.* at 305.

⁷⁸ *Id.* at 131, 134.

⁷⁹ *Id.* at 127.

Aerojet did not inform TDRH or TOSHA or its union of the existence of the RMC report.⁸⁰ When Chairman Gore called the RMC report “a horror story”⁸¹ and said he did not understand why the company did not take the RMC report to the union, or admit that the company was wrong, or try to resolve the problems, the Vice President of Aerojet dismissed the RMC report as merely a “one-shot, one-day observation.”⁸² He also revealed that after the strike began and coincidental with the RMC report, many of the report’s recommendations had already been “put in place” at TNS.⁸³

The Vice President of Aerojet also charged the Union with bad faith by using safety and health in an “unsuccessful attempt to dictate how the company is managed,”⁸⁴ including management’s exclusive right to determine safety and health programs.⁸⁵ The strike was not about employees safety and health, the Aerojet VP asserted, claiming that the union “did not raise the health and safety issue in contract negotiations until at least a week prior to the strike.”⁸⁶ He added that the only “real” safety and health issue was the striker violence “against persons and property.”⁸⁷ He emphasized that neither TDRH nor TOSHA had ever imposed a fine or any other penalty on the company because of employee health matters.⁸⁸ TOSH had fined the TNS 520 dollars for a noise violation.⁸⁹

To the contrary, House Subcommittee Chairman Gore concluded that TNS production increases were given precedence over worker safety and health.⁹⁰ At the conclusion of the hearing, he stated that the workers who had to go out on strike and as a conse-

⁸⁰ Gore Hearings, *supra* note 25, at 104-05.

⁸¹ *Id.* at 295.

⁸² *Id.* at 105.

⁸³ *Id.*

⁸⁴ *Id.* at 298.

⁸⁵ *Id.* at 75, 108, 110.

⁸⁶ *Id.* at 107, 190-214 (union testimony regarding negotiations).

⁸⁷ *Id.* at 75.

⁸⁸ *Id.* at 298-299.

⁸⁹ *Id.* at 299.

⁹⁰ *Id.* at 121.

quence lost their jobs “have suffered a tremendous injustice.”⁹¹ He also hoped that there was “some way to remedy it” to “prevent an injustice like this from occurring in the future.”⁹²

D. WHAT IS ABNORMALLY DANGEROUS WORK? SECTION 502 OF THE NLRA

On July 8, 1981, TNS notified the workers Gore had praised for having “the guts to put their jobs on the line”⁹³ that they had been permanently replaced.⁹⁴ On December 3, 1981, five days before the House hearing began, the Oil, Chemical, and Atomic Workers Union filed charges with the NLRB.⁹⁵ The NLRB General Counsel, in April 1983, issued a complaint against TNS alleging that the company had violated the Act by permanently replacing and refusing to reinstate TNS workers who had ceased work in good faith because of abnormally dangerous working conditions within the meaning of Section 502.⁹⁶ The complaint also alleged that TNS had interfered with, restrained and coerced employees in the exercise of their Section 7 rights to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as well as engaged in prohibited discrimination in regard to any condition of employment “to encourage or discourage membership in any labor organization” in violation of Section 8(a)(3).⁹⁷

The workers and their union waited 21 months for the NLRB General Counsel to issue this complaint against the company.⁹⁸ They would wait another 16 years, until 1999, for a final NLRB decision.⁹⁹

⁹¹ Gore Hearings, *supra* note 25, at 307.

⁹² *Id.* at 124.

⁹³ *Id.* at 107.

⁹⁴ *Id.* at 95.

⁹⁵ *See id.* at 43.

⁹⁶ TNS, Inc., 309 N.L.R.B. at 1388-89.

⁹⁷ *Id.* at 1454 n.226.

⁹⁸ TNS, Inc., 309 N.L.R.B. at 1388-89.

⁹⁹ TNS Inc., 329 N.L.R.B. 602 (1999).

Administrative Law Judge (“ALJ”) Arlene Pacht issued her decision on the complaint on July 31, 1987 after 67 nonconsecutive hearing days between November 1983 and April 1985 that resulted in almost 13,000 pages of transcript and hundreds of exhibits.¹⁰⁰ Judge Pacht concluded that the employees began and continued their work stoppage as a good faith protest of abnormally dangerous conditions at their workplace; that objective evidence supported their belief that conditions were abnormally dangerous; that Section 502 protected them even though the work stoppage occurred after the expiration of their collective bargaining agreement; and that these TNS workers “[were] not economic strikers who may be permanently replaced.”¹⁰¹

Five years and five months later, on December 23, 1992, the NLRB dismissed the complaint in its entirety and ruled that the General Counsel had failed to prove that abnormally dangerous working conditions existed when the employees walked out.¹⁰² The Board concluded, consequently, that TNS did not commit an unfair labor practice when it permanently replaced TNS employees who engaged in the work stoppage.¹⁰³

E. THE ALJ AND FIRST NLRB DECISION: CONTEXT AND COMMENTARY ON “OBJECTIVE” TEST

Neither of these outcomes was compelled by case precedent, statutory language or legislative history. Instead, it was the unstated value preferences of the decision-makers and their conflicting perceptions of worker and employer rights, duties, interests, and motivations that were most influential in determining the meaning of “abnormally dangerous working conditions” and worker “good faith belief” as set forth in Section 502.

Section 502 of the NLRA states that the “quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions of work” would not “be deemed a strike un-

¹⁰⁰ TNS Inc., 309 N.L.R.B. at 1348 nn.1-2.

¹⁰¹ *Id.* at 1454.

¹⁰² *Id.* at 1348.

¹⁰³ *Id.*

der this Act.”¹⁰⁴ The Administrative Law Judge and the Board agreed that workers would not have to be killed or injured in order to prove that a workplace was abnormally dangerous.¹⁰⁵ In the words of the ALJ, “the very purpose of Section 502 is to guarantee that employees may withhold their labor before actual damage befalls them.”¹⁰⁶ The ALJ and the Board also agreed that the good faith belief required to invoke the protection of Section 502 could not be merely an honest belief but had to be supported by “ascertainable objective evidence.”¹⁰⁷ The Supreme Court had created that requirement in 1974 in dicta in *Gateway Coal Co. v. Mine Workers*.¹⁰⁸

The Supreme Court’s acceptance and application of an objective evidence rule and rejection of a good faith belief standard in *Gateway Coal* is an example of a clear choice among competing values motivated by the personal policy-making preferences of decision-makers.¹⁰⁹ Nothing in the language of Section 502 or the legislative history of that statutory provision compelled or required that choice.¹¹⁰ In fact, *Gateway Coal* was not an action brought under Section 502 but rather under Section 301 of the NLRA¹¹¹ to enjoin a strike and compel arbitration of a safety dispute under the provisions of a collective bargaining contract.¹¹² The Supreme Court chose the objective evidence requirement to extend the already Court-created federal policy promoting arbitration of labor management disputes¹¹³ and discouraging strikes.¹¹⁴ Although

¹⁰⁴ TNS Inc., 309 N.L.R.B at 1356.

¹⁰⁵ *Id.* at 1436.

¹⁰⁶ *Id.* at 1442.

¹⁰⁷ *Id.* at 1357.

¹⁰⁸ *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 387 (1974).

¹⁰⁹ *See infra* Section.I.

¹¹⁰ *See infra* Section.I.

¹¹¹ TNS Inc., 309 N.L.R.B. at 1379.

¹¹² *Id.*

¹¹³ *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Mfg. Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

that test leaves some protection for workers under Section 502, it preserves “as little of that protection as possible.”¹¹⁵

In *Gateway Coal*, the Supreme Court gave the highest priority to labor peace, stability, and uninterrupted production.¹¹⁶ Lawyer-historian Staughton Lynd identified the Court’s “inarticulate major premise”: “that the highest of all goods is to get the workers off the streets, or the shop floor, and into the chambers of some purportedly neutral umpire.”¹¹⁷ The Supreme Court chose “labor peace at the expense of individual liberty” instead of “individual liberty at the risk of labor peace.”¹¹⁸ The Third Circuit Court of Appeals in *Gateway Coal* had decided, to the contrary, that “considerations of economic peace that favor the arbitration of ordinary disputes have little weight here”.¹¹⁹

If employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be. The arbitrator is not staking his life on his impartial decision. It should not be the policy of the law to force the employees to stake theirs on his judgment.¹²⁰

The Third Circuit required only that workers believed that conditions of work had become abnormally dangerous because, as the Court explained, disputes concerning safety and health where

¹¹⁴ Jonathan L. F. Silver, *National Labor Policy and the Conflict Between Safety and Production*, 23 B. C. L. REV. 1, 7, 22 (1981).

¹¹⁵ *Id.*

¹¹⁶ *Gateway Coal Co. v. United Mineworkers of America*, 414 U.S. 368 (1974).

¹¹⁷ Staughton Lynd, *The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History*, 50 IND. L.J. 720, 752 (1975).

¹¹⁸ *Id.*

¹¹⁹ *Gateway Coal Co. v. United Mine Workers of America*, 466 F.2d 1157, 1160 (3d Cir. 1972).

¹²⁰ *Id.*

people worked were not the ordinary type of labor dispute concerning wages, hours, seniority and other economic matters.¹²¹ They concern life and death.¹²²

The Supreme Court, however, chose the opinion of the Third Circuit's dissenting judge to provide not only the rationale for rejecting the honest belief standard but also the precise language for an objective evidence test.¹²³ The Supreme Court called "justified" the dissenting judge's assertion that no employer could expect stability in labor relations because the subjective belief test "runs directly counter to our national policy of promoting labor stability" and "opens new and hazardous avenues in labor relations for unrest and strikes."¹²⁴ "I believe," the dissenting judge stated, that when Section 502 is raised as a justification for a work stoppage, "the union must present ascertainable, objective evidence supporting its conclusion that abnormally dangerous conditions for work exist."¹²⁵

The Supreme Court simply asserted that it agreed with the dissenting judge's unsupported assertion that ascertainable, objective evidence must be presented to support any claim that abnormally dangerous conditions of work existed.¹²⁶ The Court did proclaim its own notion of the way things ought to be at the workplace: "absent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be."¹²⁷ The majority presented no evidence of any sort to support its claim of Congressional intent.¹²⁸

¹²¹ See *Gateway Coal*, 466 F.2d at 1160.

¹²² See *id.* at 1159.

¹²³ See *Gateway Coal*, 414 U.S. at 386; see *Gateway Coal*, 466 F.2d at 1162.

¹²⁴ See *Gateway Coal*, 414 U.S. at 386; see *Gateway Coal*, 466 F.2d at 1162.

¹²⁵ *Gateway Coal*, 466 F.2d at 1162.

¹²⁶ See *Gateway Coal*, 414 U.S. at 386.

¹²⁷ *Gateway Coal*, 414 U.S. at 386.

¹²⁸ See *id.* at 385.

Under this “objective test” choices still had to be made concerning what constituted “ascertainable objective evidence” and how much of that evidence was needed to justify a finding of good faith.¹²⁹ The Administrative Law Judge set a standard that required “competent evidence” to support the employees’ perceptions.¹³⁰ It was what she called “a reasonably grounded fear” that abnormally dangerous conditions existed.¹³¹ The Board, focusing more on proof than belief, asserted that the “burden of objective proof imposed under Section 502 is a heavy one.”¹³² The Board designed two tests that were most difficult for workers to meet. One test required a showing “on the basis of objective evidence” that employees “reasonably believed” that “inherently dangerous conditions” at the workplace “had changed significantly for the worse, so as to impose a substantial threat of imminent danger if exposure were continued at the time the employees began to withhold their services.”¹³³ An alternative test required a showing that the cumulative effects of exposure to radioactive or toxic substances “had reached the point at which any further exposure would pose an unacceptable risk of future injury to employees.”¹³⁴

Prior to the *TNS* case, no decision-maker, including the Supreme Court in *Gateway* or in any other case, had considered the meaning of “good faith” and “abnormally dangerous” in situations where workers faced danger from slow-acting toxins and radioactive substances.¹³⁵ As Board member Devaney pointed out in his dissent in the Board’s first *TNS* decision, the Board was “writing law” on a clean slate.¹³⁶ The Board in the second *TNS* case said that “this latency period” made the case “one of first impression.”¹³⁷ Rather than develop a new test for the new situa-

¹²⁹ *Gateway Coal*, 466 F.2d at 387.

¹³⁰ *Id.* at 386.

¹³¹ *TNS Inc.*, 309 N.L.R.B. at 1401.

¹³² *Id.* at 1357.

¹³³ *Id.* at 1347 (emphasis added).

¹³⁴ *Id.* at 1357, 1358.

¹³⁵ *Id.* at 1371.

¹³⁶ *TNS Inc.*, 309 N.L.R.B. at 1371.

¹³⁷ *TNS Inc.*, 329 N.L.R.B. at 603.

tion, however, all decision-makers chose to apply the ascertainable objective evidence *Gateway* test.¹³⁸

The *Gateway Coal* decision was not about worker safety and health but about labor arbitration.¹³⁹ Consequently, the courts' and the Board's reliance on *Gateway Coal* in the *TNS* litigation was improper.¹⁴⁰ The Supreme Court decision in *Gateway Coal* should have been and should be limited to *Gateway Coal*.¹⁴¹ It took some straining by the Supreme Court to weave its references to Section 502 into *Gateway Coal*'s focus on labor peace through labor arbitration policy.¹⁴² It also took some straining by decision makers considering refusals to work for reasons of health and safety to make *Gateway Coal* the bedrock Section 502 case it was never intended to be and should not be.¹⁴³ The majority claimed that its reading of the statute was consistent not only with common sense but with Section 502's previous application.¹⁴⁴ The Court cited four NLRB decisions presumably to demonstrate consistent previous application of Section 502.¹⁴⁵ A review of the four cited cases confirms, however, that the line between objective and subjective was blurry rather than clear.¹⁴⁶

¹³⁸ TNS Inc., 329 N.L.R.B. at 606.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 607.

¹⁴⁶ In *Knight Morley Corp.*, which involved dust and heat from a broken air blower, the Board relied on both the testimony of employees as well as the expert testimony of an industry hygienist in concluding that conditions might reasonably be considered abnormally dangerous. *Knight Morley Corp.*, 116 N.L.R.B. 140, 141-43 (1956). In *Philadelphia Marine Trade Ass'n*, the Board adopted a Trial Examiner's findings that employees in good faith fear of injury declined to work if they had to use pallets to unload ships rather than slings. The Trial Examiner, not wanting to "join in a game of semantics" concerning "abnormally dangerous conditions," took the position that "whatever the word used, the weight of a 100-pound bag of sugar falling on a man underneath remains the same;" "it is doubtful if any of the longshoremen who declined to use pallets...consciously based their decision upon any selection of descriptive

Fitting the reality of latent harm to workers from continued exposure into a rigid framework requiring demonstrable and present danger, created an insuperable barrier of proof for employees—what one commentator described as the burden of proving the unprovable.¹⁴⁷ Devaney charged that the results reached were determined “by unstated policy considerations that foreclose employee access to the statute.”¹⁴⁸

The NLRB found insufficient proof that TNS workers reasonably believed either that “the dangers which were inherent in the TNS workplace had changed materially for the worse at or around the time of the walkout” or that their cumulative exposure to depleted uranium “had reached a level at which any further exposure would have been unacceptably risky.”¹⁴⁹ The Board acknowledged that objective proof of abnormally dangerous conditions was “complicated by the insidious nature of invisible hazards which may not result in ascertainable physical injury for

terms, but upon inarticulate concept prompted by fear of getting hit by a falling bag of sugar.” Philadelphia Marine Trade Ass’n, 138 N.L.R.B. 737, 753 (1962). In *Redwing Carriers, Inc.*, employees feared for their safety if they crossed a picket line of another employer. The Board, while emphasizing that the controlling test was the “actual working conditions shown to exist by competent evidence” not the “state of mind of the employees involved,” also reaffirmed the standard set forth in *Knight Morley*: whether the actual working conditions “might in the circumstances reasonably be considered ‘abnormally dangerous.’” *Redwing Carriers, Inc.*, 130 N.L.R.B. 1208, 1209 (1961). In *Fruin-Colnon Construction Co.*, the Board adopted a Trial Examiner’s report that relied heavily on the testimony of miners working in shafts that their conditions of work had become abnormally dangerous. *Fruin-Colnon Construction Co.*, 139 N.L.R.B. 894, 904-05 (1962). The Eighth Circuit Court of Appeals denied enforcement, however, in part because the Board’s determination was based on the isolated testimony of the miners with no expert witness testimony. *NLRB v. Fruin-Colnon Construction Co.*, 330 F. 2d 885, 892 (8th Cir. 1964). The Eighth Circuit added: “We do not believe that only the good faith belief of the employees is necessary to find their work stoppage protected.” *Id.*

¹⁴⁷ C. John Cicero, *TNS, Inc. – the NLRB’s Failed Vision of Worker Self-Help to Escape Longterm Health Threats From Workplace Carcinogens and Toxins*, 24 STETSON L. REV. 19, 63-64 (1994).

¹⁴⁸ *TNS Inc.*, 309 N.L.R.B. at 1388 (emphasis added).

¹⁴⁹ *Id.* at 1358.

years.”¹⁵⁰ The Board took the position, however, that under the objective test it said was required by Section 502 there had to be some manifest “present need” for employees to quit the workplace in cumulative exposure circumstances as well as situations involving immediate physical dangers.¹⁵¹ The Board found no evidence that cumulative exposures at TNS had reached a “critical threshold” emphasizing that the record “does not even establish what the threshold level of exposure is.”¹⁵²

F. WORKERS’ KNOWLEDGE

The Administrative Law Judge had questioned how employees could be expected to know at what point in time Section 502 could protect their refusal to undergo continued exposure to radiation.¹⁵³ She found that even the most knowledgeable TNS workers understood little about how radiation affected the body or what the risks were and that they remained “untutored” because of incompetent and inefficient company training.¹⁵⁴ The little instruction that did occur was undercut by management comments that trivialized the possibility of hazards and dulled the employees’ sense of danger.¹⁵⁵ Because the consequences of radiation exposure were undetectable until years later, the ALJ understood why TNS workers continued to tolerate their working conditions while trying to get TNS to remedy the situation.¹⁵⁶

¹⁵⁰ TNS Inc., 309 N.L.R.B. at 1357.

¹⁵¹ *Id.* (emphasis in original).

¹⁵² *Id.* at 1360.

¹⁵³ *Id.* at 1400-01, 1437, 1439.

¹⁵⁴ *Id.* at 1443.

¹⁵⁵ *Id.* at 1439.

¹⁵⁶ *Id.* The Administrative Law Judge concluded that the employees believed in good faith that their working conditions were abnormally dangerous. Her conclusion was based not only on the testimony of TNS workers and the RMC report, but also on evidence concerning air quality at the plant; the protracted use of respirators by a substantial number of employees; employees’ average whole body exposures to radiation; the “excessive uranium-in-urine levels” that indicated serious risk of kidney damage; the “serious breaches” of

The Board discounted the TNS production workers' inability to comprehend the conflicting scientific evidence to which they "were not privy anyway."¹⁵⁷ According to the Board, these workers knew the risks of working with uranium products due to daily confrontations with working conditions: "visible DU dust, inadequate ventilating and shielding equipment, furnace blowings, and unsanitary changing rooms"¹⁵⁸ In the opinion of the Board, moreover, if the TNS workers in the months and weeks before the work stoppage had believed that "these or unseen hazards posed abnormal dangers," they or their union would have brought this to the attention of either TDRH or TOSHA or both.¹⁵⁹ The Board found it revealing that "they did neither until they had voted on the strike and were on the verge of walking out."¹⁶⁰

That outcome was the assured consequence not only of putting the burden of proving the existence of abnormally dangerous conditions on employees but also of making that burden, as the Board in the first *TNS* decision did, "a heavy one."¹⁶¹ This also shifted the risks associated with enforcement of Section 502 to workers most vulnerable to health and safety violations in the first place and least likely to be able to bear that burden.¹⁶² Workers rarely have the information about workplace safety and health matters needed to make informed assessments of conditions of work.¹⁶³

In *TNS*, even distinguished scientists and experts disagreed about acceptable levels, if any, of exposure to radiation.¹⁶⁴ Empir-

federal and state safety and health regulations by TNS; and the company's inadequate health and safety programs." *Id.* at 1437-40.

¹⁵⁷ *Id.* at 1361.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1357.

¹⁶² Charlotte S. Alexander & Arthi Prasad, *Bottom-up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1106 (2014).

¹⁶³ *Id.* at 1073.

¹⁶⁴ See *TNS Inc. v. NLRB*, 296 F.3d 384, 402 (6th Cir. 2002) ("While the urine samples pointed to by the Board exceed the non-binding guideline set out by the NRC, they are within the standard promulgated by the U.S. Army

ical studies have confirmed, moreover, that even when informed, most workers experiencing workplace rights violations remain silent because they fear employer retaliation and believe that any action they might take would be ineffective anyway.¹⁶⁵ The history of the *TNS* case reinforces those findings.¹⁶⁶ There is also the mistaken presumption that workers know the law and what their workplace rights are.¹⁶⁷ Combined, the lack of safety and health information, fear of retaliation, and not knowing what is and what is not protected motivate “most workers to keep their heads down and avoid making waves.”¹⁶⁸ Consequently, despite talk about the right to a safe and healthful workplace, workers choose to risk their health and safety rather than risk their jobs.¹⁶⁹

G. OTHER FACTORS

The issue before the NLRB was not whether working conditions at TNS were in fact abnormally dangerous but rather whether the workers’ belief that they were was reasonable (supported by objective evidence) and in good faith.¹⁷⁰ It was unavoidable, however, that the Board and the ALJ had to assess the working conditions as a necessary part of their determination of the reasonableness of the workers’ belief.¹⁷¹ Although reaching different conclusions, the ALJ and the Board, in determining whether the working conditions at TNS justified workers’ belief that those conditions were abnormally dangerous, considered the inherent danger of the work risks, standards of permissible exposures, and the actions of the agencies TOSHA and TDRH.¹⁷²

and adopted by the TDRH, and there is no evidence in the record to suggest that the Army guidelines are not equally good.”).

¹⁶⁵ See Alexander & Prasad, *supra* note 162, at 1073.

¹⁶⁶ See *id.* at 1099.

¹⁶⁷ Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers’ Legal Knowledge*, 1999 U. ILL. L. REV. 447, 448, 465 (1999).

¹⁶⁸ See Lynd, *supra* note 117, at 720.

¹⁶⁹ See Alexander & Prasad, *supra* note 162, at 1073.

¹⁷⁰ See *TNS, Inc. v. NLRB*, 296 F.3d 384, 402 (6th Cir. 2002).

¹⁷¹ *Id.* at 402 (citing *TNS Inc.*, 309 N.L.R.B. 1348, 1357 (1992)).

¹⁷² *TNS, Inc.*, 296 F.3d at 402-03.

H. AGENCY ACTION AND INACTION: TOSHA AND TDRH

In its assessments of working conditions at TNS, the Board found decisive the fact that TDRH never considered shutting down all or a part of TNS' operations or suspending TNS's operating license.¹⁷³ According to the Board, TDRH and the NRC found working conditions at TNS "plainly in need of improvement" but "not so dangerous as to require removal of employees from the plant."¹⁷⁴ The Board considered the agency's reactions as "objective" evidence and "essential lest we allow the invocation of Section 502 as an end run around the statutes directly applicable to worker safety in their industry."¹⁷⁵ The Board said that it was "of some significance" that TNS workers "could have consulted TDRH before the walkout" but did not.¹⁷⁶

The ALJ had found that TDRH's "endless correspondence" with TNS revealed the Agency's conviction that the TNS safety program was inadequate and did not protect workers from unnecessary radiation.¹⁷⁷ The ALJ also concluded that TDRH, even if it had been informed about all of TNS' health and safety deficiencies, would not have shut down the company's operations because "such a sanction was virtually unthinkable to the Agency's functionaries."¹⁷⁸ Although TDRH had the authority to seek a license revocation, the ALJ pointed out "it was a power never invoked."¹⁷⁹

In regard to radiation limits, rather than using the maximum dose permitted as the standard, the ALJ held that TNS had a duty to lessen the risk of harm to its employees by applying the enforceable regulatory requirement: As Low As Reasonably Achievable (ALARA).¹⁸⁰ That means employing all reasonable

¹⁷³ TNS Inc., 309 N.L.R.B. at 1356.

¹⁷⁴ *Id.* at 1358.

¹⁷⁵ *Id.* at 1356.

¹⁷⁶ *Id.* at 1358.

¹⁷⁷ *Id.* at 1445.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ 10 C.F.R § 20.1101.

methods to reduce radiation doses as far below established legal limits as is reasonably achievable.¹⁸¹ The ALJ identified many safety and health changes in physical plant engineering and cleaning and ventilation equipment made by TNS after the employees who walked out had been replaced.¹⁸² Consistent with the ALARA concept, the ALJ concluded that “it would be an error to find that abnormal conditions exist only when regulatory limits are exceeded.”¹⁸³

The Board acknowledged that TNS had a “less than state-of-the-art” exposure-prevention program that for several years before the work stoppage resulted in a level of airborne depleted uranium contaminants and worker exposure higher than it could have been if TNS had followed the ALARA concept.¹⁸⁴ The Board in its decision emphasized, however, that TNS was not legally obligated to follow standards such as ALARA that were non-mandatory guidelines.¹⁸⁵ The Board also underscored the NRC Director’s testimony during the Gore Hearings that “regulatory guides are not substitutes for regulations and compliance with them is not required.”¹⁸⁶

I. INHERENTLY DANGEROUS WORK

In determining when working conditions were abnormally dangerous NLRB case precedent, according to the ALJ, excluded “normally or even inherently dangerous” work from the meaning of abnormally dangerous but recognized that Section 502 could be involved “when normally dangerous conditions became abnormally so.”¹⁸⁷ The ALJ concluded that was precisely what happened at TNS when the company allowed a hazardous workplace “to denigrate” into one that was abnormally dangerous by failing to overhaul its malfunctioning machinery and instead saddling workers

¹⁸¹ TNS Inc., 309 N.L.R.B. 1348, 1359 (1992).

¹⁸² *Id.* at 1443-44; *see id.* at 1392-98, 1410, 1440 (specific changes).

¹⁸³ *Id.* at 1437.

¹⁸⁴ *Id.* at 1358.

¹⁸⁵ *Id.* at 1349, 1354.

¹⁸⁶ *Id.* at 1354, 1361.

¹⁸⁷ *Id.* at 1436.

with burdensome respiratory equipment; failing to maintain a supervisory staff competent to enforce sound health-protecting practices and withholding information about excessive exposures from the TDRH and employees “beset with uranium contamination.”¹⁸⁸

She also relied on reports and expert testimony concerning other facilities in the nuclear industry showing that radiation doses from depleted uranium received by TNS workers were “remarkably higher” than other workers in the industry; that TNS workers “had an abnormally higher risk of cancer when compared to the national average for workers in all other nuclear facilities;” and that TNS employees “were subjected to whole body radiation exposure greater than that experienced by 90 percent of their peers in the nuclear industry.”¹⁸⁹

The Board’s discussion of what constituted abnormally dangerous conditions emphasized the inherent dangers of working with depleted uranium in an industry “inherently more dangerous than most.”¹⁹⁰ As a result, in their “normal working conditions,” TNS workers “faced a greater likelihood of cancer or kidney damage” than most other workers.¹⁹¹ Consequently, the Board asserted, the “benchmark for normalcy” in evaluating claims of abnormal danger is the “prevailing conditions” at the TNS plant—not conditions in the nuclear industry or conditions experienced by employees working with depleted uranium.¹⁹²

It did not follow, the Board reasoned, that the “maintenance of prevailing conditions at TNS” transformed “existing dangers into abnormal dangers.”¹⁹³ The Board asserted that the “narrow scope” of Section 502 required ascertainable objective proof that the workers experienced a substantial increase in the normally high risk of cancer or kidney injury if they remained at work.¹⁹⁴ Instead, the Board said that at TNS exposure levels remained rela-

¹⁸⁸ TNS Inc., 309 N.L.R.B. at 1446.

¹⁸⁹ *Id.* at 1416-22, 1442.

¹⁹⁰ *Id.* at 1358, 1365.

¹⁹¹ *Id.* at 1358.

¹⁹² *Id.*

¹⁹³ *Id.* at 1359.

¹⁹⁴ *Id.*

tively constant in the few months before the work stoppage.¹⁹⁵ According to the Board, the only significant change was the expiration of the union-company collective bargaining agreement.¹⁹⁶

The Board also inferred the absence of a good faith reasonable belief of abnormally dangerous working conditions from the fact that the employees continued to work at TNS particularly from March 10, 1981 when their union announced that the employees would walk out over safety and health issues until May 1, 1981, when the work stoppage began.¹⁹⁷ “It defies credulity,” the Board asserted, even to suggest that employers believed on March 10 that their lives were in imminent danger because of cumulative exposure to depleted uranium after working in the same conditions for nearly two months.¹⁹⁸

In inherently dangerous jobs such as those at TNS, where threats to worker safety and health are the greatest, workers face even greater obstacles to demonstrating abnormal conditions of work. The NLRB in the second *TNS* decision, for example, defined abnormal as “deviating from the normal condition or from the norm or average.”¹⁹⁹ Although reaching different conclusions, both NLRB Boards in *TNS* considered prevailing conditions of work as synonymous with “normal.”²⁰⁰ Defining whatever exists as “normal” ignores the possibility that those prevailing conditions themselves could be abnormally dangerous or seriously threaten worker health and safety.²⁰¹ It also permits employers individually and industry-wide to establish the benchmark for what is normal.

¹⁹⁵ *TNS Inc.*, 309 N.L.R.B. at 1359.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1363.

¹⁹⁹ *TNS Inc.*, 329 N.L.R.B. 602, 607 (1999) (quoting *Fruin-Colnon Construction Co.*, 139 N.L.R.B. 894 (1962)).

²⁰⁰ The Board in the first *TNS* decision considered the prevailing conditions of work only at the TNS plant (*TNS Inc.*, 309 N.L.R.B. 1348, 1358-59 (1992)) whereas the Board in the second case considered a level of danger “reasonably to be expected in the industry.” *TNS Inc.*, 329 N.L.R.B. 602, 608 (1999).

²⁰¹ *TNS Inc.*, 329 N.L.R.B. 602, 607 (1999).

Workers are then required to provide evidence that workplace dangers have become “substantially greater” than those “normally existing” conditions.²⁰² As Member Devaney put it in his dissent, “[i]n effect, the more reprehensible the employer is, the less protection the employees have.”²⁰³ This way of determining what was “normally dangerous” as opposed to “abnormally dangerous” adds to the already heavy burden of proof on workers, in other ways as well.²⁰⁴ The Board’s test in the first *TNS* case, for example, defined prevailing conditions at TNS as normal and required evidence from employees that those conditions had changed significantly for the worse.²⁰⁵ In support, the Board adopted the reasoning of a prior Board in *Anaconda Aluminum Co.*:²⁰⁶

Absent the emergence of new factors or circumstances which change the character of the danger, work which is recognized and accepted by employees as inherently dangerous does not become “abnormally dangerous” merely because employee patience with prevailing conditions wears thin or their forbearance ceases.²⁰⁷

The phrase “work which is recognized and accepted by employees as inherently dangerous” is clearly the age-old employer common law defense of assumption of risk.²⁰⁸ The NLRB ALJ in the first *TNS* case, for example, explained the ten-fold greater protection against radiation exposure afforded the public than workers as the consequence of workers assuming the risk of radiation doses in return for higher wages.²⁰⁹

²⁰² *TNS Inc.*, 309 N.L.R.B. 1348, 1357 (1992).

²⁰³ *Id.* at 1376.

²⁰⁴ *See id.*

²⁰⁵ *Id.* at 1359.

²⁰⁶ *Anaconda Aluminum Co.*, 197 N.L.R.B. 336, 344 (1972).

²⁰⁷ *Id.*

²⁰⁸ *See id.*

²⁰⁹ *TNS Inc.*, 309 N.L.R.B. 1348, 1437 (1992); *see also* *Daniel Construction Company*, 264 N.L.R.B. 770, 771 (1982) (The Board found no violation

The assumption of risk presumption when coupled with the notion that prevailing conditions are normal further insulates employers from workers' claims of abnormal danger. Rather than considering that TNS workers remained at work because of limited options and economic necessity, they were seen as condoning the prevailing conditions no matter what those conditions were, even if caused by employer neglect.²¹⁰ However viewed—an employer would be permitted to have an unsafe and unhealthful workplace if condoned by employees; the employer was free to purchase from workers their right to a safe and healthful workplace; or the workers had voluntarily sold that right to their employer—the application of the assumption of risk value judgment makes it even more unlikely that workers could obtain Section 502 protection.²¹¹

Putting the burden of proof on workers and making it an onerous one increases the likelihood that workers will lose their jobs if they seek Section 502 protection.²¹² As the Eighth Circuit Court of Appeals explained, if workers leave their jobs believing in good faith that abnormally dangerous conditions of work exist, they run the risk of discharge for striking in violation of a no-strike agreement or for engaging “in the unprotected activity of dictating to management” their conditions of employment should proof fail to support their belief.²¹³ In 1989, three years before the NLRB's first decision in the *TNS* case, the General Counsel for the workers' union pointed out that TNS had “completely renovated” the plant and installed many of the engineering controls the union had demanded in 1981.²¹⁴ He wrote: “[t]he Workers accomplished what they set out to do—the Section 502 activity forced TNS to

when the employer discharged an employee because “the man knew when he was hired he was going to be exposed to ‘radiation,’ that he accepted the risk in return for which he was paid,” and that when the employee refused to do the work for which he was hired he “lost the right to remain on the payroll.”)

²¹⁰ *TNS Inc.*, 309 N.L.R.B. at 1374 n.11, 1375.

²¹¹ *Id.* at 1375.

²¹² *NLRB v. Fruin-Conlon Construction Co.*, 330 F.2d 885, 892 (8th Cir. 1964).

²¹³ *Id.*

²¹⁴ *McKendree*, *supra* note 24, at 209.

provide a workplace free of the overexposures about which they had complained—but lost their jobs in the process.”²¹⁵

Those jobs stayed lost despite or because of over 20 years of decision-making in the legal process. The high risk of losing one’s job, therefore, is clearly a deterrent to engaging in a work stoppage and invoking Section 502 protection.²¹⁶ At the same time, in what could be seen as a trap closing, workers who continue to work in danger that they face regularly find that their efforts are used against them when decision-makers say that a work situation cannot be abnormally dangerous because workers have endured those dangerous conditions for a considerable period of time.²¹⁷ That is true even when workers are trying to hold onto their jobs while trying to eliminate those dangers.²¹⁸ This is precisely what happened in the Board’s first *TNS* decision.²¹⁹

It is often argued (often ignoring economic reality) that workers who fear for their safety and health where they work are free to quit and work elsewhere. Focus on the alleged freedom to quit as well as the assumption of risk presumption have obscured the fact that the fundamental right at issue is the right of workers to remain at work under safe and healthful conditions.²²⁰

J. RAUDABAUGH CONCURRENCE

The Board that decided *TNS* in 1992 was comprised of four members rather than the full complement of five.²²¹ All four had

²¹⁵ McKendree, *supra* note 24, at 209.

²¹⁶ *Id.* at 214.

²¹⁷ *TNS, Inc.*, 309 N.L.R.B. 1348, 1360 (1992).

²¹⁸ *Id.* at 1374 n.11.

²¹⁹ *Id.*; see also *Custodis-Contrell, Inc.*, 283 N.L.R.B. 585, 589 (1987);

Robert C. Stephens, *The Right to Strike over Safety Issues*, 51 CHI. KENT L. REV. 200, 205 (1974).

²²⁰ But see Alfred W. Blumrosen et al., *Injunctions against Occupational Hazards: The Right to Work under Safe Conditions*, 1 Berkeley J. of Emp. & Lab. L. 25, 36 (1976).

²²¹ *TNS, Inc.*, 309 N.L.R.B. 1348, 1348 (1992).

been appointed by Republican Presidents.²²² Member Raudabaugh's concurring opinion agreed that Section 502 did not protect the TNS workers' walkout but for a totally different reason.²²³ Raudabaugh read Section 502 and the Supreme Court's decision in *Gateway Coal*²²⁴ to mean that a work stoppage is protected by Section 502 only if its "sole" reason is to protect employees from abnormally dangerous conditions.²²⁵ The TNS work stoppage was unprotected, according to Raudabaugh, because it "was caused, at least in part by a desire to achieve favorable results at the bargaining table."²²⁶

The Oil, Chemical and Atomic Workers International Union that represented the TNS Workers successfully petitioned the U.S. Court of Appeals for the District of Columbia to review the NLRB's order.²²⁷ On February 14, 1995, the D.C. Circuit returned the case to the Board.²²⁸ The Court ruled that the result reached by the Board did not have the support of a majority of its members because the "sole cause" concurring opinion "can count for nothing in this case" and, among other things, was "wrong as a matter of law."²²⁹

²²² Chairman James Stevens was appointed by President Ronald Reagan and Members Clifford Oviatt, John Raudabaugh, and Denis Devaney by President George Herbert Walker Bush. *Board Members Since 1935*, NAT'L LABOR RELATIONS BD. (last visited May 27, 2019) <https://www.nlr.gov/about-nlr/who-we-are/board/board-members-1935>.

²²³ TNS, Inc., 309 N.L.R.B. at 1368.

²²⁴ *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 385 (1974).

²²⁵ *Id.*

²²⁶ TNS, Inc., 309 N.L.R.B. at 1369.

²²⁷ *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 82 (D.C. Cir. 1995).

²²⁸ *Id.* at 84-85.

²²⁹ *Id.* at 91, 92-93. In regard to Member Raudabaugh's reading of the Supreme Court's language in *Gateway Coal*, the D.C. Circuit commented: "[t]o say that a strike called 'solely to protect employees from immediate danger is authorized by Section 502' is not the same as saying that 'a strike is not protected by Section 502 unless the sole reason for it is to protect employees from immediate danger.'" *Id.* at 91. The Court also noted that under federal law workers had the right to engage in economic strikes upon expiration of their collective

K. A SECOND NLRB DECISION

Over four years later, on September 30, 1999, the NLRB issued its second decision and order in *TNS, Inc.*, this time concluding that the TNS workers' work stoppage was protected by Section 502, that the company had violated the NLRA by not reinstating them when they offered to return to work, and by withdrawing recognition from and refusing to bargain with their union.²³⁰ In responding to the D.C. Circuit's instruction to articulate a majority-supported rule in TNS-like cases, the Board rejected the test used in its previous TNS decision because that test placed an unreasonably heavy burden on employees to substantiate their good faith belief that working conditions were abnormally dangerous.²³¹

The Board agreed with the D.C. Circuit Court that it was unreasonable to require proof that safety was the sole cause of the work stoppage.²³² The Board continued, however, to apply the ascertainable, objective evidence test taken from the Supreme Court's language in *Gateway Coal*²³³ "a purely subjective impression of danger will not suffice."²³⁴ The Board said that determining the nature and quantity of the ascertainable, objective evidence that would be sufficient to support workers' good faith belief was the most difficult task in applying Section 502.²³⁵ Unlike the prior Board, this Board's assessment of the sufficiency of the objective evidence included consideration of industry standards for a safe workplace.²³⁶ In regard to what would constitute an immediate

bargaining agreement and that when employees were protesting abnormally dangerous conditions "that they also deserved better wages is irrelevant." *Id.* at 92.

²³⁰ *TNS, Inc.*, 329 N.L.R.B. 602, 603 (1999).

²³¹ *Id.* at 603 n.7.

²³² *Id.*

²³³ *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 387 (1974).

²³⁴ *TNS, Inc.*, 329 N.L.R.B. at 607.

²³⁵ *TNS, Inc.*, 329 N.L.R.B. at 607.

²³⁶ *Id.* at 608.

threat of harm, the Board did not interpret that to mean that workers had to leave the workplace in a single moment or face serious injury in the next—particularly in situations of cumulative exposure to radioactive toxic substances.²³⁷

However, similar to the approach used by the prior Board, the Board in 1999 accepted the notion that Section 502 did not pertain to inherent routine dangers.²³⁸ Section 502 did apply, the Board held (as did the ALJ in the prior Board decision), when such risks escalated or were maintained at a point where they posed an immediately existing threat to worker safety or health.²³⁹

The 1999 Board decided that the evidence cited by the ALJ in the first consideration of the *TNS* case regarding air quality, the protracted use of respirators, and employees' uranium exposures and "uranium-in-urine" levels constituted sufficient objective proof to support the workers belief that conditions had become too unsafe to continue working at TNS.²⁴⁰ Because the TNS workers had engaged in a protected 502 work stoppage, the Board ruled that they were not strikers and, therefore, were not subject to the risk of permanent replacement as were economic strikers.²⁴¹ The Board cited Supreme Court case precedent emphasizing the "inherent inequity" of penalizing employees for engaging in conduct induced solely by an employer's unlawful conduct.²⁴²

The Board ordered TNS to offer full reinstatement to all employees who participated in the Section 502 work stoppage.²⁴³ The Board also ordered TNS to make the workers whole for loss of earnings and benefits from February 15, 1982 (the date of their rejected unconditional offer to return to work) until TNS made them a valid offer of employment—almost 18 years back pay with interest.²⁴⁴

²³⁷ *TNS, Inc.*, 329 N.L.R.B. at 608 n.31.

²³⁸ *Id.*

²³⁹ *Id.* at 607.

²⁴⁰ *Id.* at 609.

²⁴¹ *Id.* at 614.

²⁴² *Id.* at 610 (citing *Mastro Plastics v. NLRB*, 350 U.S. 270, 287 (1956)).

²⁴³ *Id.* at 612.

²⁴⁴ *TNS, Inc.*, 329 N.L.R.B. at 611.

A Board Panel of three—Wilma Liebman, Sarah Fox and Peter Hurtgen—decided this case.²⁴⁵ All were nominated to the Board by President William Clinton; Liebman and Fox to “Democrat” seats and Hurtgen to a “Republican” seat.²⁴⁶ Hurtgen dissented, arguing, among other things, that the majority’s approach, would foster an easy escape from no-strike clauses—“a departure from the sanctity of no-strike clauses” that encouraged work stoppages and undermined industrial instability.”²⁴⁷

Hurtgen argued, in addition, that permanent replacement was not precluded by Section 502.²⁴⁸ He concluded that the workers who engaged in the TNS work stoppage were neither economic strikers nor unfair labor practice strikers but rather “quitters.”²⁴⁹ Hurtgen contended that permanent replacement is not equivalent to discharge because the permanently replaced striker has a right to reinstatement whenever a replacement leaves or a vacancy occurs in a striker’s job.²⁵⁰

He also maintained that it was a “fundamental right” of an employer to protect and operate his or her business and that an employer’s “economic justification” for operating his business with permanent replacements during a Section 502 work stoppage outweighs the limited impact on employee rights.²⁵¹ Finally, Hurtgen emphasized his view that the working conditions at TNS were not unlawful under the NLRA or any other law.²⁵²

²⁴⁵ TNS, Inc., 329 N.L.R.B. 602, 602 (1999).

²⁴⁶ *Board Members Since 1935*, NAT’L LABOR RELATIONS BD. (last visited May 27, 2019) <https://www.nlr.gov/about-nlr/who-we-are/board/board-members-1935>.

²⁴⁷ TNS, Inc., 329 N.L.R.B. at 613.

²⁴⁸ *Id.* at 614.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 615-16.

²⁵² *Id.* at 613.

L. THE SIXTH CIRCUIT COURT OF APPEALS

Two years later the Board's second decision in TNS was before the Sixth Circuit Court of Appeals.²⁵³ In reviewing TNS's challenges to this Board's statutory interpretations, the Sixth Circuit followed the standard set forth by the Supreme Court in *Chevron U.S.A v. National Resources Defense Council*.²⁵⁴ Under that standard, if Congress has not clearly spoken to a question, the reviewing court must uphold the agency's interpretation if it is "permissible" and "reasonable" even if it is not the one the court would have adopted.²⁵⁵

Applying the *Chevron* standard, the Sixth Circuit upheld the Board's determinations that Section 502 applied to situations where there is no "no-strike" provision; that Section 502 does not require that abnormally dangerous conditions actually exist; and that Section 502 prohibits employers from permanently replacing workers who quit work because of abnormally dangerous conditions.²⁵⁶

The Sixth Circuit then considered TNS's challenges to the Board's application of Section 502 to the facts of the case.²⁵⁷ Contrary to the contentions of the company, the Sixth Circuit found that there was substantial evidence to support the Board's "factual findings" that TNS workers believed in good faith that their working conditions were abnormally dangerous and that this belief was a contributing cause to their stoppage of work.²⁵⁸

The Sixth Circuit acknowledged that the Board did not find that working conditions at TNS were "in fact" abnormally dangerous but only that there was sufficient objective evidence to support employees belief that their working conditions were abnormally dangerous.²⁵⁹ Yet, nonetheless, the Court characterized as "not

²⁵³ See *TNS, Inc., v. NLRB*, 296 F.3d 384, 387 (6th Cir. 2002).

²⁵⁴ *Chevron, U.S.A., Inc. v. Nat'l. Res. Def. Council Inc.*, 467 U.S. 837, 842-43 (1984).

²⁵⁵ See *TNS, Inc.*, 296 F.3d at 389.

²⁵⁶ *Id.* at 390-94.

²⁵⁷ *Id.* at 394.

²⁵⁸ *Id.* at 396.

²⁵⁹ *Id.* at 399.

terribly persuasive” much of the supporting evidence relied upon by the ALJ in her decision and “merely cited without explanation” by the Board.²⁶⁰ The Court then proceeded to observe that whereas TNS workers received higher than average radiation exposure than other employees in the nuclear industry, that exposure was not above that permitted by NRC and TDRH regulations.²⁶¹ The Court emphasized, moreover, that the NRC regulation on permissible uranium levels in employees’ kidneys was “only a non-binding guideline” never adopted by the NRC and that the TDRH used a more permissive standard.²⁶² In sum, the Court concluded that the “pieces of evidence” on which the Board relied to support its finding that TNS employees believed their conditions of work were abnormally dangerous, “merely show that TNS had largely complied with regulatory limits.”²⁶³

In a sad and shameful ending to these workers’ experiences with the legal system, the Sixth Circuit Court vacated the Board’s decision because the Court did “not see a reasonable way to hold the Company responsible for damages accruing over all of this time, especially when its structure and business changed in the interim.”²⁶⁴ Over 21 years had passed since 100 men and women had refused to continue working under what they believed were abnormally dangerous conditions at TNS Inc. and sought enforcement of a law they believed would justify their action and protect their jobs.²⁶⁵ After 21 years the decision-makers who applied that law told them that the law did neither.²⁶⁶

In January 2003, the Supreme Court declined to consider whether the Sixth Circuit had erred in vacating the Board Order.²⁶⁷ In its petition for Supreme Court review,²⁶⁸ the workers’ union

²⁶⁰ *TNS, Inc.*, 296 F.3d at 402-03.

²⁶¹ *Id.* at 402.

²⁶² *Id.* at 401.

²⁶³ *Id.* at 402.

²⁶⁴ *Id.* at 404.

²⁶⁵ *Id.* at 386.

²⁶⁶ *Id.* at 404.

²⁶⁷ *Paper v. TNS, Inc.*, 537 U.S. 1106 (2003).

²⁶⁸ *Petition for Writ of Certiorari, Paper, Allied-Indus., Chem. & Energy Workers Indus. Union v. TNS*, 537 U.S. 1106 (2003) (No. 02-557).

maintained that the Sixth Circuit's decision to invalidate the Board's action altogether not only denied innocent employees a remedy for the company's wrongdoing but also excused TNS's violation of the Act.²⁶⁹

The NLRB, then with a majority of Board members and a General Counsel nominated by George Walker Bush, concluded its role in the TNS case when its General Counsel joined with TNS in contending that the case did not raise an issue warranting further review by the Supreme Court.²⁷⁰

M. BEYOND SECTION 502: SECTION 7 OF THE NLRA

What workers experienced at TNS is commonplace in other circumstances when administrative agencies and the judiciary have interpreted the provisions of laws written to protect vulnerable workers—such as OSHA and Section 7 of the NLRA which encourages workers to engage in concerted action for their own mutual aid and protection—in ways that undermine efforts to refuse to work for reasons of health and safety.²⁷¹ They have chosen instead to craft rules that increase the risks and consequences for workers who refuse to work in those circumstances.²⁷²

Consequently, the workers' dilemma—refuse work and risk my job or work and risk my body—remains a daily reality. In addition, the tangled and confusing and different rules pertinent to Section 502, Section 7 of the NLRA, and OSHA leave workers even less aware of their rights and what protections they have, if any, and more dependent on “experts” in the legal process. As noted previously, not knowing what is protected causes workers to “keep their heads down and avoid making waves”²⁷³ In addition to being a choice of one horn of the workers' dilemma—work and risk my body—the heads down and make no waves approach is a

²⁶⁹ Petition for Writ of Certiorari, Paper, *Allied-Indus., Chem. & Energy Workers Union v. TNS*, 537 U.S. 1106 (2003) (No. 02-557).

²⁷⁰ Brief for NLRB at 6, Paper, *Allied-Indus., Chem. & Energy Workers Indus. Union v. TNS, Inc.*, 537 U.S. 1106 (2002) (No. 02-557).

²⁷¹ National Labor Relations Act, 29 U.S.C. § 157 (2012).

²⁷² See Lynd, *supra* note 117, at 720.

²⁷³ *Id.*

variation on the right to quit solution which also ignores the fundamental right of workers to remain at work under safe and healthful conditions.

As seen in the *TNS* case, these extra-legislative, agency or court-created rules are themselves often only the embodiment of the values of the judges or agency members asserting the rule.²⁷⁴ Section 7 of the NLRA is that law's core source for the protection of workers' rights. Judicial and NLRB decisions concerning the extent to which Section 7 provides protection to refusals to work for reasons of safety and health provide additional examples not only of the value-inspired choices of those decision-makers but also of the confusing tangle of inconsistent rules and standards utilized in applying different statutory provisions.²⁷⁵

In the first major case of its kind, almost 20 years before the TNS workers walked off their jobs in protest of what they believed were abnormally dangerous working conditions, a unanimous Supreme Court in *NLRB v. Washington Aluminum*²⁷⁶ concluded that refusals to perform hazardous work were protected under Section 7. The Supreme Court upheld the right of seven employees to walk off the job in protest of "bitterly cold" temperatures outside ranging from a low of 11 degrees to a high of 22 with a broken oil furnace inside the plant. In startling contrast to the reaction of decision-makers to radiation exposure by TNS workers, the Court in *Washington Aluminum* was moved to say that the workers were trying to protect themselves and "to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours."²⁷⁷

Although the Supreme Court in *Washington Aluminum* assessed the gravity of the employees' working conditions, the Justices emphasized that the reasonableness of workers' decisions to engage in concerted activity is irrelevant.²⁷⁸ Since then the ques-

²⁷⁴ See *Paper v. TNS, Inc.*, 296 F.3d 384, 389-94 (6th Cir. 2002).

²⁷⁵ *NLRB v. Tamara Foods Inc.*, 692 F.2d 1171, 1179 (8th Cir. 1982).

²⁷⁶ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 9 (1962).

²⁷⁷ *Id.* at 17-18.

²⁷⁸ *Washington Aluminum Co.*, 370 U.S. at 16.

tion of whether the conditions which workers protest are in fact unsafe has been irrelevant to the determination of whether their Section 7 rights have been violated. As the Board put it in *Union Boiler Company*, “the issue here is not the objective measure of safety conditions, it is whether these employees left their jobs because they thought conditions were unsafe.”²⁷⁹ Years later, the NLRB, citing *Washington Aluminum*, rejected the contention that the Board should require “objective ascertainable evidence” to support any claims of unsafe conditions:

The Board’s policy is clearly a wise one. It is to the interest of employees and employers alike that concerns such as potential safety problems be brought to light; a requirement that the complaint be meritorious in order to be protected would discourage such concerns from being surfaced.²⁸⁰

The Board has distinguished the standard it uses in Section 502 cases to define abnormally dangerous conditions from the standard it uses in Section 7 cases.²⁸¹ Consequently, Section 7 protects the rights of workers to engage in protests, including work stoppages, over what they believe are unsafe or unhealthful working conditions.²⁸² The Board’s use of a good faith belief standard rather than an objective proof standard lightens the employees’ burden of proof and lessens the risk of job loss for refusing to perform work they believe threatens their health and safety.²⁸³

Section 7 of the NLRA sets forth several workers’ rights: the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their

²⁷⁹ *Union Boiler Co.*, 213 N.L.R.B. 818, 818 (1976).

²⁸⁰ *Keystone-Seneca Wire Cloth Co.*, 244 N.L.R.B. 398, 400 (1979).

²⁸¹ See *Vemco, Inc.*, 314 N.L.R.B. 1235, 1240 (1994); *Odyssey Capital Group*, 334 N.L.R.B. 1110, 1111 (2002).

²⁸² *Tamara Foods, Inc.*, 258 N.L.R.B. 1307, 1308 (1981) (enforcing *NLRB v. Tamara Foods Inc.*, 692 F.2d 1171 (8th Cir. 1982)); see also *Brown & Root, Inc.*, 246 N.L.R.B. 33, 36 (1979); *E. R. Carpenter Co.*, 252 N.L.R.B. 18, 21 (1980); *Colorado Forge Corp.*, 260 N.L.R.B. 25, 36 (1982).

²⁸³ *Union Boiler Co.*, 213 N.L.R.B. at 818.

own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.²⁸⁴ The exercise of these rights, however, is not unlimited. Workers who engage in a work stoppage, even for reasons of health and safety, for example, are subject to being replaced permanently (as were the TNS workers) according to the same rules governing economic strikers.²⁸⁵ Workers covered by no-strike agreements would not be protected by Section 7 if they engaged in concerted work stoppages.²⁸⁶

The workers at the Washington Aluminum Company were unorganized.²⁸⁷ The overwhelming number of workers covered by the NLRA and its Section 7 are unorganized—possibly 90 percent or more.²⁸⁸ Among the unorganized are those who are most vulnerable to the violation of their workplace rights and bear a disproportionate risk to their workplace safety and health. Even under the more protective terms of the *Washington Aluminum* decision, the risks of initiating and pursuing rights enforcement have to be borne by those most vulnerable to the exercise of power by others including their employers.²⁸⁹ All of the reasons for workers to stay silent and keep their jobs and risk their health and safety—fear of employer retaliation, the perceived futility of protesting, a lack of knowledge of what their rights are or how to enforce them—apply to all workers but more so to unorganized workers.

Unorganized employees' Section 7 rights are detrimentally affected in another important way. In order to be protected by

²⁸⁴ NLRB v. Washington Aluminum Co., 370 U.S. 9, 12-13 (1962).

²⁸⁵ NLRB v. Mackay Radio, 304 U.S. 333, 345-46 (1938).

²⁸⁶ Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 107 (1962) (explaining that the extent of their Section 7 protection has been restricted further, even in situations without no-strike agreements, by a Supreme Court ruling that agreements to arbitrate give rise to an implied promise not to strike); Paper v. TNS, Inc., 296 F.3d 384, 384 (6th Cir. 2002) (concluding that what prevails is the court-created policy of resolving labor-management disputes through arbitration).

²⁸⁷ *Washington Aluminum Co.*, 370 U.S. at 12.

²⁸⁸ *Id.* at 13 n.6.

²⁸⁹ *Id.*

Section 7, employees must also prove that they were engaged in “concerted activity” for the purpose of collective bargaining or other mutual aid or protection. NLRB and judicial decision-makers have disagreed over what is protected concerted activity and unprotected individual activity or “personal gripes.”²⁹⁰ The result once again has been a confusing and inconsistent set of rules defining concerted activity, one applying to organized employees and a different one to unorganized employees.

In regard to organized workers, the NLRB in *Interboro Contractors Inc.*²⁹¹ established the principle that an individual employee was engaged in concerted activity and protected by Section 7 when asserting a right grounded in a collective bargaining agreement:

However, even if the complaints were made by John alone [a discharged employee], they still constituted protected activity since they were made in the attempt to enforce the provisions of the existing collective bargaining agreement. The Board has held that complaints made for such purposes are grievances within the framework of the contract that affect the rights of all employees in the unit and thus constitute concerted activity which is protected by Section 7 of the Act.²⁹²

The Board has applied the *Interboro* precedent broadly, including safety and health issues. In *T&T Industries, Inc.*,²⁹³ for example, where an individual employee refused to drive a tractor alleged to be unsafe because it was blowing fuses, the Board held that “where an employee complains about safety matters which are embodied in a contract he is acting in the interest of all the em-

²⁹⁰ Robert Gorman & Matthew Finkin, *The Individual and the Requirement of ‘Concert’ under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 290 (1981).

²⁹¹ *Interboro Contractors Inc.*, 157 N.L.R.B. 1295, 1298 (1966).

²⁹² *Id.*

²⁹³ *T & T Indus., Inc.*, 235 N.L.R.B. 517, 520 (1978).

employees covered by the contract in attempting to enforce those provisions and such actions are held to constitute protected concerted activities under the Act.”²⁹⁴

In 1984, the Supreme Court in *NLRB v. City Disposal Systems*²⁹⁵ upheld the Board’s *Interboro* doctrine as a reasonable interpretation of the Act.²⁹⁶ In *City Disposal*, the employer discharged a truck driver hauling garbage after the driver refused to drive a truck he believed to be unsafe because of faulty brakes and had challenged his supervisor by asking “what you going to do, put the garbage ahead of the safety of the men?”²⁹⁷ The relevant contractual clause provided: “[t]he Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law.”²⁹⁸ The Supreme Court found that this lone worker’s invocation of a right grounded in his collective bargaining agreement was concerted activity because it was “an integral part of the process that gave rise to the agreement”:

That process—beginning with the organization of a union continuing into the negotiation of a collective bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity...Moreover, when an employee invokes a right grounded in the collective bargaining agreement, he does not stand alone. Instead he brings to bear on his employer the power and resolve of all his fellow employees.²⁹⁹

²⁹⁴ T & T Indus., Inc., 235 N.L.R.B. at 520 (ruling that Section 7 protection is not dependent on the merits of the asserted contract claims or whether the employees expressly refer to applicable contracts in support of their actions or are even aware of the existence of such agreements).

²⁹⁵ *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 822 (1984).

²⁹⁶ *Id.* at 841.

²⁹⁷ *Id.* at 827.

²⁹⁸ *Id.* at 824-25.

²⁹⁹ *Id.* at 831-32.

The Supreme Court also found that, although there is nothing in the legislative history that specifically states congressional understanding of concerted activities, the Interboro doctrine was “entirely consistent with the purposes of the Act, which explicitly include the encouragement of collective bargaining.”³⁰⁰ The Court added that the Interboro doctrine preserved the integrity of the collective bargaining process because, by invoking a right grounded in a collective bargaining agreement, the employee “makes that right a reality.”³⁰¹ Concerted activity, moreover, required only an honest invocation of a contractual right.³⁰² It did not require the employee to be correct in his or her belief that a right had been violated.³⁰³

The Supreme Court in *City Disposal* did not address what would constitute concerted action involving unorganized workers without collective bargaining agreements. Even in the absence of collective bargaining agreements, the NLRB had found individual worker protests concerted if the protests involved matters affecting the working conditions of other employees and remedying those complaints would benefit other employees.³⁰⁴

The Board extended this approach to individual employee protests concerning health and safety rights contained federal and state statutes other than the NLRA.³⁰⁵ In *Alleluia Cushion Co.*,³⁰⁶ for example, the employer discharged an unorganized employee who, acting alone, had complained to the California OSHA office about safety conditions.³⁰⁷ The Board asserted that safety was one of the most important conditions of employment and of great and continuing concern for all workers.³⁰⁸ The Board also emphasized that Congress had recognized and confirmed that “vital interest” by enacting the Occupational Safety and Health Act as had many

³⁰⁰ *City Disposal Sys. Inc.*, 465 U.S. at 833-34.

³⁰¹ *Id.* at 835-36.

³⁰² *Id.* at 840.

³⁰³ *Id.*

³⁰⁴ *Gorman & Finkin*, *supra* note 290, at 296.

³⁰⁵ *Id.* at 303-04.

³⁰⁶ *NLRB v. Alleluia Cushion Co., Inc.*, 221 N.L.R.B. 999, 999 (1975).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 1000.

state and local governments through the passage of similar legislation.³⁰⁹

The Board also decided that the NLRA “cannot be administered in a vacuum.”³¹⁰ The Board “must recognize the purposes and policies of other employment legislation, and construe the Act in a manner supportive of the overall statutory scheme.”³¹¹ The Board concluded that the discharged employee’s protest was concerted as well as protected:

Since minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto deem such activity to be concerted.³¹²

The Board appointed by President Ronald Reagan in the 1980s, however, reversed many major policy decisions, covering at least two decades of NLRB history—including a long line of Board decisions expanding the definition of concerted activity.³¹³ In *Meyers Industries, Inc.*³¹⁴ that Board explicitly overruled *Alleluia Cushion*.³¹⁵ The Board said that henceforth it would apply an “objective standard” to determine if an employee’s activity was

³⁰⁹ *Alleluia Cushion Co., Inc.*, 221 N.L.R.B. at 1000.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ See JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994*, 246-47, 354, 358 (Temple University Press: Philadelphia 1995).

³¹⁴ *NLRB v. Meyers Indus., Inc.*, 268 N.L.R.B. 493, 496 (1984).

³¹⁵ *Id.*

concerted.³¹⁶ It would require that the activity be engaged in with or on the authority of other employees.³¹⁷ The Board maintained that the “principles inherent in Section 7” compelled this objective standard.³¹⁸

Kenneth Prill, whose protest and firing at Meyers Industries triggered this case, had complained unsuccessfully about malfunctioning brakes and steering on the truck he was assigned to drive.³¹⁹ While driving in Tennessee, Prill was involved in an accident caused by defective brakes on his truck.³²⁰ After being told by the president of Meyers Industries to have a mechanic check the truck “but to get it home as best he could,”³²¹ Prill on his own contacted the Tennessee Public Service Commission.³²² The Commission put the truck out of service due to defective brakes and other problems. The employer’s Vice-President terminated Prill’s employment because “we can’t have you calling the cops like this all the time.”³²³ The Board, applying its objective standard, found that Prill’s protest was not concerted, because he “acted solely on his own behalf.”³²⁴ Consequently, Section 7 did not protect him from discharge.³²⁵

The Board—granting that Prill’s situation was a “sympathetic one” and allowing that the Board, too, might be outraged by an employer, who risked the life of a driver and others traveling the highways, by squeezing “the last drop of life out of a trailer that had clearly given up the ghost,”—asserted that it was “not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state law.”³²⁶

³¹⁶ Meyers Indus., Inc., 268 N.L.R.B. at 496.

³¹⁷ *Id.* at 497.

³¹⁸ *Id.* at 496.

³¹⁹ *Id.* at 497.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.* at 498.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 499.

On petition to review the Board's order in *Meyers*, the District of Columbia Circuit Court of Appeals, while expressing no opinion about the correctness of the Board's test of concerted activities, decided that the Board erred in assuming that the NLRA mandated the Board's more restrictive and substantially narrower standard for determining what constitutes concerted activity.³²⁷ The Court, in remanding the case to the Board for reconsideration, noted that the Board did not have the "benefit" of the Supreme Court's opinion in *City Disposal* when the Board decided the *Meyers Industries* case.³²⁸

The D.C. Circuit also pointed out that the Board's decision in *Meyers I* created an "anomaly": that an organized worker who complains about a safety or health matter covered by a collective bargaining agreement would be protected under *Interboro* and *City Disposal*, while an unorganized employee would be denied protection for engaging in identical conduct.³²⁹

After remand, the Board in *Meyers II* adhered to its definition of concerted activity.³³⁰ The Board agreed that it had a duty to construe the NLRA to accommodate other federal laws but maintained that whereas the "invocation of employee contract rights is a continuation of an ongoing process of employee concerted activity," an unorganized employee's "invocation of statutory rights is not."³³¹ On review of *Meyers II*, the D.C. Circuit Court of Appeals affirmed the Board's decision.³³²

N. SOME OBSERVATIONS

In some important ways, organized and unorganized workers covered by the NLRA can use their Section 7 rights to engage in concerted action for their mutual aid and protection, including refusals to work in unsafe and unhealthful conditions.³³³ *Washing-*

³²⁷ *Prill v. NLRB*, 755 F.2d 941, 942 (1985).

³²⁸ *Id.* at 953.

³²⁹ *Id.* at 957.

³³⁰ *Meyers Indus., Inc.*, 281 N.L.R.B. 882, 889 (1986).

³³¹ *Id.* at 888.

³³² *Prill v. NLRB*, 835 F.2d 1481, 1485 (1987).

³³³ *Id.* at 1483.

ton Aluminum and subsequent applications of that decision have relieved employees seeking Section 7 protection of the burden of proving with “objective, ascertainable evidence” that the conditions they were protesting were in fact unsafe or unhealthful.³³⁴ Not having to prove that their claims are meritorious but only that their protests were based on a good faith belief lessens the risk employees assume when they protest conditions that threaten their health and safety.³³⁵

This lessened risk does not matter much, however, when these same Section 7 protesters, if engaging in a work stoppage, can be permanently replaced; they are treated no differently than economic strikers even if they are protesting health and safety conditions.³³⁶ This means either that “prudence” prevails and there is no concerted refusal to work on the one hand or on the other that those who do strike to protest health and safety conditions are permanently replaced and their employers proceed as they choose, defeating the intent of the Act—as happened to the workers at TNS.³³⁷

The Board’s definition of concerted activity in *Meyers II* resulted in what the D.C. Circuit Court of Appeals warned would be the anomaly of having identical conduct protected by Section 7 if engaged in by a single organized employee but not protected if engaged in by a single unorganized employee.³³⁸ Professors Finkin and Gorman referred to this “extraordinary anomaly” caused by that construction of the term “concerted” resulting in statutory protection for an act “engaged in by two employees while the very same action engaged in by one remains unprotected.”³³⁹

The Board’s interpretation of concerted activity is more than an anomaly revealing inconsistency and causing confusion

³³⁴ *Keystone-Seneca Wire Cloth Co.*, 244 N.L.R.B. 398, 400 (1979).

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *TNS, Inc.*, 309 N.L.R.B. 1348, 1388-89 (1992).

³³⁸ *Prill*, 755 F.2d at 957.

³³⁹ Gorman & Finkin, *supra* note 290, at 329; *see also* Matthew W. Finkin, *Labor Law by Boz – A Theory of Meyers Industries, Inc., Sears, Roebuck and Co., and Bird Engineering*, 71 IOWA L. REV. 155, 157 (1985).

for workers: it strikes at the core justification for the Act that affects all employees organized and unorganized.³⁴⁰ The emphasis of the Wagner Act was on the relative helplessness of individual workers when confronted with the power of their employers.³⁴¹ The Act was intended to increase the liberty and dignity of individual workers by encouraging them to increase their power by acting collectively:

The assumption of the Act was *not* that action which should be protected when engaged in by a group should be left unprotected when engaged in by the individual, but that individual action should not become unlawful when engaged in collectively...But there is not the slightest hint in the history of the NLRA that in attempting to *expand* the protection that the law would give to *group* activity to secure benefits or improvements, Congress contemplated a *less* favored status for *individual* activity having the same objective.³⁴²

As Gorman and Finkin concluded, “at the core of the freedom of the individual to protest in a group necessarily lies the freedom of the individual to protest at all.”³⁴³

Treating all work-related claims of individual employees as within the scope of concerted activities³⁴⁴ is the interpretation most consistent with the legislative history of the NLRA as well as most protective of employees’ Section 7 rights, and most consistent with the Act’s encouragement of all workers to exercise those rights and to pursue work-related issues such as their own safety and health.³⁴⁵

³⁴⁰ Gorman & Finkin, *supra* note 290, at 344.

³⁴¹ *Id.* at 336.

³⁴² *Id.* at 336, 338 (emphasis in the original).

³⁴³ *Id.* at 345.

³⁴⁴ *Id.* at 309.

³⁴⁵ Gorman & Finkin, *supra* note 290, at 329.

The current denial of Section 7 protection to individual unorganized employees, who are employees at will, leaves them open to discipline, including discharge, or other forms of employer retaliation for insubordination if they refuse to work for reasons of health and safety—and leaves employers free to do so.³⁴⁶ That recreates the same pre-Act employer power and worker helplessness that the Act was intended to eliminate.

Workers vulnerable to such charges and consequences fear pursuing their workplace rights individually and their co-workers fear joining any employee who would or does protest.³⁴⁷ It also gives unscrupulous employers an incentive to discharge an individual before that protester has an opportunity to enlist fellow-employees.³⁴⁸ Such “preemptive strikes” also prevent employees from engaging in activity protected by Section 7 of the Act.³⁴⁹ In any event, chilling messages are conveyed to workers.

O. THE OCCUPATIONAL SAFETY AND HEALTH ACT

The Occupational Safety and Health Act (OSHA) of 1970 was the federal government’s first comprehensive attempt to regulate workplace safety and health.³⁵⁰ In Section 2 of the OHSA Congress declared it to be its purpose and policy “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”³⁵¹ In order to achieve that objective, Congress imposed two major duties on employers. Employers were obligated to comply with the safety and health standards set by the Secretary of Labor and, in what is known as the “general duty clause”, to provide employment and a place of employment

³⁴⁶ See *Prill*, 755 F.2d at 957.

³⁴⁷ Finkin, *supra* note 339, at 157.

³⁴⁸ *Parexel Int’l*, 356 N.L.R.B. 516 (2011).

³⁴⁹ *Id.*

³⁵⁰ David Michaels, Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Testimony before the U.S. Senate Committee on Health, Education, Labor and Pensions (Apr. 27, 2010) in OSHA Archive.

³⁵¹ 29 U.S.C. § 651(b) (2012).

“free from recognized hazards that are causing or are likely to cause death or serious physical harm” to workers.³⁵²

Section 11(c) prohibited discharge or discrimination against any employee who exercised a right afforded by the Act,³⁵³ but contained no provision addressing explicitly workers’ right to refuse work because of unsafe or unhealthful conditions. Consequently, the Secretary of Labor issued a regulation interpreting Section 11(c) to contain an implied but limited right to refuse work for reasons of health and safety.³⁵⁴ The Secretary’s regulation protected an employee against discrimination if that employee with no reasonable alternative refused in good faith to perform work that a reasonable person would conclude posed a danger of death or serious injury in a situation so urgent that there was insufficient time to eliminate the danger through OSHA’s regular enforcement channels.³⁵⁵

Some appellate courts upheld the validity of the Secretary’s regulation but most did not.³⁵⁶ The Fifth Circuit Court of Appeals, for example, feared that the Secretary’s regulation “could disrupt or cripple an employer’s business.”³⁵⁷ That Court added that the legislative history of OSHA “is manifest that Congress feared such a result.”³⁵⁸ Opponents of the regulation, such as the Fifth Circuit, relied mainly on Congressional rejection of two most hotly contested proposals in the Senate and House bills leading to OSHA.³⁵⁹ One proposal would have given the Secretary of Labor the authority in urgent, imminently dangerous situations to take action, including, if necessary, shutting down an entire plant.³⁶⁰ Economic consequences for employers dominated the debate:

³⁵² 29 U.S.C. § 654(a)(b) (2012).

³⁵³ 29 U.S.C. § 660(c)(1) (2012).

³⁵⁴ 29 C.F.R. § 1977.12 (1979).

³⁵⁵ 29 C.F.R. § 1977.12(b)(2).

³⁵⁶ James H. Swain, *Protecting Individual Employees: Is It Safe To Complain About Safety?*, 9 U. BRIDGEPORT L. REV. 59, 86-87 (1988).

³⁵⁷ *Id.* at 87.

³⁵⁸ *Marshall v. Daniel Construction Co.*, 563 F.2d 707, 711-15 (5th Cir. 1977).

³⁵⁹ *Marshall*, 563 F.2d at 715.

³⁶⁰ *Id.* at 720.

“lost production time as the result of disruption or shutdown of plants was seen as increasing the cost of doing business, contributing to inflation, and generally causing American business to be less competitive.”³⁶¹ The proposal was defeated and the Secretary was authorized only to seek court-ordered action in such situations.³⁶²

The other proposal in Congressman Daniels’ bill would have recognized the right of employees whose work exposed them to toxic substances to “absent themselves from risk of harm without loss of regular compensation” under certain circumstances.³⁶³ That proposal was derided as “the right to strike with pay,” a label which almost by itself defeated the proposal.³⁶⁴ Opponents also maintained that unions could use the provision to avoid contractual no-strike agreements and that individual workers could abuse it.³⁶⁵

Congressman Daniels’ proposal, however, was neither an unreasonable burden on employers, nor an invitation for worker and union abuse, nor an invitation to strike with pay. The proposed language would have permitted employees and employers to ask the then Department of Health, Education and Welfare (“HEW”) to determine if any substance normally found or used at the workplace had potentially toxic or harmful effects.³⁶⁶ If HEW found such potentially harmful effects, an employer would be given 60 days to correct the situation during which time an employer could not require any employee to be exposed to such substances—unless the material was labeled with information concerning the hazards involved, the symptoms of overexposure and precautions to be taken and the employer provided personal protective equipment.³⁶⁷ If the conditions were not corrected after 60 days – and the employer had not informed employees of the hazard and

³⁶¹ Susan T. Preston, *A right under OSHA to Refuse Unsafe Work or a Hobson’s Choice of Safety or Job?*, 8 U. BAL. L. REV. 519, 532 (1979).

³⁶² *Id.* at 532.

³⁶³ *Id.* at 529.

³⁶⁴ *Id.* at 530.

³⁶⁵ *Id.* at 530.

³⁶⁶ *Id.* at 529-30.

³⁶⁷ Preston, *supra* note 361, at 529.

had not provided employees with personal protective equipment—then employees were permitted to remove themselves from risk of harm “for the period necessary to avoid such danger without loss of regular compensation” for that period.³⁶⁸

The Daniels proposal was intended to compel employer compliance with the law by seeking expeditious determinations of health and safety threats, requiring speedy action to eliminate those threats, and placing the economic consequences of non-compliance on the employer not the employees subject to the health and safety danger.³⁶⁹ It was also intended to prevent employees from being economically coerced into risking their health to keep their jobs.³⁷⁰

The Secretary of Labor’s regulation was another instance of a clash between profits, production and management authority and the protection of worker safety and health. In 1980, a unanimous Supreme Court in *Whirlpool Corp. v. Marshall*³⁷¹ decided that the Secretary’s regulation “clearly conforms to the fundamental objective of the Act—to prevent occupational deaths and serious injuries.”³⁷²

Whirlpool Corporation manufactured household appliances. At its plant in Ohio it installed horizontal wire-mesh guard screen approximately 20 feet above the plant floor to protect employees from objects that occasionally fell from overhead conveyers.³⁷³ Each week, maintenance workers would remove objects from the screen. In 1973, the employer began to install heavier wire in the screen after several employees had fallen through the old screen and a number of maintenance workers had complained to their foreman.³⁷⁴

In 1974, a maintenance employee fell to his death through an area of the old screen that had not been replaced.³⁷⁵ Two

³⁶⁸ H.R. 16785, 91st Cong. § 19(a)(5) (1970).

³⁶⁹ *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980).

³⁷⁰ *Id.* at 14 n.20.

³⁷¹ *Id.* at 2.

³⁷² *Id.* at 11.

³⁷³ *Id.* at 5.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

maintenance workers, unsatisfied with the employer's response to their complaints about the safety of the screen, obtained from the plant safety director contact information for the local OSHA representative.³⁷⁶ The safety director cautioned them that they "had better stop and think about what [they] were doing."³⁷⁷ The next day, the same two employees were ordered to work on a section of the old screen. When they refused, claiming that the screen was unsafe, they were sent home without pay for the remaining six hours of their shift and written reprimands were placed in their personnel files.³⁷⁸

One month later, the Secretary of Labor filed suit charging that the employer's action against the two maintenance workers constituted discrimination in violation of Section 11(c)(1) of the Act.³⁷⁹ Eventually, the Supreme Court addressed the question of whether the Secretary's regulation authorizing employee "self-help" in some circumstances was permissible under the Act.³⁸⁰ In finding that the regulation conformed to the purpose of OSHA, the Supreme Court also emphasized that the law's remedial approach was designed to prevent death or serious injury, not to wait until death or serious injury occurred.³⁸¹ The Court quoted a sponsor of the Senate bill: "[w]e are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact."³⁸²

The Supreme Court concluded, that given this preventative intent, it would be "anomalous" to deny an employee with no other alternative the freedom to leave a workplace the employee "reasonably believes is highly dangerous."³⁸³

In regard to the fears that the Secretary's regulation would be costly to business, the Court emphasized its belief that because

³⁷⁶ *Whirlpool Corp.*, 445 U.S. at 6.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 7.

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 8.

³⁸¹ *Id.* at 11-12.

³⁸² *Id.* at 12 n.16.

³⁸³ *Id.* at 12.

of its stringent requirements and limited scope the Secretary's regulation would have minimal effect on and rarely interfere with employers' business operations.³⁸⁴ The Court also made it clear that, under the Secretary's regulation, employers were not required to pay employees who refused work in situations of immediate danger.³⁸⁵

In response to the argument that under the Secretary's regulation workers could shut down an employer's operation—an authority that Congress had denied the Secretary of Labor—the Supreme Court pointed out that employees had no power to require employers to correct hazardous conditions.³⁸⁶ In what could only further discourage workers from seeking the protection of the regulation's already limited right to refuse work, the Supreme Court cautioned that any employee who acted in reliance on the regulation ran the risk of discharge or discipline if a court found that the employee acted unreasonably or in bad faith.³⁸⁷

P. CONCLUDING COMMENTS AND RECOMMENDATIONS

Protection of workers' right to refuse work that threatens their health and safety is essential if workers' right to a safe and healthful workplace is to be achieved. Instead, decision-makers' interpretations of Sections 7 and 502 of the NLRA and the Secretary of Labor's regulation concerning refusals to work for reasons of health and safety under OSHA have not freed workers from the workplace health and safety dilemma they have faced long before any of these provisions existed.³⁸⁸ What the ALJ in *TNS* called a "Hobson's choice"³⁸⁹ remains. In some cases, interpretations have increased the risk of job loss, others lessened that risk somewhat—but in keeping the risk of refusal high *in all cases* they have effec-

³⁸⁴ *Whirlpool Corp.*, 445 U.S. at 21.

³⁸⁵ *Id.* at 19.

³⁸⁶ *Id.* at 21.

³⁸⁷ *Id.*

³⁸⁸ Cicero, *supra* note 147, at 26, 32-33, 109.

³⁸⁹ *TNS, Inc.*, 309 N.L.R.B. 1348, 1454 (1992).

tively denied workers the exercise of their right to refuse hazardous work.³⁹⁰

In part this is due to a legal system in which decision-makers “safely ensconced in their chambers” have the power to determine what constitutes reasonable behavior by workers such as those at *TNS* is likely to produce outcomes remote from the realities of workplace dangers.³⁹¹ In addition to their distance from workplace reality, these decision-makers’ preoccupation with legal theorizing increases the influence on outcomes of their own personal value choices among different goals and policy preferences. These decision-makers were the ones who defined abnormally dangerous, good faith, inherently dangerous work, immediate danger, and assumption of risk.³⁹² They also decided that employers did not have to prove that their workplaces were safe and healthy for employees.³⁹³ Rather, decision-makers agreed that it was workers who had the burden of proof; that the workers’ burden could not be met by their subjective judgment “however honest it may be;”³⁹⁴ and that the workers were obliged to provide ascertainable, objective evidence acceptable to these decision-makers or otherwise risk losing their jobs as unprotected strikers subject to permanent replacement by their employer.³⁹⁵

The ALJ in *TNS* commented that “employees are particularly vulnerable and must trust their employer not to expose them to abnormal danger” especially when the hazard is “invisible, silent and latent” as it was at *TNS*.³⁹⁶ She went on to say, however, that *TNS* had “exacerbated rather than abated dangers” and had

³⁹⁰ See Emily A. Spieler, *Risks and Rights: The Case for Occupational Safety and Health as a Core Worker Right*, in *WORKERS’ RIGHTS AS HUMAN RIGHTS* 100, 100 (James Gross ed., 2003).

³⁹¹ *NLRB v. Golub Corp.*, 388 F.2d 921, 929 (2d Cir. 1967); Larry Drapkin, *The Right to Refuse Hazardous Work after Whirlpool*, 4 *BERKLEY J. OF EMP. & LAB. L.* 29, 45 (1980).

³⁹² Drapkin, *supra* note 391, at 45, 52, 54.

³⁹³ *Gateway Coal Co. v. United Mineworkers of Am.*, 414 U.S. 368, 384-85 (1974).

³⁹⁴ *Id.* at 386.

³⁹⁵ *Id.* at 386-87.

³⁹⁶ *TNS, Inc.*, 309 N.L.R.B. 1348, 1443 (1992).

“revealed a greater regard for productivity than for human well-being.”³⁹⁷ Decision-makers’ choices have made it safe for employers to do that.³⁹⁸ The workers experience at TNS and with the legal system demonstrates that relying on employers, administrative agencies, and courts to protect their safety and health can be futile, self-defeating, and, in any event, insufficient. It leaves workers without control of their own safety and health at the workplace.

A different standard for judgment is needed—one that is consistent with NLRA’s Section 502’s stated protection of employees who cease work because of abnormally dangerous work, Section 7’s encouragement of worker actions on behalf of their mutual aid and protection, and OSHA’s express purpose to ensure all working men and women in the country safe and healthful conditions of work.³⁹⁹ For many reasons, OSHA’s General Duty provision is or should be that standard of judgment.

Using OSHA Article 5(a)(1), the General Duty clause, as the standard of judgment in refusal to work cases would harmonize rather than compartmentalize rule applications across Section 502, Section 7 and the Secretary of Labor’s regulation.⁴⁰⁰ It would recognize that worker rights such as freedom of association, the right not to be discriminated against and safety and health are so interrelated that all are necessary to the realization of any one. The Supreme Court did recognize the interrelatedness of labor laws in *Whirlpool* when the Court upheld the Secretary of Labor’s refusal to work regulation, in part, because it was consistent with “the general pattern of federal labor legislation” (Section 502 and Section 7) affording workers the right “to walk off their jobs when faced with hazardous conditions.”⁴⁰¹ The NLRB in *Alleluia Cush-*

³⁹⁷ TNS, Inc., 309 N.L.R.B. at 1446.

³⁹⁸ But see Jeffrey Hilgert, *The Future of Workplace Health and Safety as a Fundamental Human Right*, 34 COMP. LAB. L. & POL’Y J. 715, 735 (2013).

³⁹⁹ Gross, *supra* note 11, at 387.

⁴⁰⁰ Donald L. Morgan & Mark N. Duvall, *OSHA’s General Duty Clause: An Analysis of Its Use and Abuse*, 5 INDUS. REL. L.J. 283, 284 (1983); Gross, *supra* note 11, at 382.

⁴⁰¹ *Whirlpool Corp.*, 445 U.S. at 18.

ion⁴⁰² stated the interrelatedness of labor laws most precisely: “[t]he National Labor Relations Act cannot be administered in a vacuum. The Board must recognize the purposes and policies of other employment legislation, and construe the Act in a manner supportive of the overall statutory scheme.”⁴⁰³

In support, the Board cited the Supreme Court’s decision in *Southern Steamship Company v. NLRB*:⁴⁰⁴

[T]he Board has not been commissioned to effectuate the policies of the National Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.⁴⁰⁵

This harmonization would not mean that the NLRB would administer OSHA or that OSHA would administer the NLRB. It would mean that the agencies, whenever possible, would construe their respective statutes in ways that would accommodate and support the purposes of the overall statutory scheme.⁴⁰⁶

⁴⁰² Alleluia Cushion, 221 N.L.R.B. 999 (1975).

⁴⁰³ *Id.* at 1000.

⁴⁰⁴ *Id.* (citing *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942)).

⁴⁰⁵ *Southern Steamship Co.*, 316 U.S. at 47.

⁴⁰⁶ See *Examining Delays in OSHA’s Standard-Setting Process and the Impact on Worker Safety*, Hearing Before S. Comm. on Health, Educ., Labor and Pensions, 112th Cong., (2012) (examples of inter-agency cooperation concerning safety and health); Memorandum from Anne Purcell, Associate General Counsel, to All Regional Directors, Officers In Charge, and Resident Officers, (May 21, 2014) (on file with NLRB Website); Jim Morris, *How Politics Gutted Workplace Safety*, SLATE: MONEYBOX (July 7, 2015), http://www.slate.com/articles/business/moneybox/2015/07/osha_safety_standards_how_politics_have_undermined_the_agency_s_ability.html; see OSHA INTERNATIONAL, <https://www.osha.gov/international/> (last visited May 28,

This “general duty” clause constitutes an entirely new philosophy in regard to workplace safety and health. The enforceable statutory recognition in Section 5(a)(1) expresses that workers have a right to be free of workplace dangers to their health and safety.⁴⁰⁷ It places responsibility on employers to take affirmative action to improve workplace conditions and reduce work related illness and injury.⁴⁰⁸ The “general duty” clause also shifts emphasis from compensating victims, the body in the morgue approach, to prevention of injury and illness.⁴⁰⁹

Using the “general duty” clause as the standard for judgment, therefore, would markedly change the definition of “abnormally dangerous” without requiring changes in legislation. “Normal” would now be a workplace in compliance with the law, which is a workplace free from all recognized, predictable, and preventable hazards likely to cause death or serious injury. “Abnormally dangerous” would be any workplace that had recognizable and predictable hazards that could be prevented but were not and were likely to cause death or serious injury.

The “general duty” standard would shift the burden of proof from employees to employers.⁴¹⁰ The burden would be put on the parties who are responsible with providing, controlling, and maintaining safe and healthful work and workplaces. The focus would shift, therefore, from the prerogatives of property and management rights to the duties of property ownership and management authority.

2019) (examples of international cooperation); see *Workplace Safety: Ensuring a Responsible Regulatory Environment, Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. and the Workforce*, 11th Cong. (2011) (statement of David Michaels, Assistant Secretary, OSHA) (examples of agency adaptation to different workplace circumstances).

⁴⁰⁷ Morris, *supra* note 406.

⁴⁰⁸ Nicholas A. Ashford and Judith I. Katz, *Unsafe Working Conditions: Employee Rights Under the Labor Management Relations Act and the Occupational Safety and Health Act*, 52 NOTRE DAME L. REV. 802, 827 (1977).

⁴⁰⁹ Drapkin, *supra* note 391, at 32.

⁴¹⁰ See Ashford & Katz, *supra* note 408, at 827.

It would no longer be a “catch me if you can”⁴¹¹ approach to workplace safety and health in a system designed to make employers difficult to catch by requiring employees to be the catchers and making the catching process onerous and risky. Instead, employers would have the burden of eliminating from the workplace all well-recognized and preventable hazards that are likely to cause death or serious injury of a worker.⁴¹² Employers would have the burden, therefore, of proving that their workplaces were in fact safe and healthful. The failure of an employer to do so would be a presumptively willful act.⁴¹³

Shifting the burden to employers also diminishes the risk to employees who have had to jeopardize their employment on the dim prospect that some decision-maker sometime later will find their refusals to work justified.⁴¹⁴ Under the general duty standard, therefore, holding employees to a subjective good faith test rather than to any objective evidence of proof test best achieves not only the primacy of safety and health but also the active participation of employees in the enforcement of their right to safe and healthful work and workplaces.⁴¹⁵ The subjective good faith test is one necessary way, among others, to bring about the end of the work and risk life and limb or refuse work and risk their jobs dilemma now imposed on workers.⁴¹⁶

Use of the general duty standard would reduce the job risk to workers involved in or contemplating refusals to work by redefining abnormally dangerous in a way that expands the statutory protection of Section 502 and the Secretary’s regulation concern-

⁴¹¹ Tripp Baltz, *OSHA To Release Proposal by End of Year*, Michaels Tells Public Health Association, BLOOMBERG BNA (Nov. 11, 2010), <https://www.bna.com/osha-release-proposal-n4964/>.

⁴¹² See *id.*

⁴¹³ *Putting Safety First: Strengthening Enforcement and Creating a Culture of Compliance at Mines and Other Dangerous Workplaces: Hearing before the S. Comm. on Health, Educ., Labor, & Pensions*, 111th Cong., (2010) (testimony of David Michaels).

⁴¹⁴ See Ashford & Katz, *supra* note 408, at 805-06.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

ing refusals to work.⁴¹⁷ The redefinition of abnormally dangerous as compliance with the general duty clause, for example, would widen the scope of protection for organized employees working under no-strike agreements who refuse to work in abnormally dangerous conditions because those work stoppages would not be considered strikes.⁴¹⁸

The redefinition of abnormally dangerous, moreover, would apply to unorganized as well as organized and to individual workers as well as those acting collectively. Section 502 refers to the quitting of labor by “an employee or employees” and OSHA protects individual complainants and does not require concerted activity.⁴¹⁹ Utilizing Section 502 rather than Section 7 would render irrelevant impediments to individual action imposed by the Board’s decision in *Meyers Industries*.⁴²⁰

Although neither Congress nor the Supreme Court has addressed the issue, the Sixth Circuit Court of Appeals in *TNS* upheld the Board’s ruling that Section 502 protections apply to situations where there is no no-strike provision.⁴²¹ The Court’s opinion makes it clear that the coverage of Section 502 extends to unorganized employees as well as unionized workers: “[i]t would seem somewhat anomalous to provide this protection to unionized employees subject to a collective bargaining agreement that includes a no-strike clause but deny it to unionized employees not working under such a collective bargaining agreement and to all non-unionized employees.”⁴²²

Section 502 recognizes that there is something exceptional about workers’ refusal to work because of abnormally dangerous conditions.⁴²³ The Sixth Circuit in *TNS* pointed out that Section 502 confers “special protection” on workers who quit work in the good faith belief that their workplace is abnormally dangerous.⁴²⁴

⁴¹⁷ Ashford & Katz, *supra* note 408, at 806.

⁴¹⁸ Drapkin, *supra* note 391, at 30.

⁴¹⁹ 29 U.S.C. § 143 (2012).

⁴²⁰ *Meyers Indus., Inc.*, 281 N.L.R.B. 882 (1986).

⁴²¹ *TNS, Inc. v. NLRB*, 296 F.3d 384, 390 (6th Cir. 2002).

⁴²² *Id.* at 391.

⁴²³ *Id.* at 394.

⁴²⁴ *Id.*

The Court upheld the last Board's position in *TNS* that Section 502 prohibited the permanent replacement of such workers.⁴²⁵ The Court held that Section 502 "protection is meaningless if companies can simply replace these employees as if they were normal economic strikers."⁴²⁶ The Sixth Circuit cited its earlier decision in *Clark Engineering Construction*:

When a work stoppage properly results from abnormally dangerous working conditions, an employer cannot resort to the weapons available to him in an economically-motivated work stoppage...the very natures of the two types of work stoppage are entirely different.⁴²⁷

The Board in its final *TNS* decision emphasized the unfairness of penalizing employees for actions induced by an employer's unlawful conduct.⁴²⁸

The workers' dilemma cannot be eliminated without removal of the fear of permanent replacement for engaging in a work stoppage protesting abnormally dangerous conditions of work. Equating the definition of abnormally dangerous with compliance with the statutory requirements of the general duty clause means that employees invoking protection for their refusals to work would be claiming in fact that their employer was engaging in unlawful conduct.⁴²⁹

The general duty clause standard for what is abnormally dangerous work would also expand the scope of what would be considered justifiable refusals to work under the Secretary of Labor's regulation.⁴³⁰ The Supreme Court in *Whirlpool* found that the Secretary's regulation ensured that employees "will in all circumstances enjoy the rights afforded them by the 'General Duty'

⁴²⁵ *TNS, Inc.*, 296 F.3d at 393.

⁴²⁶ *Id.* at 394.

⁴²⁷ *Clark Eng'g & Constr. Co. v. United Bhd. of Carpenters & Joiners of Am.*, 510 F.2d 1075, 1080 (6th Cir. 1975).

⁴²⁸ *TNS, Inc.*, 329 N.L.R.B. 602, 610 (1999).

⁴²⁹ *Id.*

⁴³⁰ *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980).

clause.”⁴³¹ The Court saw the Secretary’s regulation as an aid to the full effectuation of the law’s General Duty clause which placed on employers a mandated obligation to prevent deaths and serious injuries.⁴³²

The Secretary’s regulation, as did the Supreme Court in *Gateway Coal*,⁴³³ refers only to situations where the danger is immediate and urgent. As the *TNS* cases highlighted, however, the knowledge and consequences of certain health hazards are not known or manifested until years later.⁴³⁴ The general duty clause applies to health as well as safety hazards.⁴³⁵ It does not distinguish between health and safety hazards in obliging employers to provide work and workplaces free of recognized hazards causing or likely to cause death or serious injury. Use of the general duty clause as the standard for defining what constitutes abnormally dangerous work, therefore, would not distinguish among types of danger or immediate or longer-term risks as long as the recognized hazards involved were predictable, preventable, and were causes or likely causes of death or serious injury.

OSHA has not restricted its activities solely to matters of safety. Although criticized, the agency has issued health standards and, over the years, has sought to protect workers from various recognized hazards from exposure to chemicals and other substances known to cause cancer and neurological problems over time.⁴³⁶

Adoption of the general duty clause as the measure of what constitutes abnormally dangerous work would also deny employers the common law defense of assumption of risk which shifts all liability to employees.⁴³⁷ The general duty clause, imposes on employers the affirmative obligation to eliminate from the workplace all recognized hazards that are causing or are likely to cause

⁴³¹ *Whirlpool Corp.*, 445 U.S. at 13.

⁴³² *Id.* at 12-13.

⁴³³ *Gateway Coal Co.*, 414 U.S. at 386; *Whirlpool Corp.*, 445 U.S. at 3.

⁴³⁴ See *supra* notes 150-53 and accompanying text.

⁴³⁵ See *supra* notes 15-17 and accompanying text.

⁴³⁶ See Gross, *supra* note 11, 352-56.

⁴³⁷ See Richard S. Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 998, 1003-04 (1973).

death or serious injury. Assumption of risk becomes, therefore, a concept or defense irrelevant to employers' liability.⁴³⁸ It would also be irrelevant to the determining of abnormally dangerous work.

Employers would no longer be able to purchase immunity from having unsafe and unhealthful work and workplaces by buying from employees' waivers of their right to safe and healthful conditions of employment. Under the general duty standard such economic transactions would in no way alter employers' liability to eliminate serious work hazards.⁴³⁹ The fact that some employees were willing to work even in abnormally dangerous conditions also would not relieve employers of their obligation to eliminate such hazards. Even employers in "inherently dangerous" operations would be obligated to eliminate all predictable and preventable hazards causing or likely to cause death or serious injury.⁴⁴⁰ There are abnormally dangerous hazards that can be eliminated even in inherently dangerous operations.

Overall the general duty clause as a standard for determining what constitutes abnormally dangerous work would shift the burden of proof from employees to employer, deny employers their common law defense of assumption of risk, broaden the definition of what is abnormally dangerous work under Section 502 of the NLRA and the Secretary of Labor's regulation, and protect workers who engage in work stoppages from permanent replacement or disciplinary action.⁴⁴¹ In other words, it would eliminate the key elements of the current standards that create and perpetuate the workers' dilemma.⁴⁴²

⁴³⁸ Morey, *supra* note 437, at 1003-04.

⁴³⁹ *Id.* at 1005.

⁴⁴⁰ Morgan & Duvall, *supra* note 400, at 297.

⁴⁴¹ See *supra* notes 411-12 and accompanying text.

⁴⁴² In addition to their obligations under the General Duty Clause, employers are also required to comply with the occupational safety and health standards issued by the Secretary of Labor. OSHA's standard issuing process has fallen far short of being a major, if not the most important instrument for achieving the law's objectives. Morgan & Duvall *supra* note 400, at 283 (expectations concerning standards). Some say the standard-issuing system is "broken." *Time Takes Its Toll: Delays in OSHA's Standard-Setting Process*

The workers' dilemma must be eliminated if workers are to become actively involved in the promotion, protection, and enforcement of their own rights to safety and health at their workplaces. The refusal to work for reasons of safety and health is essential to securing those rights. This paper proposes, for several reasons, a set of value choices and new rules based on those value choices that should govern workers' refusal to perform work that they believe threatens them with death or serious injury. The core reason is that "it is in fact the right to life that we are talking about when we are talking about worker safety."⁴⁴³ Workplace-related injuries and diseases are not merely economic costs and inefficiencies—they kill people quickly or slowly.⁴⁴⁴ Consequently, the question of worker safety and health is more a moral question than an economic one.

The moral principle that human life matters more than authority, competitiveness, efficiency, production and profit margin is not new and it has diverse sources. Internationally, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights consider workers' rights to safety and health fundamental human rights.⁴⁴⁵ In 2011, David Michaels, then Assistant Secretary of Labor in charge of OSHA, in testimony before Congress called the right to work in a safe work-

and the Impact on Worker Safety, 112th Cong. 2 (Apr. 19, 2012) (statement of Sen. Tom Harkin). The standard-setting was made increasingly difficult over the years by statutory and administrative procedures, employer opposition and constant court challenges, and "hard look" standards of judicial review concerning what constitutes "significant risk" and judicial requirements that OSHA provide quantitative evidence that all standards were economically and technologically feasible and requiring OSHA to proceed individual standard by individual standard and industry by industry. One consequence of inhibiting standard promulgation and restricting its scope, however, has been the concomitant expansion in the scope of the General Duty clause. *Id.*

⁴⁴³ Spieler, *supra* note 390, at 78, 94.

⁴⁴⁴ Morey, *supra* note 437, at 993.

⁴⁴⁵ Spieler, *supra* note 390, at 82-83.

place a “basic human right.”⁴⁴⁶ The International Labor Organization’s Declaration of Philadelphia affirms that labor is not a commodity—not some kind of human resource no different from any other factor of production.⁴⁴⁷

As discussed, although they did not use the term human rights, Congressman Gore (no employer has the right to endanger the health of its workers), Secretary of Labor Wirtz (rejecting human sacrifice for the development of progress and asserting the absolute priority of human over economic values) and Senator Yarborough (emphasizing that at issue were people’s lives, not the indifference of some cost accountant) all expressed a commitment to the priority of human life.⁴⁴⁸

The General Duty clause is most consistent with the moral principle of the priority of human health and safety at the workplace. The prevalent value scheme, to the contrary, deters workers from protecting their own health and safety by jeopardizing their jobs, if they refuse to perform work that seriously threatens their health and safety. Instead of making workers fearful of protecting their own safety and health, adoption of the General Duty clause as the standard of what constitutes abnormally dangerous work, on the other hand, would make employers fearful of violating the law, if they do not eliminate all such predictable and preventable hazards.⁴⁴⁹ The core moral principle of the priority of human life is also most consistent with the preventive intent of OSHA. Whereas the prevalent standards being applied reflect the humans as resources, compensation-based body in the morgue approach that OSHA was intended to replace.

Ultimately, workplace safety and health, particularly workers’ ability to exercise their right to refuse unsafe and unhealthful work, is a clash between economic values and interests and the core moral principle of the priority of human life. Although it did

⁴⁴⁶ *Occupational Safety and Health Administration U.S. Dep’t of Labor*, Comm. on Educ. and the Workforce Subcomm. On Workforce Protections (Oct. 5, 2011) (statement of Asst. Secretary David Michaels, PhD, MPH).

⁴⁴⁷ Spieler, *supra* note 390, at 87.

⁴⁴⁸ See *supra* notes 38, 12 and accompanying text.

⁴⁴⁹ See Morey, *supra* note 437, at 1005; see also Morgan & Duvall, *supra* note 400, at 283.

not concern the OSHA General Duty clause directly, the 1981 Supreme Court decision in *American Textiles Manufacturers Institute, Inc. v. Donovan*⁴⁵⁰ is an excellent illustration of that clash of values.

Section 6(b)(5) of OSHA requires the Secretary of Labor in promulgating standards dealing with toxic materials to set a standard “which most adequately assures to the extent feasible...that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standards for the period of his working life.”⁴⁵¹ The Secretary of Labor in promulgating the Cotton Dust Standard, determined that exposure to cotton dust represented a significant health hazard to employees and promulgated the most stringent standard to protect against material health impairment.⁴⁵² OSHA found the Cotton Dust Standard to be technologically and economically feasible.⁴⁵³

The Textile Employer Association asked the Supreme Court to reject the standard because the Secretary failed to demonstrate “that the reduction in risk of material health impairment [was] significant in light of the costs of attaining that reduction.”⁴⁵⁴ The Secretary responded that this was a cost-benefit analysis in disguise that would require “placing a [dollar] value on human life and freedom from suffering.”⁴⁵⁵

The Supreme Court interpreted the phrase “to the extent feasible” to mean “capable of being done.”⁴⁵⁶ No cost-benefit was required by the statute, the Court concluded, because Congress had already determined the relationship between the costs and benefits “by placing the ‘benefit’ of worker health above all other considerations save those making attainment of this ‘benefit’ unachievable.”⁴⁵⁷ The Court found that Congress used the term

⁴⁵⁰ See *American Textile Mfr. Inst. v. Donovan*, 452 U.S. 490 (1981).

⁴⁵¹ 29 U.S.C. § 655-(b)(5) (2012).

⁴⁵² *American Textile Mfr. Inst.*, 452 U.S. at 493.

⁴⁵³ *Id.* at 503.

⁴⁵⁴ *Id.* at 506.

⁴⁵⁵ *Id.* at 507.

⁴⁵⁶ *Id.* at 508-09.

⁴⁵⁷ *Id.* at 509.

feasible to confirm that the Act did not require absolute safety.⁴⁵⁸ At the same time, the Court emphasized that Congress knew that the Act would “impose real and substantial costs of compliance on industry”⁴⁵⁹ yet “intended to impose such costs when necessary to create a safe and healthful working environment.”⁴⁶⁰ The Court upheld the Cotton Dust standard even though the Secretary found that “some marginal employers may shut down rather than comply.”⁴⁶¹

The Supreme Court quoted Senator Yarborough who asked:

One may well ask too expensive for whom? Is it too expensive for the company who for lack of proper safety equipment loses the services of its skilled employees? Is it too expensive for the employee who loses his hand or leg or eyesight? Is it too expensive for the widow trying to raise her children on meager allowance under workmen's compensation or social security? And what about the man—a good hardworking man—tied to a wheelchair or hospital bed for the rest of his life? That is what we are dealing with when we talk about industrial safety.⁴⁶²

The discussion and recommendations presented in this paper are intended to dislodge established mindsets and value choices and substitute choices based on values that give priority to human life at workplaces and, in refusal to work situations, enable currently shut out workers to exercise control over their own safety and health.

A caveat: the meaning of all the terms in the general duty clause such as “recognized hazards,” “likely to cause,” “serious

⁴⁵⁸ *American Textile Mfr. Inst.*, 452 U.S. at 514.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* at 520.

⁴⁶¹ *Id.* at 531.

⁴⁶² *Id.* at 520-21.

physical harm,” “free from” and others in OSHA such as “to the extent feasible” are as susceptible to the values of decision-makers as were the terms “abnormally dangerous,” “good faith belief,” and “concerted activity.”⁴⁶³ One should never underestimate the ability of decision-makers in the legal systems to interpret words to mean what they want them to mean.

⁴⁶³ See generally *id.* (explaining the susceptibility of the meaning of terms in the general duty clause).

