

International Union of Operating Engineers, Local Union 18, AFL-CIO and C. E. McKee, Jr., and Davis-McKee, Inc. Cases 9-CB-3146 and 9-CB-3201

September 29, 1978

DECISION AND ORDER

On May 9, 1977, Administrative Law Judge John M. Dyer issued the attached Decision in this proceeding. Thereafter, the Respondent, the General Counsel, and the Charging Parties filed exceptions and supporting briefs, and the Respondent filed a brief in partial support of the Administrative Law Judge's Decision. The Charging Parties also filed an answering brief in response to the Respondent's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, except as modified herein,¹ and to adopt his recommended Order.

We agree with the Administrative Law Judge, for the reasons stated in his Decision, that Respondent violated Section 8(b)(1)(B) of the Act, when it charged, tried, and fined Supervisor Harold Heselden for performing supervisory work for Davis-McKee, Inc. (the Employer), at a time when the Respondent was engaged in a sympathy strike against the Employer. We also agree with the Administrative Law Judge's ultimate finding that the Respondent did not violate Section 8(b)(1)(A) of the Act by fining two of its members, George Wagner and Richard Welch, because they failed to participate in the same sympathy strike.² However, we deem it appropriate to expand upon the Administrative Law Judge's reasoning for dismissing the 8(b)(1)(A) allegations of the complaint.

In passing on the legality of the fines imposed on Wagner and Welch by the Respondent, the critical determination which must be made by the Board is whether the Respondent waived the statutory right of its members to engage in sympathy strikes.³ If the

¹ In the section of his Decision entitled "The Remedy," the Administrative Law Judge stated that he would recommend an Order requiring Respondent to "revoke and rescind its action of charging, trying, and fining Heselden in the amount of \$1,000." As Heselden was actually fined \$2,000 by Respondent, although \$1,000 of that amount was conditionally suspended, we hereby correct the Administrative Law Judge's reference to the amount of "\$1,000" in "The Remedy" section of his Decision to read "\$2,000."

² The Respondent charged Wagner and Welch with violating the union constitution and bylaws by crossing a picket line established by another union and by accepting employment without using the Union's referral system. Although the Respondent contends that Wagner and Welch were found guilty only of failing to use the referral system, it is evident that the Respondent would not have referred any employees to the Employer during a period in which it was engaged in a sympathy strike. Thus, it appears that Wagner and Welch were actually fined for not supporting the work stoppage.

³ Wagner and Welch, members of the Respondent, were employed by Wander Construction Company. On July 11, 1975, an official of Davis-

Respondent relinquished this right in the collective-bargaining agreement, members observing the picket line engaged in unprotected activity. *N.L.R.B. v. Rockaway News Supply Company, Inc.*, 345 U.S. 71 (1953). Analogously, the Union violated Section 8(b)(1)(A) if it fined these members for refusing to violate a no-strike clause which prohibited sympathy strikes.⁴ Thus, we must determine the appropriate standard by which purported waivers of the right to engage in sympathy strikes are to be judged and apply it to the facts of this case.

In assessing an allegation that a party has contractually waived rights granted by the Act, traditionally the Board and the courts have declined to infer readily such relinquishment, requiring instead a showing of "clear and unmistakable" waiver. See, e.g., *The Timken Roller Bearing Co. v. N.L.R.B.*, 325 F.2d 746, 751 (C.A. 6, 1963), cert. denied 376 U.S. 971 (1964). See also *Mastro Plastics Corp., and French-American Reeds Mfg. Co., Inc. v. N.L.R.B.*, 350 U.S. 270, 283-284 (1956). Waiver may be found in express contractual language or in unequivocal extrinsic evidence bearing upon ambiguous contractual language. In apparent contrast to our concurring colleague, we believe that the Board has applied and should continue to apply this strict standard to assess alleged waivers of the fundamental right to strike in general, and the right to engage in sympathy work stoppages in particular. See *Gary-Hobart Water Corporation*, 210 NLRB 742, 744 (1974), enf'd. 511 F.2d 284 (C.A. 7, 1975), cert. denied 423 U.S. 925 (1975). Our essential difference of opinion with Member Penello is whether broad no-strike language clearly includes sympathy work stoppages. Contrary to our colleague, we believe that a waiver of the right to strike for the purpose of coercing an employer into granting demands with respect to wages, hours, and other terms and conditions of employment is not equivalent to a requirement that employees cross stranger picket lines. We will not infer a waiver of the protected right to engage in sympathy strikes solely from an agreement to refrain

McKee, Inc., one of the Charging Parties herein, asked them to operate a crane on its premises after unsuccessfully attempting to obtain the services of its regular employees who were engaged in a sympathy strike. These regular employees were also members of the Respondent which had a broad no-strike agreement with Davis-McKee. Wagner and Welch performed the work on July 12, and thereafter were disciplined by the Respondent. We are of the opinion that, notwithstanding the fact that Wagner and Welch bypassed the Respondent's referral system, they nevertheless were employed by Davis-McKee subject to the terms of the collective-bargaining agreement between the Respondent and Davis-McKee. Only by resigning from the Respondent could they have escaped the effects of any applicable no-strike clause.

⁴ *Local 12419, International Union of District 50, United Mine Workers of America (National Grinding Wheel Company)*, 176 NLRB 628 (1969). The trial examiner in *National Grinding Wheel* reasoned that it would have violated the public policy in favor of the integrity of labor-management agreements were he to have reached a contrary result. For a discussion of other situations in which the Board has employed a "public policy" analysis in finding union discipline violative of Sec. 8(b)(1)(A), see Wellington, *Fines and Workers' Rights*, 85 Yale L.J. 1022, 1024-28 (1976).

from all "stoppages of work." Rather, we shall require that the parties, at the very least, have discussed the question and, preferably, have expressly embodied in their agreement their intent to extend a strike ban to sympathy strikes.

In *National Grinding Wheel*, *supra*, relied upon extensively by our concurring colleague, the Board adopted a trial examiner's finding that a clause in a collective-bargaining agreement which purported to ban "any strike or slowdown" during the term of the agreement applied to sympathy strikes; and, thus, that the union signatory to that agreement violated Section 8(b)(1)(A) when it fined members for crossing a sister union's picket line. The trial examiner relied on the Supreme Court's decision in *Rockaway News*, *supra*, reasoning that there the Court ruled that a broad no-strike clause, in itself and without more, contemplated the prohibition of sympathy strikes. We have since rejected that interpretation, however, based on our conclusion that the Court in *Rockaway News* also relied on bargaining history which indicated that the union had acquiesced in the omission of a clause excepting picket line observance from the no-strike pledge, and on an arbitration award made prior to the filing of charges with the Board wherein the no-strike clause was interpreted as barring sympathy strikes. *Keller-Crescent Company, a Division of Mosler*, 217 NLRB 685, 691 (1975), enforcement denied 538 F.2d 1291 (C.A. 7, 1976); *Gary-Hobart Water Corporation*, *supra* at 746.⁵

Our concurring colleague insists that our most recent interpretation of *Rockaway News* is based on an erroneous assumption that bargaining history was, in fact, relied upon by the Court, since the Court noted only that the employer had made an offer of proof with respect to bargaining history. In our opinion, however, his rationalization of the Court's mention of the offer of proof is not persuasive. Plainly, in that case the Court was concerned primarily with the Board's disregard of the application of a no-strike clause to a sympathy work stoppage based on its decision that the entire collective-bargaining agreement was void due to the fortuitous presence of an unlaw-

ful union-security clause. Rejecting that analysis, the Court proceeded to resolve the questions as to the interpretation of the no-strike agreement based upon the express language of the clause, the offer of proof concerning bargaining history underlying the clause, and an arbitral award interpreting the clause. Surely Professor Moore's interpretation of appellate decisions construing Rule 43(c) of the Federal Rules of Civil Procedure can hardly be sufficient to refute the implication that, at the very least, it is unclear whether the Court did or did not rely upon the offer of proof as corroborated by an arbitral award. Most of those cases were decided long after *Rockaway News*, which did not, in any event, involve the Federal Rules of Civil Procedure. Further, we note particularly that the Board and the courts have, for the most part, concluded that the Court did rely on the bargaining history. See, e.g., *Keller-Crescent*, *supra* at 691; *Gary-Hobart Water Corp.*, *supra* at 746; *The News Union of Baltimore v. N.L.R.B.*, 393 F.2d 673 (C.A.D.C., 1968).⁶ Moreover, our colleague dismisses the Court's reliance on an arbitral award obtained by the parties interpreting the contract as barring sympathy strikes as a "convenient makeweight," stating that the arbitrators did not "rely upon bargaining history, or upon any special or additional evidence of the parties' intent." In fact, as he apparently admits, the arbitrators relied upon an industry practice of including language specifically exempting sympathy work stoppages from no-strike pledges and the absence of such language from the contract in question to conclude that the parties had intended to ban sympathy strikes.⁷ Accordingly, to the extent that *National Grinding Wheel* stood for the proposition that the right to engage in sympathy strikes is waived by a union's agreement to a broad no-strike clause, with-

⁵ We are somewhat puzzled by our concurring colleague's rationalization of his participation in *Gary-Hobart* by referring to the "pertinent bargaining history." In fact, there was no bargaining history present in that case. *Gary-Hobart* involved a situation in which one union represented two units at one employer, one for production and maintenance employees and one for clerical employees. The Board noted that following the beginning of a strike by the production and maintenance employees over the negotiation of a new contract governing their unit, and the clerical employees' observance of their picket lines, the employer sought to obtain an express provision in the new contract with the production and maintenance employees (a contract which in most respects was identical to that of the clerical employees) by which the union would waive the right to engage in sympathy strikes. We do not believe that the Board's reference to a subsequent attempt to remedy the ambiguity of a no-strike clause in another contract involving a different unit was necessary to its finding that the clause in question did not prohibit sympathy strikes, nor is it evident that the Board considered this fact determinative. See *Gary-Hobart Water Corp.*, *supra* at 746.

⁶ Our concurring colleague cites the *News Union* case for this interpretation of *Rockaway News*. In fact, the language he quotes, with which we agree, refutes a contention by the union that picket line observance can never be construed as a strike in violation of a no-strike clause. 393 F.2d at 677. The court went on to hold that the Board was warranted in applying its requirement that waiver be expressed clearly and unmistakably, and thus that the Board "was not required to regard the contract language as free from doubt on its face." *Id.* at 678. It concluded that in light of the traditional judicial deference to the Board's expertise in labor relations which "extends to the interpretation of collective bargaining agreements," the Board properly examined bargaining history and other extrinsic factors and was warranted in concluding that, notwithstanding the ambiguous language in the contract, waiver was present.

⁷ Conveniently ignoring this arbitral award, our concurring colleague has challenged us to find that the offer of proof is substantive evidence or admit that his interpretation of *Rockaway News* is correct. Since it is arguable that the Board would have given similar deference to the award had the Court remanded the proceedings, we find it unnecessary to rely solely on the ambiguity concerning the Court's mention of the offer of proof. See *Spielberg Manufacturing Company*, 112 NLRB 1089 (1955). While we would be more comfortable, of course, if the Court had remanded the proceeding after determining that the Board had erred in voiding the entire collective-bargaining agreement due to the fortuitous presence of an unlawful union-security provision, we are no more distressed by this fact than our concurring colleague should be by the Court's specific reference to bargaining history and the arbitral award.

out more, it has been overruled, *sub silentio*, by *Keller-Crescent* and *Gary-Hobart*.⁸

Analysis of a number of Supreme Court decisions under Section 301, particularly *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976), lends further support to our conclusion herein that we were correct in *Gary-Hobart* when we held that broad no-strike clauses, without more, are insufficient to establish waiver of the right of engage in sympathy strikes. Although the Administrative Law Judge in the instant proceeding may have viewed too broadly the Court's holding in *Buffalo Forge* as flatly controlling this case, the rationale therein seems dispositive of the issues here. In that case, the Court ruled that a federal district court does not have jurisdiction to enjoin a sympathy strike pending an arbitrator's determination of whether or not a broad no-strike clause prohibits such strikes, reasoning that the dispute in which the sympathy strikers involve themselves is not arbitrable under any contract to which they are privy. Accordingly, the Court continued, given the premise that no-strike agreements are the *quid pro quo* for the employer's agreement to arbitrate disputes, there can be no implied repealer of the Norris-LaGuardia Act's prohibition of federal injunctions in labor disputes in this context.⁹ The Court did note that a district court could order the parties to arbitrate over the interpretation of the no-strike clause, given the presumption in favor of arbitrability, and could enforce by way of injunction an arbitrator's decision that the no-strike clause barred sympathy strikes.¹⁰ Nevertheless, it is

⁸ Our colleague is plainly in error in suggesting that *Mississippi Gulf Coast Building and Construction Trades Council, et al.*, 222 NLRB 649 (1976), enfd. 542 F.2d 573 (C.A. 5, 1976), resurrected the rule of *National Grinding Wheel*. There, the Board adopted an Administrative Law Judge's finding that a union violated the Act when it fined members who crossed a picket line which was unlawful under Sec. 8(b)(4)(B). In addition, the Board noted that "in any event, the fines for not honoring the picket lines would nonetheless violate Section 8(b)(1)(A) of the Act because they were imposed in the face of valid no-strike clauses in the collective-bargaining agreements." *Id.* at 650. The failure of either the Board or the Administrative Law Judge to analyze the no-strike clause and its underlying bargaining history pursuant to *Gary-Hobart* is of little consequence, since this added rationale for finding a violation was unnecessary to the decision. Although then Member Fanning dissented in *Mississippi Gulf Coast*, he did so because he would not have found the picket line unlawful under Sec. 8(b)(4)(B) and, accordingly, he considered that the union could lawfully fine members who crossed it. Additionally, *International Association of Machinists, Oakland Lodge No. 284, International Association of Machinists and Aerospace Workers, AFL-CIO (Morton Salt Company)*, 190 NLRB 208 (1971), aff'd. in pertinent part 472 F.2d 416 (C.A. 9, 1972), and *Local 1197, Communications Workers of America, AFL-CIO (Western Electric Company, Inc.)*, 202 NLRB 229 (1973), cited by our colleague as additional applications of *National Grinding Wheel*, plainly are inapposite since they do not involve the issue of whether broad no-strike language, without more, proscribes sympathy strikes.

⁹ 29 U.S.C. § 104. For a somewhat different perspective on the *quid pro quo* doctrine, see Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif L. Rev. 663, 757-760 (1973).

¹⁰ Our concurring colleague's suggestion that the Court's acknowledgment of the possibility that an arbitrator could decide that a broad no-strike clause contemplates the prohibition of sympathy strikes requires such an interpretation of the clause here ignores the fundamental distinction between the role of the Board and the role of the courts in collective bargaining. In *United*

clear that the Court reaffirmed its unwillingness to readily infer no-strike obligations as being any broader than the arbitration clauses for which they were bartered.¹¹ In *Gary-Hobart*, decided prior to *Buffalo Forge*, the Board used this same rationale in declining to interpret a broad no-strike clause¹² as barring sympathy strikes, reasoning that the dispute underlying the sympathy strike was not arbitrable under the parties' agreement. We adhere to that reasoning.¹³

Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960), the Supreme Court stated:

The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question . . . for the arbitrator. [*Id.* at 567-568.]

See also *Buffalo Forge*, *supra* at 405. Similarly, in other cases under Sec. 301, arbitrators' decisions, even if unreasonable, are generally final and binding unless there were procedural improprieties in the arbitral proceeding, the arbitrator exceeded his authority under the contract, or the award would involve the parties in unlawful conduct. In part, the extreme deference paid by the courts to arbitration can be explained by the national policy against federal judicial intervention in labor disputes. The Board, however, is not similarly required to abstain pending arbitration, but rather can proceed to resolve contractual issues incident to the determination of whether unfair labor practices have occurred. *N.L.R.B. v. C & C Plywood Corporation*, 385 U.S. 421 (1967); *General American Transportation Corporation*, 228 NLRB 808 (1977). Moreover, it has long been the law that the Board is not bound by an arbitral award which is "repugnant to the purposes and policies of the Act." *Spielberg Manufacturing, supra*. Thus, our concurring colleague simply is in error when he suggests that we, in any way, should be influenced by the Court's hypothetical deference to a hypothetical arbitral award, particularly when the courts have given similar deference to our own interpretations of collective-bargaining agreements. See, e.g., *N.L.R.B. v. C & C Plywood Corp., supra; News Union, supra* at 678.

¹¹ See also *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Company*, 369 U.S. 95, 105 (1962). Our concurring colleague attempts to distinguish these cases by pointing to the fact that neither involved express no-strike clauses, but rather involved the implication of no-strike obligations from arbitration clauses. We believe that the distinction he makes between cases with implied no-strike obligations and those with ambiguous no-strike clauses is specious. The analysis employed by the Court in those cases was first to imply a no-strike obligation and, then, based on the doctrine of *quid pro quo*, to infer the breadth of that obligation as coterminous with the duty to arbitrate disputes. Similarly, as was the case in *Gary-Hobart* and as is the case here, where a no-strike clause's application to sympathy work stoppages is uncertain because it does not mention sympathy strikes, and no evidence is presented that the parties even considered the question, it is appropriate that we examine the arbitration clause in the contract to determine the probable intent of the parties as to the breadth of the no-strike obligation.

In addition, our concurring colleague asserts that after many careful readings of *Buffalo Forge*, he has been unable to find any support for our conclusion that the Court therein reaffirmed the aforementioned principle. However, the majority of the justices responded to the dissenters' suggestion that the Court establish an exception to the statutory prohibition against federal injunctions in labor disputes where a union's violation of its no-strike obligation is "clear" because of unrestricted no-strike language in the contract by stating that "[i]t is incredible to believe that the courts would always view the facts and the contract as the arbitrators would." Thus, the Court implicitly declined to interpret the no-strike clause as any broader than the arbitration clause. *Buffalo Forge*, 428 U.S. at 412.

¹² It is well settled that the Board has authority to interpret collective-bargaining agreements in the course of deciding unfair labor practice cases. See *N.L.R.B. v. C & C Plywood Corp., supra; Mastro Plastics Corp. v. N.L.R.B., supra; News Union, supra*.

¹³ Our concurring colleague asserts that it is irrelevant that the dispute underlying the sympathy strike is not arbitrable, stating that the real issue is

In this case, the Administrative Law Judge found that the Respondent and the Employer had provided for a ban on all "stoppages of work because of any difference of opinion or dispute which arise [sic] between the union and the employer," but that they had agreed to arbitrate disputes only over the interpretation of the agreement. Thus, he concluded that sympathy strikes were not prohibited by the broad no-strike clause. We agree. Moreover, in the absence of express contractual language or unequivocal bargaining history evidencing an intent to waive the right to engage in sympathy strikes, we shall not infer a waiver here. Accordingly, we agree with the Administrative Law Judge that the Respondent did not violate Section 8(b)(1)(A) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, International Union of Operating Engineers, Local Union 18, AFL-CIO, Columbus, Ohio, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

MEMBER PENELLO, concurring in the result:

The root question which divides the Board today is under what circumstances may a union be deemed to have waived the statutory right of employees it represents to engage in a sympathy strike.¹⁴ It so happens that under the particular facts of this case, I concur in the majority's conclusion that the Union never relinquished that right, and therefore did not violate Section 8(b)(1)(A) of the Act by fining two of its members for working during a sympathy strike.¹⁵

whether the work stoppage violates the no-strike clause. Obviously, this begs the question. Our decisions in *Gary-Hobart*, that sympathy strikes are not barred by broad no-strike language, without more, is premised on the presumption, fashioned by the Supreme Court, that when the union gives up the right to strike in return for the employer's obligation to submit disputes to arbitration, it does so only with respect to those disputes which are arbitrable. Sympathy strikers do not strike over whether their no-strike obligation is broad or narrow. Rather, they align themselves with other workers involved in a dispute with another employer (or perhaps the same employer). E.g., *N.L.R.B. v. Southern Greyhound Lines, Division of Greyhound Lines, Inc.*, 426 F.2d 1299 (C.A. 5, 1970). Since that dispute is not arbitrable under the applicable contract, we correctly held that the statutory protection accorded sympathy strikers will not be deemed waived unless the contract expressly so provides, or unless such an intent is manifest from other extrinsic circumstances.

¹⁴ Such right was implicitly recognized by the Supreme Court in *N.L.R.B. v. Rockaway News Supply Company, Inc.*, 345 U.S. 71 (1953). See *Redwing Carriers, Inc., and Rockana Carriers, Inc.*, 137 NLRB 1545 (1962), *enfd.* 325 F.2d 1011 (C.A.D.C., 1963), *cert. denied* 377 U.S. 905 (1964); *N.L.R.B. v. Southern Greyhound Lines, Division of Greyhound Lines, Inc.*, 426 F.2d 1299 (C.A. 5, 1970).

¹⁵ I agree with the majority, for the reasons stated in the Administrative Law Judge's Decision, that the Union violated Sec. 8(b)(1)(B) by fining Supervisor Harold Heselden for performing supervisory work during the sympathy strike.

However, I profoundly disagree with the standard erected by my colleagues for deciding when the right to participate in a sympathy strike has been waived.

A brief review of the important facts will serve to place discussion of the issue in context. Respondent Union was party to a collective-bargaining agreement with Davis-McKee, Inc., a general construction contractor. The labor agreement included the following no-strike clause: "There shall be no stoppage of work because of any difference of opinion or dispute which arise [sic] between the union and the employer."

During the spring of 1975, several members of Respondent Union were employed by Davis-McKee at the so-called Alum Creek construction site. Whalen Erection Company, a subcontractor performing work on the jobsite, had a labor contract with the Ironworkers Union, which expired on May 30, 1975.¹⁶ When the parties failed to reach agreement on a new contract, the Ironworkers struck Whalen and began picketing the construction site on July 8. The picketing continued on most days until July 22. Respondent Union and its members working at the site decided to observe the Ironworkers picket line.

Shortly after the strike began, four "sluice gates" were delivered to the jobsite from the manufacturer. Officials of Davis-McKee asked a member of Respondent Union, whom it normally employed at the site, to return to work at least briefly to "set" the gates so that they would be protected from the weather. He refused, and the union business agent informed Davis-McKee that no members of Respondent Union would cross the Ironworkers picket line. However, Davis-McKee arranged to have two other members of Respondent Union, George Wagner and Richard Welch, do the job on Saturday, July 12.¹⁷ When Respondent Union learned that Wagner and Welch had set the sluice gates for Davis-McKee, it fined each of them essentially for working during the union-authorized sympathy strike.

I.

It is long-settled law that a union may surrender the statutory right of the employees it serves as bargaining agent to engage in sympathy strikes, as well as in direct work stoppages.¹⁸ Where that right has been waived, the law is equally plain that a union may not fine employee-members who refuse to take part in a sympathy job action.¹⁹ The key to solving this case, therefore, lies in determining whether the

¹⁶ All dates herein are in 1975.

¹⁷ Wagner and Welch were regularly employed by another concern, Wander Construction Company.

¹⁸ *N.L.R.B. v. Rockaway News Supply Co., Inc.*, *supra*.

¹⁹ *Local 12419, International Union of District 50, United Mine Workers of America (National Grinding Wheel Company, Inc.)*, 176 NLRB 628 (1969).

no-strike promise given by the Union to Davis-McKee encompassed sympathy strikes.

The same issue of whether the right of employees to engage in a sympathy strike has been waived also comes before the Board in cases where an employer is charged with illegally disciplining or discharging such strikers; if the protected right to strike in sympathy with other employees has not been waived, an employer obviously commits an unfair labor practice by interfering with that right. Nevertheless, the Board has used one standard for measuring the scope of a no-strike clause in such cases,²⁰ but an altogether different test for deciding the issue in cases like the instant one, where a union is alleged to have violated 8(b)(1)(A) by fining employee-members for working during a sympathy strike.²¹ As a not unexpected consequence, the Board has issued decisions discussing waiver of the right to engage in sympathy strikes which are in substantial conflict with one another.²²

Because the issue of whether the sympathy strike right has been relinquished is common to cases arising both under Section 8(b) and under Section 8(a) of the Act, it is appropriate that the same standard be used to decide waiver questions in each context. My colleagues think that the test used in *Gary-Hobart Water Corporation*, *supra*, should henceforth be applied in all cases involving a strike-waiver issue; to the contrary, I believe that such waivers should be judged in accordance with our decision in *National Grinding Wheel*. I base my conclusion upon the following detailed examination of *Rockaway News*, *National Grinding Wheel*, *Gary-Hobart*, and *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*.²³

II.

In *Rockaway News*, a deliveryman named Waugh, who was a member of a union having a collective-bargaining agreement with his employer, refused to cross the picket line of another union at a location where he was supposed to pick up and deliver newspapers. As a consequence, the employer discharged Waugh. The labor contract between the union and the employer, which the Court found to be valid, contained this no-strike provision: "No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto during the term hereof except as against a party failing to comply with a decision, award, or order of the Adjustment Board."²⁴

²⁰ *Gary-Hobart Water Corporation*, 210 NLRB 742 (1974), *enfd.* 511 F.2d 284 (C.A. 7, 1975), *cert. denied* 423 U.S. 925 (1975).

²¹ *National Grinding Wheel*, *supra*.

²² See the comparison, *infra*, of *Gary-Hobart* with *National Grinding Wheel*.

²³ 428 U.S. 397 (1976).

²⁴ 345 U.S. at 79.

The Court held that it was not an unfair labor practice to discharge Waugh, because his refusal to cross the picket line violated this clause. In other words, the Court found that the union had relinquished the right of Waugh and the other employees covered by the contract to engage not only in direct strikes, but in sympathy work stoppages as well. What requires careful consideration, however, is whether the Court regarded the wording of the no-strike undertaking as it appeared in the contract sufficient, without more, to waive the employees' sympathy strike right, or whether essential to its holding were two other factors referred to in its opinion. These factors were an offer of proof concerning the negotiations leading to agreement upon the no-strike provision, and an arbitration award which interpreted the clause.

Respecting bargaining history, the Court noted that the employer *offered to prove* that it had successfully resisted a union negotiating demand that the employees' right to honor picket lines be preserved in the contract, and had won instead union acceptance of the broad no-strike clause. But there was no positive indication that the employer actually was permitted to introduce at the hearing the evidence alluded to in the offer; the Court stated it was at least unclear whether the offer had been accepted or rejected. The Court, therefore, felt confident only in saying that "the arbitrators' interpretation of the contract was in harmony with the offer." (Emphasis supplied.)²⁵ Plainly, then the Court referred to the offer of proof only to show that it was consistent with evidence that definitely had been made part of the record, i.e., the arbitration decision.

An offer of proof is not a substitute for evidence. For that reason, I must conclude that the Court's sympathy strike-waiver finding did not depend, nor could it properly have depended, to any degree at all upon an alleged history of bargaining between the parties. Had the Court deemed it necessary to rely upon the background of negotiations to make that finding, its only recourse would have been to remand the case for receipt of the evidence promised in the offer of proof.²⁶ That it did not do so is, alone, enough to belie any contention that the Court "relied" upon discussions which occurred during negotiations in deciding the case.²⁷

²⁵ *Id.* at 80.

²⁶ See 10 *Moore's Federal Practice*, §103.23, regarding offers of proof. "Even in a nonjury case, only where the record is complete and balanced in its presentation, can an appellate court reverse without remanding." It must equally be true that an appellate court may not rely upon a bare offer of proof without remanding to affirm the judgment of a lower court.

²⁷ It may, however, properly be inferred from the Court's opinion that actual evidence relating to bargaining history on the waiver issue would have been relevant.

In discussing the issue involving the offer of proof in *Rockaway News*, the majority has resorted to what can only be described as the ultimate boot-

That leaves only the arbitration award mentioned by the Court as a possible additional vital element in its finding of a broad waiver of the right to strike. Before charges were filed with the Board, the union took the matter of Waugh's discharge to arbitration. The arbitration panel decided that Waugh had no right to refuse to obey an order to cross the picket line: "[T]he contract between the parties does not specifically permit the refusal by the employee to comply with such an order although other contracts in the industry do contain such a provision."²⁸

This sentence, which the Court quoted from the award, discloses that the arbitrators did not rely upon bargaining history, or upon any other special or additional evidence of the parties' intent, in reaching their conclusions that the contractual no-strike clause banned sympathy work stoppages. Rather, they found that the broadly worded no-strike provision contained no explicit exception authorizing employees to honor picket lines, unlike some labor agreements which did so limit the no-strike promise. Stated otherwise, the arbitrators did not find it necessary to reach beyond the metes and bounds of the literal words of the no-strike clause to uphold Waugh's discharge. Thus, I believe that the Court used the arbitration award only as a convenient makeweight to confirm its own reading of the no-strike provision in the contract.²⁹

I, therefore, conclude that the Court's decision teaches that any no-strike clause as broadly written as that in *Rockaway News* suffices to waive the employ-

strap argument. They state that the decision was based in part upon bargaining history referred to only in an offer of proof because the Board said so in *Gary-Hobart*, *supra*, and in *Keller-Crescent Company, a Division of Mosler*, 217 NLRB 685 (1975), enforcement denied 538 F.2d 1291 (C.A. 7, 1976). Of course, the whole issue being addressed is whether the Board properly interpreted *Rockaway News* in *Gary-Hobart* and in cases which have followed it. The majority has, therefore, reduced its position to the schoolyard type of argument that *Gary-Hobart* is right because it is right.

Further, my colleagues have grossly misconstrued the court of appeals decision in *The News Union of Baltimore v. N.L.R.B.*, 393 F.2d 673 (C.A.D.C., 1968), in stating that the court interpreted *Rockaway News* as depending upon bargaining history. The court decided only that the Board was not legally precluded from examining actual extrinsic evidence concerning the parties' intent in judging the scope of a no-strike clause. Indeed, as noted *infra*, the court strongly suggested that its own view was that a broad no-strike clause on its face prohibits both sympathy and direct work stoppages.

My colleagues must surely concede that a court or Board decision cannot be based upon anything except evidence which has been properly made part of the record in the particular proceeding. I, therefore, ask my colleagues directly whether they regard a mere offer of proof as such evidence. If they do, then they should say so explicitly and state the authority upon which they rely to support the proposition, in order to give guidance to parties in future Board proceedings. If they do not consider an offer of proof as being record evidence, they should frankly admit that my interpretation of *Rockaway News* on this point is correct.

²⁸ 345 U.S. at 80.

²⁹ Indeed, to say that reference to the arbitration award formed an intrinsic part of the Court's holding would be to assume that the Court would have reached a different result, but for the fortuitous circumstance that the issue was arbitrated before unfair labor practice charges were filed. I simply do not think that is a fair reading of the opinion as a whole.

ees' right to engage in sympathy strikes—unless, of course, other relevant evidence, such as bargaining history, reveals a contrary intent by the parties. The United States Court of Appeals for the District of Columbia Circuit has recognized this as the meaning of *Rockaway News*, citing that case as direct authority in support of the following construction of a no-strike provision:

Petitioners point out that there is no explicit reference [in the agreement] to the crossing of picket lines and suggest initially that language which in terms inhibits only a strike is not to be read as restricting the observance of picket lines. But the practical relationship between work stoppages and the honoring of picket lines is so well understood in the industrial climate that we think that a clause of this kind using only the word "strike" includes plant suspensions resulting from refusals to report for work across picket lines.³⁰

III.

Having identified the core holding of *Rockaway News*, I next turn to consideration of *National Grinding Wheel*. The Board decided there that the union violated Section 8(b)(1)(A) when it fined employees for crossing the picket line of another labor organization at the employer's plant. The Board found that the no-strike clause of the collective-bargaining agreement between the respondent union and the employer broadly prohibited strikes,³¹ without distinction between direct and sympathy refusals to work.

The fine imposed by Respondent Local on the members who crossed the picket line was thus a penalty for refusing to participate in a work stoppage in violation of the no-strike clause of Respondent's contract. It is the same in effect as if the fine had been a penalty for refusing to engage in a strike that Respondent had itself authorized and called outright in violation of the no-strike clause.³²

The Board concluded that it would run counter to a basic policy of the statute to permit unions to "penalize members for failing or refusing to participate in a violation of a no-strike clause," and thereby to "provide an incentive to unions and members to violate contracts."³³

³⁰ *The News Union of Baltimore v. N.L.R.B.*, *supra* at 676-677; see *Montana-Dakota Utilities Co. v. N.L.R.B.*, 455 F.2d 1088, 1093 (C.A. 8, 1972).

³¹ The no-strike clause said, "During the term of this agreement, the Company will not conduct a lockout at its plant, and the Union or Local Union will not cause or permit its members to cause any strike or slowdown, total or partial, of work at the Company's plant." 176 NLRB at 628.

³² *Id.* at 630.

³³ *Id.* at 632.

The point of special significance for purposes of this discussion, however, is that the Board cited *Rockaway News* as precedent for finding that the express no-strike provision of the contract, *in and of itself*, served to relinquish the employees' right to take part in a sympathy strike. Indeed, there was no evidence bearing upon whether that right had been waived other than the simple wording of the no-strike clause. For that reason, the Board took pains to declare that it did not interpret *Rockaway News* as turning upon the Court's mention of the offer of proof concerning bargaining history: "The court did not suggest that the no-strike clause's true purport derived from the union's unsuccessful offer of the qualifying clause, but merely [referred to it] to answer any suggestion that the clause might in any way be deemed ambiguous."³⁴

I view *National Grinding Wheel* as an obviously correct application of the Court's holding in *Rockaway News*. And it is noteworthy that the Board has faithfully followed *National Grinding Wheel* in judging strike-waiver issues which have arisen in the context of 8(b) unfair labor practice proceedings.³⁵

IV.

The Board concluded in *Gary-Hobart* that the employer violated Section 8(a)(3), when it discharged office clerical employees who declined to cross the picket line of striking production and maintenance workers at its plant. For two main reasons, the Board rejected the employer's argument that the terminations were legal because the clerical employees had struck in breach of broad no-strike pledges made by their union in its contract with the employer.³⁶ One

³⁴ *Id.* at 630, fn. 9.

³⁵ See, among many cases, *International Association of Machinists, Oakland Lodge No. 284, International Association of Machinists and Aerospace Workers, AFL-CIO (Morton Salt Company)*, 190 NLRB 208 (1971), *affid.* in pertinent part 472 F.2d 416 (C.A. 9, 1972); *Local 1197, Communications Workers of America, AFL-CIO (Western Electric Company, Inc.)*, 202 NLRB 229 (1973); *Mississippi Gulf Coast Building and Construction Trades Council and its Constituent Members, et al.*, 222 NLRB 649 (1976), *enfd.* 542 F.2d 573 (C.A. 5, 1976).

Contrary to the majority, in *Mississippi Gulf Coast Building and Construction Trades Council and its Constituent Members, supra*, the Board squarely applied *National Grinding Wheel* in deciding that two unions violated Sec. 8(b)(1)(A) by threatening to fine employee-members for working during a sympathy strike, even though the only evidence of whether the unions had waived the right of the employees they represented to engage in a sympathy strike was broad contractual no-strike language. The Board stated: "It is well established that where there is a valid, unambiguous, no-strike clause between a union and an employer, such as the Respondents have here, it is a violation of Section 8(b)(1)(A) of the Act for the union to fine members for not participating in a work stoppage," citing *National Grinding Wheel* and subsequent cases. 222 NLRB at 661.

³⁶ There were two relevant clauses. The first stated,

It is expressly understood and agreed that the services to be and being performed by the employees covered by this agreement pertain to and are essential to the operation of a public utility and to the welfare of the public dependent thereon, and in consideration thereof, and of the agreement and conditions herein by and between the Company and the Union mutually agree that during the term of this agreement there shall be no lockouts by the Company and there shall be no strike, stoppages of work or any other form of interference with any of the production or

reason was that pertinent bargaining history indicated that the no-strike provisions were not intended to outlaw sympathy as well as direct strikes. As this extrinsic evidence overcame the literal wording of the no-strike clauses in revealing the parties' intent, the Board rightly decided the case against the employer upon this ground. However, the other justification given for the result marked the birth of a novel, and I now think erroneous, theory of how no-strike clauses should be construed.³⁷

Examining the no-strike clauses in isolation, the Board found them inadequate to waive the right of the employees to engage in sympathy strikes—even though the provisions were equally as broad as those involved in *Rockaway News* and *National Grinding Wheel*. According to the Board, such clauses prohibit only strikes which are *over* disputes that are themselves subject to the grievance and arbitration machinery of the contract. Thus, because a sympathy strike is not caused by a direct dispute between the sympathy strikers and their employer, the Board decided that a broad no-strike provision does not reach such a strike.

Of course, this interpretation of the no-strike obligation squarely conflicted with that in *Rockaway News* and *National Grinding Wheel*; the latter two cases said that an unrestricted no-strike clause, without more, includes sympathy strikes, while the Board, in *Gary-Hobart*, said that such a provision forbids only direct strikes. However, several cases decided by the Supreme Court under Section 301 of the Labor Management Relations Act³⁸ provided what the Board perceived to be a logical link between its factually correct statement that a sympathy strike is not over an otherwise arbitrable grievance, and its legal conclusion that a broad no-strike clause does not encompass sympathy strikes.

In this connection, the Board cited *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Company*,³⁹ for the proposition that a no-strike agreement should not be implied "beyond the area which has been agreed will be exclusively covered by compulsory arbitration." *Gate-*

other operations of the Company by the Union or its members, and any and all disputes and controversies arising under or in connection with the terms of provisions hereof shall be subject to the grievance procedure. . . . [210 NLRB at 743, fn. 4.]

The second clause said,

The Union agrees there shall be no strikes, slowdowns or other interruptions of work by any of its members during the term of the agreement, and both parties agree that any disputes or differences shall be taken up under the Grievance and Arbitration procedures of this agreement. [*Ibid.*]

³⁷ I signed the majority decision in *Gary-Hobart*; and, in view of the evidence relating to bargaining history, I have no doubt that we reached the correct result. However, after careful consideration, I have decided not to adhere any longer to the second rationale underlying *Gary-Hobart*.

³⁸ 29 U.S.C. § 185.

³⁹ 369 U.S. 95, 105.

way *Coal Company v. United Mine Workers of America*⁴⁰ was cited to similar effect. *But in neither case did the collective-bargaining contract at issue contain a no-strike clause at all.* The Court implied in each of these cases a union obligation not to strike only over otherwise arbitrable grievances, because there was obviously no warrant for assuming that the union had agreed to forgo strikes over matters which were not themselves subject to the grievance and arbitration procedure. However, *Lucas Flour* and *Gateway Coal* can hardly be read to mean that, where a union has consented to an express contract provision purporting to ban strikes without limitation, sympathy work stoppages are implicitly exempted from such a clause.⁴¹ Nonetheless, the Board managed to reach the conclusion that even where there is a broad, explicit no-strike clause in a contract, that clause concerns only strikes where the underlying cause of the strike falls within the grievance and arbitration machinery.⁴²

I think the place where the Board erred in *Gary-Hobart* has perhaps best been described as follows:

[T]he Board . . . assumed that because picket line respect is not triggered by an otherwise arbitrable grievance, a work stoppage of this nature presents no question "arising under or in connection with" the agreement as required by the arbitration clause. *But the appropriate question is not whether the sympathy strike or picket line respect was caused by an arbitrable grievance, but whether such a work stoppage is prohibited by the no-strike clause.* Clearly, this is an issue arising "under or in connection with" the interpretation of a part of the agreement—the no strike clause. There-

⁴⁰ 414 U.S. 368 (1974).

⁴¹ I find my colleagues' interpretation of *Lucas Flour* and *Gateway Coal* nearly incomprehensible. The Court in *Gateway Coal* carefully delineated the relationship between no-strike and arbitration clauses in collective-bargaining agreements:

[A]n arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties. [414 U.S. at 382.]

Therefore, as in *Lucas* and *Gateway*, in the absence of a clause dealing expressly with strikes, it is logical to conclude that the parties desired that only disputes made subject to the arbitration machinery of the contract be resolved by that means rather than through work stoppages. But, when the parties have embodied in their agreement a provision describing the no-strike obligation, that clause, along with relevant extrinsic evidence, is plainly the only proper guide for determining whether the employer and the union intended to forbid sympathy as well as direct strikes. The arbitration clause of the contract is not relevant. In fact, in such circumstances, it is not possible to discover from an examination of the arbitration provision whether the no-strike clause was meant to encompass sympathy strikes, because the underlying dispute which causes a sympathy strike, by definition, involves employees other than the sympathy strikers and, therefore, cannot be resolved by arbitration under the sympathy strikers' contract.

⁴² In addition, although wildly inapposite, the Board relied upon *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), where the Supreme Court created a limited exception to the wide anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 101-15, finding that strikes over disputes subject to the grievance and arbitration procedure of a labor contract could be enjoined.

fore, it is a question subject to the conventional arbitration clause involved in the *Gary-Hobart* case. [Emphasis supplied.]⁴³

When the question is thus properly formulated, i.e., did the strike violate the no-strike clause of the contract, the answer in the case of sympathy strikes is to be found by measuring the scope of the clause against those in *Rockaway News* and *National Grinding Wheel*. The cause of the strike is not relevant, and it plainly begs the question to say that, because a strike is not over an otherwise arbitrable matter, the parties did not intend a broad no-strike clause to encompass sympathy strikes.⁴⁴

Regrettably, however, the Board has adhered to *Gary-Hobart* in deciding waiver issues raised in cases where an employer is accused of committing unfair labor practices by disciplining or discharging sympathy strikers.⁴⁵ The majority has now compounded the mistake made in *Gary-Hobart* by extending its application to 8(b) cases involving alleged waivers of the right to strike. But I think it is about time the Board recognized, as I have, that part of the rationale for the *Gary-Hobart* decision was wrong, and overruled it to the extent that it is inconsistent with *Rockaway News* and *National Grinding Wheel*.

V.

I hardly agree with my colleagues' assertion that *Buffalo Forge Company v. United Steelworkers of America, supra*, is "dispositive in resolving the issues here." However, to the extent that it is relevant, I find persuasive authority in the decision for the point of view I have outlined.

In *Buffalo Forge*, the employer sought an injunction against a sympathy strike, and also an order compelling arbitration on the issue of whether the

⁴³ Smith, *The Supreme Court, Boys Markets Labor Injunctions, and Sympathy Work Stoppages*, 44 Chicago L. Rev. 321, 356-357 (1977) (*hereinafter* Smith).

⁴⁴ The majority's "reasoning" in fn. 13 of their opinion forms a geometrically perfect circle. My colleagues first state that they "presume" that even no-strike clauses, which by their terms ban strikes without qualification, nevertheless are intended to prohibit strikes only over otherwise arbitrable grievances. They then congratulate themselves on having correctly decided that such clauses do not waive the right of employees to engage in sympathy work stoppages, because the underlying cause of a sympathy strike is not arbitrable. Thus, assuming the point in issue, the majority renders its legal conclusion based upon a "presumption" it has itself created out of thin air. (My colleagues wrongly assert that the Supreme Court, rather than themselves, "fashioned" this presumption. In no case has the Court decided that, notwithstanding the presence of a broad no-strike clause in a collective-bargaining agreement, such a provision is presumed to prohibit strikes only over disputes which are themselves subject to the arbitration procedure of the contract.) Far from benefiting from such a presumption, a party asserting that a contractual provision which, on its face, states that all strikes are prohibited does not include sympathy strikes should bear the burden of showing that the intent of the parties was contrary to the plain meaning of the words used to express that intent.

⁴⁵ See, e.g., *Keller-Crescent Company, a Division of Mosler*, 217 NLRB 685 (1975), enforcement denied 538 F.2d 1291 (C.A. 7, 1976).

strike violated the broad no-strike clause present in its labor contracts with the sympathy strikers' union.⁴⁶ The Court acknowledged that the employer was entitled to the order requiring arbitration.

Each of the contracts between the parties also has an arbitration clause broad enough to reach not only disputes between the Union and the employer about other provisions in the contracts but also as to the meaning and application of the no-strike clause itself. Whether the sympathy strike the Union called violated the no-strike clause, and the appropriate remedies if it did, are subject to the agreed-upon dispute-settlement procedures of the contracts and are ultimately issues for the arbitrator. . . . The employer thus was entitled to invoke the arbitral process to determine the legality of the sympathy strike and to obtain a court order requiring the Union to arbitrate if the Union refused to do so. . . . Furthermore, were the issue arbitrated and the strike found illegal, the relevant federal statutes as construed in our cases would permit an injunction to enforce the arbitral decision.⁴⁷

But the Court went on to say, "[I]t does not follow that the District Court was empowered to enjoin the strike pending the decision of the arbitrator, despite the express prohibition of Sec. 4(a) of the Norris-LaGuardia Act against injunctions prohibiting any person from '[c]easing or refusing to perform any work or to remain in any relation of employment.'"⁴⁸ The Court then held that, because of the stringent limitations placed upon the issuance of federal injunctions in labor disputes by the Norris-LaGuardia Act, only strikes which are over disputes themselves subject to the grievance and arbitration procedure of a labor agreement may be enjoined, citing *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, *supra*.

From all this, it is too evident for cavil that the Supreme Court merely decided in *Buffalo Forge* that it would not broaden the scope of *Boys Markets* to allow injunctions against sympathy strikes. The Court did not deal with the precise question concerning us here, i.e., did the strike breach the no-strike clause of the contract, as it explicitly preserved that issue for decision by the arbitrator. Consequently, despite many careful readings of the opinion, I have been unable to locate any authority for the majority's con-

tion that, "[T]he Court implicitly declined to interpret the no-strike clause as any broader than the arbitration clause."⁴⁹

However, close analysis of the Court's opinion discloses some support for the view that a broad no-strike clause, such as that involved in *Buffalo Forge* and other cases which we have discussed, should be interpreted as forbidding both sympathy and direct strikes. Thus, the Court stated, "[h]ad the contract [at issue in *Buffalo Forge*] not contained a no-strike clause or had the clause expressly excluded sympathy strikes, there would have been no possible basis for implying from the existence of an arbitration clause a promise not to strike that could have been violated by the sympathy strike in this case."⁵⁰ To me, this implies that an unrestricted no-strike clause which does not, by its terms, exempt sympathy strikes is an undertaking by the union, on behalf of the employees it represents, not to engage in sympathy strikes.

Further, relying upon the opinion as a whole, at least one scholar has likewise read *Buffalo Forge* as implying that a broad no-strike provision is meant to prohibit sympathy work stoppages.

The majority in *Buffalo Forge* implicitly recognized that the scope of grievance-arbitration procedures and no-strike clauses should not be presumed to be coterminous in the context of sympathy strikes and respect for picket lines. Although prearbitration injunctive relief against the sympathy strike was not ordered, the majority ruled that the dispute over the scope of the no-strike clause was arbitrable. Thus the Court left the arbitrator free to construe the no-strike clause as prohibiting sympathy strikes, even though the dispute that caused the work stoppage was not arbitrable. . . . This suggests that, unless the agreement specifically so provides, an otherwise unrestricted express no-strike clause should not be construed as coextensive with the scope of grievance-arbitration provisions when the disputed issue concerns the permissibility of a sympathy work stoppage.⁵¹

Based on the foregoing, I respectfully suggest that my colleagues have badly misread *Buffalo Forge*.

⁴⁶ Two union locals represented the sympathy strikers. Each collective-bargaining contract provided, in relevant part, that "There shall be no strikes, work stoppages or interruption or impeding of work. No Officers or representatives of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activity." 428 U.S. at 399, fn. 1.

⁴⁷ *Id.* at 405.

⁴⁸ *Id.* at 410.

⁴⁹ My colleagues quote the following statement from the Court's opinion to support this assertion: "It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would. . . ." 428 U.S. at 412. My only comment is that one might as well select at random a sentence from a daily newspaper and state that it supports the majority's construction of *Buffalo Forge*, as to offer this statement as authority for the proposition that even an unqualified no-strike clause should be read only as waiving the right of employees to strike over matters themselves subject to the arbitration procedure.

⁵⁰ 428 U.S. at 408.

⁵¹ Smith at 357.

VI.

I put forward today only a simple, seemingly self-evident, proposition. It is this: Where the parties to a collective-bargaining contract embody in the agreement a clause stating essentially that there shall be no strikes during the term of the agreement, it means that there shall be no strikes during the term of the agreement—unless extrinsic evidence indicates that the parties intended otherwise. Any questions over whether a clause is sufficiently broad to waive generally the employees' right to strike should be resolved by comparing the provision with those in *Rockaway News* and *National Grinding Wheel*. Of course, to every rule there are exceptions. Such an unrestricted no-strike clause would not, naturally, relinquish the right of the employees to strike in protest of serious unfair labor practices committed against them by the employer,⁵² or even to cease work as a result of the commission on such unfair labor practices against other employees of the employer.⁵³ Further, a broad no-strike promise would not, in my view, deprive employees of the right to strike due to "abnormally dangerous conditions for work," as that right is specially protected by Section 502 of the Labor Management Relations Act.⁵⁴ Finally, I do not foreclose the possibility that there may be other situations, which do not now come to mind, where it would be inappropriate to find that an unlimited no-strike clause surrendered altogether the employees' right to strike.

VII.

I now come full circle to deciding this case upon its facts. Recalling the terms of the no-strike clause contained in the labor contract at issue,⁵⁵ it is apparent that Respondent Union waived only the employees' right to strike over matters in direct dispute between itself and Davis-McKee. Unlike the unions in *Rockaway News* and *National Grinding Wheel*, Respondent clearly did not consent to a broad provision purporting to prohibit all strikes. It therefore follows that Respondent did not violate the Act by fining Wagner and Welch for refusing to take part in the sympathy strike, because the strike was not in breach of its contract with Davis-McKee.⁵⁶ For that reason only, I

agree that the 8(b)(1)(A) allegations of the complaint should be dismissed.

where the right to engage in sympathy strikes had not been waived. The Board concluded, "Respondent's levying fines on the named employees for crossing the picket line did not tend to compel a breach of the no-strike prohibition in contravention of the Act's policies." 190 NLRB at 210.

DECISION

STATEMENT OF THE CASE

JOHN M. DYER, Administrative Law Judge: International Union of Operating Engineers, Local Union 18, AFL-CIO, herein called the Union, Local 18, or the Respondent, was charged by C. F. McKee, Jr., in Case 9-CB-3146, filed on January 16, 1976,¹ and Davis-McKee, Inc., of which C. E. McKee, Jr., is president, in Case 9-CB-3201, filed on March 10, with violating Section 8(b)(1)(B) of the Act by fining Supervisor Harold Heselden, and Section 8(b)(1)(A) and 8(b)(4)(i) and (ii)(B) by fining two union members who allegedly crossed a picket line although the Union and Davis-McKee, Inc., herein called the Company, had a contract which included a no-strike clause.

On May 12, 1976, the Regional Director issued an order consolidating cases, a consolidated complaint and notice of hearing which alleged that Respondent violated Section 8(b)(1)(A) and 8(b)(1)(B) of the Act. Respondent's timely answer admits the jurisdictional and commerce allegations, the status of the union and its representatives, that it is the exclusive representative of certain employees of the Company and has a contract with the Company which embodies a no-strike clause, but denies that it violated the Act or restrained and coerced its members or the Company by trying, and imposing the fines on, the three individuals.

The hearing in this case took place before Administrative Law Judge Wellington Gillis in Columbus, Ohio, on August 2 and 3, 1976. The parties thereafter filed briefs and in early 1977, Judge Gillis died. The parties were notified of this death and given alternatives as to how the case could be concluded. The parties agreed that the Chief Administrative Law Judge should appoint another Administrative Law Judge to prepare and issue a Decision on the record made before Judge Gillis. Thereafter, I was appointed and the parties so notified. The record demonstrates that the parties were given full opportunity to appear and examine and cross-examine witnesses and to argue orally. The three parties have filed briefs which have been carefully considered.

Based on the transcript and exhibits in this case, I make the following:

FINDINGS OF FACT

1. COMMERCE FINDINGS AND UNION STATUS

Davis-McKee, Inc., is an Ohio corporation engaged in the construction business as a general contractor and during the past year purchased goods which were shipped to it

⁵² *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956).

⁵³ See *C. K. Smith & Co., Inc.*, 227 NLRB 1061 (1977), enf'd. 569 F.2d 162 (C.A. 1, 1977), to the extent the reasoning therein is consistent with that expressed in this opinion.

⁵⁴ 29 U.S.C. § 143. See *Gateway Coal Company v. United Mine Workers of America*, *supra*.

⁵⁵ The clause, as noted, said, "There shall be no stoppage of work because of any difference of opinion or dispute which arise [sic] between the union and the employer."

⁵⁶ See *International Association of Machinists, Oakland Lodge No. 284, International Association of Machinists and Aerospace Workers, AFL-CIO, supra*, in which the Board upheld the lawfulness of union fines in a similar case

¹ Unless stated otherwise, the events herein occurred in the last half of 1975 and the early part of 1976.

in Ohio directly from outside the State and were valued in excess of \$50,000.

The Company and Respondent admit, and I find, that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICE

A. *Background and Facts*

Charles McKee is the president of the Company and has as his vice president of operations, L. S. Davys. Both of these men previously worked at Wander Construction Company, herein called Wander, where McKee was president. Apparently, McKee left Wander in the early 1970's and started the present Company. Harold Heselden had worked for Wander under Davys and McKee for some 10 years or so as the superintendent of equipment. George W. Wagner, a crane operator, testified that he had worked for Wander for a number of years, was still employed by that company in the summer of 1975 and had known Heselden and Davys for about 20 years.

Heselden ceased his employment with Wander on Friday, June 15, 1973, and on the following day, filed a registration card with Local 18. His memory was that on the following Monday, June 18, 1973, he started as a mechanic with the Company but according to the Union's cards, his referral was for the Monday after that, June 25, 1973. His registration card and his referral both listed him as a mechanic. Heselden states that he worked as a mechanic for the Company through 1973 and in the winter of 1973-74 became the Company's equipment superintendent because it had grown to that point. McKee and Heselden both testified that Heselden had received authority from McKee to hire and fire employees and exercised that authority, decided whom to lay off and whom to recall, handled minor disputes and grievances, and kept time records for the employees who worked under him. It was estimated that during summer, the busiest time, Heselden would have from 9 to 15 employees working under him in and out of the shop. Some were mechanics (Local 18 members), some were laborers and some were from other crafts, including truckdrivers. It was his responsibility to oversee the employees and keep in proper maintenance all the operating equipment, trucks, loaders, etc., and maintain maintenance records. When laying employees off, Heselden completed the layoff forms required for Local 18 members and signed them.

There is no contention, prior to late 1975, that the Union was ever informed that Heselden was a supervisor. In fact, at an unrelated prejob conference, Heselden was listed by the Company as a master mechanic, a position which is listed under the contract with specific hourly rates. The contract does not set forth with any specificity whether the position of master mechanic is a supervisory position or not, but has some language stating that the master mechanic "shall be answerable to the employer." I cannot, on that sole basis, determine whether the position is considered by the parties to be supervisory or of a leadman capacity.

It was stipulated by the parties that Heselden was paid

on a weekly basis but that for purposes of allocation to various jobs, his salary was broken down to an hourly rate. His salary closely approximates that of a master mechanic but Heselden receives bonuses and does not receive overtime. As he put it, when he became the equipment superintendent or assistant superintendent, he parked his truck and his tools. It should be noted that the union contract states that a supervisor cannot perform manual work which would have the effect of displacing an operating engineer. It would appear from Heselden's testimony that he did not use the tools and that he operated as a supervisor.

Respondent's evidence on Heselden's status is peripheral and does not contradict the specific testimony regarding Heselden's duties and performance. Therefore, I find that his duties and performance qualify Heselden as a supervisor within the meaning of the Act. The fact that Respondent may pay amounts into the Union's fringe benefit funds, on Heselden's behalf, indicates only that Heselden, with Respondent's acquiescence, is maintaining his membership in the Union and that the Company is making contributions for him to the various health and welfare pension funds operated with the Union.

It is quite possible that the Union did not realize that Heselden was a company supervisor at the time it originally undertook the actions against him and it may have been unpersuaded of his supervisory status when it pursued those actions to finality, but its beliefs do not overturn the facts and do not constitute a defense.

In April 1975, the Company began constructing a pumping station at Alum Creek as the general contractor and had various crafts working for it, including operating engineers, carpenters, laborers, cement finishers and teamsters. The Company also had a subcontract with Whalen Erection Company, herein called Whalen, for the placement of reinforcing steel. Whalen had a contract with the Ironworkers Union which expired on May 30, 1975. In June, the Ironworkers struck and began picketing at the Alum Creek construction site on July 8. Pickets were at that site on most days until July 22.

The Company had one or more cranes at this construction site and had employed a referred crane operator from Local 18 named Sturgeon, who had as his assistant or oiler, an employee named Mayberry. The Company stated that there was one more Local 18 rank-and-file member working for it when the pickets from the Ironworkers appeared at the site. Sturgeon, Mayberry and the other employee honored the Ironworkers' picket line and did not report to work from July 8 until July 22.

On Thursday, July 10, a truck carrying four 60-inch sluice gates came to the jobsite to deliver the gates from the manufacturer in Massachusetts. The gates, according to McKee, weighed some 3,000 to 4,000 pounds apiece and needed to be protected from the weather. McKee stated that William Christian, a district representative of the Union, was called regarding the problem and was asked to have the employees report to work to set these gates, stating that Local 18's strike was of a secondary nature and that there were no Ironworkers on the job. According to McKee, Christian said he did not know if the picket was legal or not and had not decided to tell the Local 18 members whether to go back to work. McKee had the truck-driver return to the job with the gates the following day and

contacted crane operator Sturgeon, asking him to come in and set the gates. According to McKee, Sturgeon refused to come in, saying that there was a picket at the job. McKee said he then told Vice President Davys to contact Wagner, whom they had known for a long time, and see if Wagner would come in on Saturday and set the gates.

Company Vice President Davys testified that he called employee Sturgeon and asked him to set the sluice gates, stating that they had to be protected from the weather. Davys said that Sturgeon told him his business agent told him not to cross the picket line. Davys then called the union hall and talked to Christian who told him that Sturgeon could not cross the picket line and that the men (Local 18 members) would not do so. Davys corroborated McKee that McKee had asked him to call Wagner to come in to work on Saturday, July 12. He stated that he called Wagner but was not sure that he got him.

Harold Heselden testified that on July 11, Davys called Wagner's house at about 4 p.m., and left a message asking Wagner to return the call and speak to Heselden. Davys asked Heselden to wait for the telephone call and to ask Wagner to come in and work on Saturday and set the gates and if he wanted an oiler to get one. Heselden said Wagner called around 6 p.m. and he told Wagner that McKee wanted a favor of him, to come in on Saturday and set these four sluice gates. Wagner said he would do so since it would only be a couple of hours' work and when asked whether he wanted his oiler to help him, he replied yes. Heselden then called Richard Welch who was the oiler for Wagner at Wander. He told Welch that Wagner was going to work at Alum Creek the next day for a couple of hours and wanted him to work with him. Welch agreed to do so.

On Saturday, July 12, Wagner and Welch operated the Lima crane and set the four sluice gates in about 2 hours. There were no pickets at the construction site while they were there. Heselden was also at the construction site, stating that he had been called about a "loader" and went to check it out and found it had a dead battery.

Some 2 weeks later, Union Business Agent Jake Buckles came by the job where Wagner and Welch were working and spoke to Wagner. He asked Wagner if he had set the sluice gates at Alum Creek. Wagner replied he had. Buckles said that Wagner was in trouble and probably would get a fine out of it, that he would be before a union board. Wagner replied that he did not know that he had done anything wrong.

Richard Welch testified that some 2 weeks or so after working on that Saturday, Wagner told him a union business agent had been on the job and had "seen them running the rig" and that they were in deep trouble and were going to get a big fine. Thereafter, Wagner and Welch each received a letter from Union District Representative William Christian, dated August 2, stating that the Union had received complaints about their violating the working rules and requested them to be at an advisory board meeting on Monday, August 4, at 7:30 p.m. Welch and Wagner went to the meeting. The members of the advisory board, numbering over 20, asked a number of questions of Wagner and a few questions of Welch. They asked about their having a private contract with the Company, about their bypassing the referral system, how long they had been in the Union, who called them, why they performed the job, and if they

did not know they were not supposed to cross a picket line. Wagner and Welch replied that they did not think what they had done was wrong, did not know that anyone was assigned to that crane, and that it looked like it had not been moved for some time. They stated the meeting lasted approximately half an hour.

William Christian, by a letter dated August 5, wrote to Heselden in virtually the same language, stating that he had received complaints about Heselden violating the working rules and requested that he be present at the next advisory board meeting to be held on September 2 at 7:30 p.m.

On August 29, the recording-corresponding secretary of the Union sent identical letters to Wagner and Welch, enclosing copies of charges which had been filed against them, stating that their trial before the membership was scheduled for October 13 and that they must answer the charges not later than September 27, giving them an enclosed form for them to answer. The charges were signed by Ariel Sturgeon and were identical except for the names and their jobs and were as follows:

On Saturday, July 12th, Mr. Welch who is employed by R. W. Wander Construction Company did knowingly cross the picket of the ironworkers that was put up on July 8th and remained until July 23, 1975. I was informed by several witnesses that said person in question did oil on Lima 50C crane for Davis McKee at Alum Creek Pumping Station to set gates.

I, Ariel Sturgeon am employed by Davis McKee to operate Lima 50C crane and Al Mayberry is employed to oil on said crane. Al Mayberry states he did not oil on this crane on July 12, 1975.

Mr. Welch by-passed the referral and obtained his own employment. Mr. Welch sought and accepted work held by me.

Wagner and Welch received help from the Company's attorney and answered the charges in virtually identical language, denying that the construction site was picketed, asserting they did not know whether Sturgeon was employed by the Company or not, denied bypassing the referral system and added that Sturgeon had voluntarily withheld his services so that the referral business was not applicable. They further complained that the charges were not specific and did not meet the constitutional requirements and stated that the picket was illegal, unsanctioned, and was not there.

In the interim, Heselden attended the advisory board meeting in September and was asked if he had worked on that Saturday (July 12) and if he had been paid. He answered that he had worked and had not been paid. He was told he was entitled to his 8 hours' pay and had apparently entered into a private contract with the Company and had bypassed the referral system by calling in Wagner and Welch and that they had crossed the picket line. Heselden said he probably agreed with some of the things that were said and told the members of the advisory board what the situation was in regard to the necessity for placing the gates. He stated he was then excused for some 15 minutes and called back and told that he had been found guilty and was fined \$600 and had to attend 8 of the next 12 union membership meetings. Heselden returned to the union headquarters the next day, paid his fine, and signed a docu-

ment which stated that pursuant to the charges brought against him by the International Union of Operating Engineers and subsequent to a fair pretrial hearing, he agreed that he had violated article XXIII, subdivision 7, section E, of the operating engineers' constitution and article X, sections 2, 8, and 14 of Local 18's bylaws and agreed in settlement of those violations to pay a \$600 fine and attend the next 8 out of 12 meetings. He asked for and received a copy of the constitution at that time. He testified that after reading it, he felt that the decision finding him guilty was illegal and on September 30, filed an appeal asking that this settlement be set aside and asking for a proper trial after proper charges. The business manager of Local 18 responded on October 27, setting aside the settlement and granting him a trial, stating that the charges would be sent to him and further noting that his fine would be retained pending the final outcome of the trial. On November 3, the recording-corresponding secretary of the Union sent charges to him notifying him that a pretrial hearing would take place on Monday, December 1. The charges accompanying the letter were signed by William Christian and were as follows:

On July 12, 1975, Brother Harold Heselden, Master Mechanic for Davis McKee, did knowingly violate the Constitution and By-Laws of Local 18 by:

1. Wronging a fellow member of Local 18 in by-passing the referral system and hiring George Wagner and Richard Welch to work on above sited job.
2. Allowing and inviting two members to accept a position held by members who were not properly laid off. Inasmuch as Brothers Sturgeon and Mayberry were off the job due to an ironworkers strike.
3. Entering into a private contract with Davis McKee and working on this date for nothing. Also, allowing Brother Wagner and Welch to work for nothing and depriving Brother Sturgeon and Mayberry a days pay.

Heselden received help from the Company's counsel and answered the charges, denying that he had violated any parts of the constitution or bylaws and noting that the charges were improper, that they did not set forth the things specifically; he affirmatively pleaded that if any of the employees were off work, it was because of an unsanctioned strike, and that the employees had been obligated to work and that as a supervisor for the Company, his actions were not subject to penalties.

On October 6, Wagner and Welch attended an advisory board meeting. According to Earl Erwin, president of Local 18, who conducted the meeting, a pretrial hearing was held and Welch and Wagner were asked some questions about the charges. Erwin then asked them if they wanted the advisory Board to hold the trial and after they had conferred, they agreed to allow the advisory board to hold the trial rather than to have a trial before the membership.

Wagner and Welch said they were asked questions by the advisory board and replied that there was no picket there, that they did not know that there had been any picket line at that spot, and merely had been asked to do a favor and had done it. They did not know that they were hurting anybody or that anybody was assigned to that "rig." Welch acknowledged that they were asked to agree to trial by this advisory group and that after conferring, he and Wagner

did agree. They were then asked questions regarding the picket line or if they had a private contract. Bypassing the referral system was also mentioned and they denied violating the constitution and again explained what they had done.

Erwin stated that they were specifically told that if they agreed, the decision of the advisory board would then be final and he then constituted that advisory group as a trial panel after having Wagner and Welch sign an agreement to such procedure. He stated that when they convened as a trial panel, the charges preferred by Sturgeon were read as well as their answers to the charges, that Wagner and Welch made their statements as to what had occurred and questions were asked of them. Erwin agrees that the topics testified to by Welch and Wagner were raised by various members of this trial group. Thereafter, Wagner and Welch were asked to wait in the hall and Erwin testified that at that time he told the advisory board that it was possible that neither Wagner nor Welch knew anything about the strike and therefore the advisory board should only consider violations of the referral system.

After some 15 minutes, Wagner and Welch were recalled to the room. The charges were again read to them and it was stated that they had been each found guilty and were fined \$500 and were to pay Sturgeon and Mayberry their wages for a day because of the work they lost. They were also told that they must thereafter attend 8 out of the next 12 union meetings.

On November 1, they each paid the fine and amount of wages and received from Christian; Welch for \$598.52 and Wagner for \$631.88.

Pursuant to notice, on December 1, Heselden appeared before an advisory board group for pretrial. Local 18 President Erwin conducted the meeting. According to Heselden, Erwin said this is the case of Heselden that we talked about on Saturday and asked whether Heselden was willing to allow the advisory board to judge the case on the merits rather than take it before the membership. Heselden answered no, testifying that he thought they had made up their minds, and a date of January 12 was set for trial before the general membership.

At the January 12 meeting, about 100 members were present and the charges and answer were read and then Heselden read his statement. President Erwin asked some questions. The charges were read again. Heselden asked if three ballots were to be taken since there were three charges against him. Erwin replied that they were only interested in the first charge, that of bypassing the referral system and hiring the two men. According to Heselden, 84 voted guilty, 24 voted not guilty and 5 were void.

On January 19, Heselden received a letter from the financial secretary of Local 18 stating that he had been found guilty at the meeting on January 12 and a fine had been set at \$2,000, \$1,000 of which was suspended provided that he conformed to and abided by the constitution and that no further charges be brought against him. He was also required to attend 8 of the next 12 regular district membership meetings. Since he had previously paid \$600, they notified him that he needed to pay \$400 to satisfy the amount of the fine and that under the constitution, and that they could not accept any dues from him until the fine was paid.

He was advised that he had a right of appeal to the general executive board.

B. Contentions of the Parties

In regard to the fines against Wagner and Welch, the Union relies on *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976), and contends first that the no-strike clause in its contract with the Company is not applicable to a sympathy strike and that without an applicable no-strike clause, even if Wagner and Welch were fined for working behind a picket line, there is no violation. Second, the Union contends that if there were an applicable no-strike clause, its fines against Wagner and Welch were for their nonuse of the referral system rather than for working behind a picket line and, in that regard, it would be an internal matter within the Union's province and would not violate the Act.

In regard to the 8(b)(1)(B) violation, Respondent claims that Heselden was not a supervisor and was not proven to be by General Counsel and that it had never been put on notice that he was anything other than a master mechanic, which position it contends, comes within the jurisdiction of the Union and is not supervisory.

General Counsel and the Charging Party assert that the no-strike clause is applicable to the situation regarding Wagner and Welch and that they were fined for crossing the picket line, relying on *Local 12419, International Union of District 50, United Mine Workers of America (National Grinding Wheel Company, Inc.)*, 176 NLRB 628 (1969), and subsequent Board cases. Despite Respondent's testimony that in their absence, the trial board members were told to consider only the nonuse of the referral system, the General Counsel and the Charging Party maintain that first, neither Wagner nor Welch was ever told of this and that they were found guilty of all the charges which would include working behind the picket line. They state that, in the long run, the phrase used for their fine was merely a distinction without a difference since the union officials ordered the picket line to be honored and stated that Local 18 members would not cross it, that no referrals would have been made by the Union, and that the real essence of the matter is that Wagner and Welch worked during that time.

In regard to Heselden, General Counsel and the Charging Party maintain that Heselden's uncontradicted and corroborated testimony in regard to his duties clearly establishes him as a supervisor and under the Board's interpretation of *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641, et al.*, 417 U.S. 790 (1974), that Heselden in the performance of supervisory functions is immune to union discipline. They further assert that there was no duty on the Company or Heselden to advise the Respondent that he was a supervisor.

C. Analysis and Conclusions

General Counsel and Respondent basically begin with *Local 12419, Mine Workers (National Grinding Wheel)*, 176 NLRB 628, *supra*, and follow the line of cases through *Mississippi Gulf Coast Building and Construction Trades Council, et al. (Roy C. Anderson, Jr., Inc.)*, 222 NLRB 649 (1976), in maintaining the position that a fine of a member for

crossing a picket line where there is a no-strike clause violates the Act. In a succeeding case, the Board stated in *International Alliance of Theatrical Stage Employees (RKO General, Inc., WOR-TV Division)*, 223 NLRB 959, 960 (1976), that "Section 8(b)(1)(A) is also violated when a union fines members for refusing to honor a lawful picket line established by a sister union where the union's collective-bargaining agreement contains a valid no-strike clause. In such circumstances, the union's action frustrates the Act's fundamental policy of adhering to collective-bargaining agreements and resolving labor disputes without resort to work stoppages." This statement is a part of the dictum of that case which was issued April 19, 1976.

The Union relies on *Buffalo Forge, supra*, which issued July 6, 1976, and concerned the question of whether an injunction should issue to enjoin a sympathy strike. In that case, there was a dispute between the union and the company as to whether the no-strike clause in their contract prevented a sympathy strike and the employer sought arbitration and an injunction enjoining the strike pending arbitration of that issue. The Court distinguished that situation from *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), by noting that the contract in *Boys Markets* made it clear that the strike violated the no-strike clause in their contract and consequently the Court in that case held that the union could be enjoined from striking over a dispute which it was bound to arbitrate. The Court went on to give the rationale behind *Boys Markets* and stated that *Boys Markets* did not control in the *Buffalo Forge* case. In *Buffalo Forge, supra* at 407-408, the Court stated, "that the strike was not over any dispute between the union and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issue underlying it was subject to the settlement procedures provided by the contracts between the employer and respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain. Thus, had the contract not contained a no-strike clause or had the clause expressly excluded sympathy strikes, there would have been no possible basis for implying from the existence of an arbitration clause a promise not to strike that could have been violated by the sympathy strike in this case. *Gateway Coal Co. v. Mine Workers, supra*, at 382." The Court said in footnote 10, page 408, "To the extent that the Court of Appeals, 517 F.2d, at 1211, and other courts . . . have assumed that a mandatory arbitration clause implies a commitment not to engage in sympathy strikes, they are wrong. . . . The critical determination in *Gateway* was that the dispute was arbitrable. This was the fulcrum for finding a duty not to strike over that dispute and for enjoining the strike the union had called."

In the contract in this case between Local 18 and the Company, the no-strike clause (in paragraph 89) is as follows: "There shall be no stoppage of work because of any difference of opinion or dispute which arise (sic) between the union and the employer." The next section dealing with the grievance procedure states: "In the event any differences of opinion or any grievances concerning the interpre-

tation of the Agreement arise during the term of this Agreement, an earnest effort shall be made to settle the differences or grievances in the following manner." There then follows the manner in which the grievance procedure is to act.

The contractual language brings this case clearly within the ambit of *Buffalo Forge*. The no-strike clause deals only with differences of opinions or disputes between Local 18 and the Company and does not deal with sympathy actions or ban any or all strikes. Since sympathy strikes are not banned by this contract, I am constrained to agree with Respondent and the General Counsel that absent an applicable no-strike clause, there can be no violation of the Act in this circumstance. Therefore, it is clear that I must follow the Supreme Court's lead and ignore the Board's dictum in *IATSE* and *RKO General* and conclude that Section 8(b)(1)(A) has not been violated in this instance, and dismiss the 8(b)(1)(A) allegation, and I so conclude and find.

The situation might be different if an 8(b)(4)(B) violation could be found since then an illegal secondary strike would be found. Although such a charge was initiated, it was not pursued and we have here only the elements of 8(b)(1)(A) and 8(b)(1)(B).

Assuming, *arguendo*, that the Board may disagree with this finding and conclude that the no-strike clause was binding in this situation, I would, in such an event, have agreed with the contentions of the General Counsel and the Charging Party that making a guilty finding on all the charges and not disclosing that the guilty verdict was solely on the nonuse of the referral system has not satisfied the Union's duty to the individuals and has led them and all other members to believe and conclude that they were found guilty on all the charges and that the fines were for the violations as charged which include working behind the picket line. I would find in such an event that Section 8(b)(1)(A) had been violated in regard to Wagner and Welch.

The 8(b)(1)(B) allegations rest on a completely different basis. Here, under the Board's current interpretation of *Florida Power & Light v. I.B.E.W.*, *supra*, the question simply is whether Heselden was a supervisor within the meaning of the Act and performing supervisory functions for which he was fined by Local 18. Local 18 maintains that it had no knowledge that Heselden was a supervisor in the Company's employ when it fined him. It states that all the evidence it had before it, e.g., the Company's checking off of 1 percent of Heselden's pay for fringe benefit contributions, Heselden's continuing to pay his dues, and the fact that he was listed by the Company in a prejob conference as a master mechanic and was so entitled by Wagner during Wagner's union trial, demonstrates that his position was that only of a master mechanic or mechanic, which come within the unit. Respondent also points to the salary made by Heselden, that it approximates that of a master mechanic.

The Charging Party and General Counsel point to the uncontradicted testimony of McKee, Davys, and Heselden, that some months after beginning work with the Company, Heselden was promoted and made a supervisor and given specific supervisory duties and an all-year job. There is no question but what the duties that were testified to by them establish a supervisory position. In addition, Heselden, ac-

ording to his testimony, once he became a supervisor, did not operate a truck and put aside the tools, which is in keeping with the contractual provision that supervisors are not to perform work with the tools and thus deprive an operating engineer of a job. Heselden, in addition to hiring, firing, and laying off, was also empowered to write the lay-off slips required for operating engineers who are terminated so that they can register for referral by the Union. There is no contention that Heselden was performing other than supervisory work while he was on the premises on July 12, or in calling Wagner and Welch at the direction of Company Vice President Davys.

I have concluded that Heselden was a supervisor for the Company from the winter of 1973-74 throughout the relevant period. Further, there is no contention that Heselden was performing other than supervisory work and not rank-and-file work. Respondent's claim that it did not know Heselden was a supervisor, and its defense on this line, does not constitute a true answer to its actions. Respondent did not credit or investigate Heselden's answer to the charges that he was a supervisor and performing supervisory duties at the time. It was for those precise actions that Respondent charged and fined Heselden on its belief that he was not a supervisor. Respondent's belief does not match the facts and is not a shield for its actions. Therefore, I conclude and find that Respondent has violated Section 8(b)(1)(B) of the Act by charging and fining a supervisor for performing supervisory functions during a sympathy strike.

III. EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Union set forth in section II, above, occurring in connection with the operations of the Company described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent engaged in an unfair labor practice, I shall recommend an order that it cease and desist therefrom and that it take certain affirmative action as specified below, which is necessary to remedy and remove the effects of the unfair labor practice and to effectuate the policies of the Act.

I shall recommend an order that Respondent Union revoke and rescind its action of charging, trying, and fining Heselden in the amount of \$1,000, that it expunge from its records all of the foregoing actions, and that it give written notice of such action to Heselden. I shall also recommend an order that Respondent not only post a notice to members attached as Appendix hereto but that it provide additional copies of the same for posting by the Charging Party, it being willing.

Upon the foregoing findings of fact, conclusions of law and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following:

CONCLUSIONS OF LAW

1. International Union of Operating Engineers, Local Union 18, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. Davis-McKee, Inc., is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. At all times material, Harold Heselden has been a supervisor of the Company within the meaning of Section 2(11) of the Act and is a representative of the Company for the purposes of collective bargaining and the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

4. By charging, trying, and fining Harold Heselden because he performed supervisory work at the Company's direction, Respondent Union has committed and is committing unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this case, considered as a whole, I hereby issue the following recommended:

ORDER²

The Respondent, International Union of Operating Engineers, Local Union 18, AFL-CIO, Columbus, Ohio, its officers, agents, and representatives, shall:

1. Cease and desist from in any manner restraining and coercing Davis-McKee, Inc., in the selection of representatives chosen by it for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action:

(a) Expunge all records or other evidence in their files of Respondent Union's proceedings in which Harold Heselden was charged, tried, and fined by Respondent Union.

(b) Give written notice of the foregoing action to Harold Heselden and refund the fine to him as provided in the section of this decision entitled "The Remedy."

(c) Post at its offices and meeting places copies of the attached notice marked "Appendix."³ Copies of said notice,

² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and the recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

³ In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by an other material.

(d) Forward signed copies of said notice to the Regional Director for posting by Davis-McKee, Inc., it being willing, at all locations where notices to employees are customarily posted.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the 8(b)(1)(A) allegation in the complaint is hereby dismissed.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Following a hearing at which the International Union of Operating Engineers, Local Union 18, AFL-CIO, Davis-McKee, Inc., and C. E. McKee, Jr., and the General Counsel of the National Labor Relations Board participated and offered evidence, we have been found to have violated the Act. We have been ordered to post this notice and to abide by what we say in this notice.

WE WILL NOT in any manner restrain or coerce Davis-McKee, Inc., in the selection of representatives chosen by it for the purposes of collective bargaining or the adjustment of grievances.

WE WILL expunge all records or other evidence in our files of the proceedings in which Harold Heselden was fined \$1,000 and return the money to him.

WE WILL restore Harold Heselden to his former membership status with all rights and benefits as though he had not been fined and give written notice of such action to him.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION 18, AFL-CIO