TNS, Inc. *and* Oil, Chemical and Atomic Workers International Union, AFL–CIO. Cases 10–CA–17709 and 10–CA–18785

September 30, 1999

SECOND SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The principal issue in this case, on remand from the United States Court of Appeals for the District of Columbia Circuit,[1] is whether the Respondent violated Section 8(a)(3) and (1) of the Act by permanently replacing, and thereafter refusing to reinstate, employees who engaged in a work stoppage which the General Counsel asserts was in response to "abnormally dangerous" working conditions involving exposure to radioactive and toxic substances in the Respondent's plant. A corollary issue is whether the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union on the basis of a decertification petition signed by a majority of the replacement work force.

The General Counsel and the Charging Party argue that Section 502 of the National Labor Relations Act[2] protects the employees from permanent replacement because their work stoppage was a "quitting of work . . . in good-faith because of abnormally dangerous conditions" and therefore, does not constitute an economic strike. The Respondent contends that the employees were never exposed to abnormal health risks and were economic strikers. Thus, it was entitled to hire permanent replacements, which in turn provided a legitimate business justification for its refusal to reinstate the employees. The judge agreed with the General Counsel and Charging Party, found that the Respondent had violated Section 8(a)(5), (3), and (1), and ordered the Respondent, among other things, to reinstate the employees and bargain with the Union. The Respondent excepted to the judge's findings and analysis.

In the subsequent Board Decision and Order, a two-member plurality of a four-member Board reversed the judge and dismissed the complaint, in pertinent part, on the grounds that the General Counsel had failed to prove that, at the time of the walkout, "the totality of available evidence supplied a sufficient basis for a reasonable good-faith belief that the employees' working conditions were 'abnormally dangerous' within the meaning of 502."[3] In so finding, the plurality articulated and applied a test requiring the General Counsel to prove that employees exposed to radioactive and/or toxic substances,

> reasonably believed, on the basis of objective evidence, *either* (1) that inherently dangerous conditions in the subject workplace had changed significantly for the worse, so as to impose a substantial threat of imminent danger if exposure were continued at the time the employees began to withhold their services, *or* (2) that the cumulative effects of exposure to those substances had reached the point at which any further exposure would pose an unacceptable risk of future injury to employees. [309 NLRB 1357–1358.]

A third Board member concurred with the plurality's dismissal of the complaint allegations, but he relied on a different test. In his view, a work stoppage was covered by Section 502 only if it was the "sole cause" of a walkout. In this case, he found that the work stoppage was motivated at least in part by the employees' desire to obtain favorable terms in a new collective-bargaining agreement.

The dissenting fourth Board member maintained that the judge had correctly determined that Section 502 applied to slow-acting, cumulative health risks, that the General Counsel had demonstrated that the employees' walkout was in good faith and based on objective evidence of cumulative overexposure to radioactive and toxic chemicals which rendered the TNS plant an abnormally dangerous, presently existing threat to their safety, and that employees who quit work because of abnormal dangers under Section 502 cannot be permanently replaced.

In remanding the case, the court specifically rejected the sole-cause test for Section 502 set forth in the concurring opinion. It was then

> left with only the plurality's interpretation of that section, which is supported by less than a Board majority. As a result, we are unable to discern the policy *of the Board* in a case in which the entire Board purported to address the underlying issue. We therefore hold that

[1] *TNS, Inc. v. Oil Workers*, 46 F.3d 82 (1995). The Board's prior decision is reported at 309 NLRB 1348 (1992). Subsequent to the court's remand, the Respondent and the Charging Party Union filed statements of position. The Labor Policy Association and the Chamber of Commerce of the United States of America filed a statement of position as amici curiae. The Respondent filed a reply brief to the Union's statement of position and the Union filed a reply to the amici statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] 29 U.S.C. 143. Sec. 502 states:

SAVING PROVISION

Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such service, without his consent; nor shall the quitting of labor by an employee or employees in good-faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

[3] 309 NLRB at 1355. The plurality therefore found it unnecessary to decide whether an employer could lawfully hire permanent replacements for employees engaged in a Sec. 502 work stoppage.

> the [Board's] . . . decision is thus not properly reviewable in this court.[4]

The court remanded the case to the Board for reconsideration, with instructions to "articulate a majority-supported statement of the rule that [it] will be applying now and in the future . . . in determining the applicability of section 502 in the context of occupational exposure to low-level radiation."[5]

The Board has accepted the court's remand.[6] In accordance with the court's instructions, and for the reasons set forth here, we adopt the following test to be applied in this and future cases involving cumulative, slow-acting dangers to employee health and safety. In order to establish that a work stoppage is protected under Section 502, the General Counsel must demonstrate by a preponderance of the evidence that the employees believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees' belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety.[7] Applying this test, we find, as explained below, that the General Counsel met the burden of proving that the Respondent's employees engaged in a Section 502 work stoppage. Further, we hold that employees who quit work under circumstances governed by Section 502 are not economic strikers and are not subject to permanent replacement. We therefore conclude that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the employees when they offered to return to work and violated Section 8(a)(5) by withdrawing recognition from the Union and refusing to bargain with it.

As the court noted, this case involves the definition of a legal right under the Act. Further, the facts of the case render it one of first impression before the Board. As we will discuss below, however, we do not view the Act's language, judicial interpretation of it, or underlying principles of labor law as requiring the enunciation of a novel "rule" involving exposure to slow-acting radiation and toxins as distinct from other, more obviously immediate dangers to employee health or safety. The Board has found Section 502 applicable in a number of factual settings, some of which will be discussed below, but it has never faced the issue of how the provision applies to dangers that are not sudden, readily apparent, or self-limited in time—in other words, to insidious dangers involving a latency period before the harm manifests itself. This latency period is the factual variable that makes this case one of first impression. Pursuant to the court's remand, our task is to define the type of evidence that will prove a good-faith belief of the existence of "abnormally dangerous conditions for work" in such circumstances.

Thus, our order of business is to examine the facts as fully developed by the judge and to evaluate her analysis; to state our own formulation of the circumstances under which the Board will find a work stoppage protected by Section 502 and the standards we will apply; to relate these standards to the facts of this case; and finally, to state our policy respecting the relationship between Section 502 and the permanent replacement of economic strikers.

A. Factual Background

The facts of this case are more fully developed in the preceding judge's, Board, and court decisions. We summarize them below. During the relevant period of 1980–1981, the Respondent manufactured nonnuclear ammunition made from depleted uranium (DU) in a facility in Tennessee. The Union represented about 100 employees in a production and maintenance bargaining unit. The relevant collective-bargaining agreement between the Respondent and the Union terminated on April 30, 1981.[8]

The manufacturing process at TNS involved the release into the air of DU dust. When ingested or inhaled, this substance presents two potentially life-threatening hazards to humans. It is a low-level radioactive carcinogen. It is also a toxic heavy metal that poses a threat to the kidneys.

Because DU is mildly radioactive, the Respondent's plant was under the jurisdiction of the United States Nuclear Regulatory Commission (NRC), which, pursuant to an agreement with the State of Tennessee, delegated its oversight of the Respondent's operations to the Tennessee Division of Radiological Health (TDRH). Among TDRH's duties were licensing Tennessee nuclear facilities and devising and enforcing regulations to protect workers and the public from the hazards of the nuclear industry. The NRC/TDRH agreement provided that NRC could terminate or suspend TDRH's authority if necessary to protect public health and safety, or if the state failed to comply with requirements of the Atomic

[4] 46 F.3d at 85 (emphasis in original).

[5] Id. at 92 (citation omitted). The court made it clear, however, that in declining to defer to the plurality view and remanding the case to the Board, it was deferring to the Board's judgment and congressionally mandated "principal policymaking authority."

[6] The Respondent has filed a motion to disqualify and recuse former Chairman Gould from consideration of this case. The motion has become moot as a result of the expiration of the former Chairman's term as a Board member on August 27, 1998.

[7] We have considered the two-prong test set forth by the plurality in the Board's previous decision. We reject that test because it places an unreasonably heavy burden on employees to substantiate their good-faith belief that working conditions are abnormally dangerous. We also reject the position of the amici that Sec. 502 applies only when the General Counsel has proved that working conditions were *in fact* abnormally dangerous. As noted by the judge, the D.C. Circuit in *Banyard v. NLRB*, 505 F.2d 342 (1974), has held that Sec. 502 does not require proof of abnormal danger-in-fact.

[8] Unless otherwise noted, all further dates shall be in 1981.

Energy Act.[9] On occasion, NRC officials accompanied TDRH employees on their inspections of the Respondent's plants. In furtherance of its mandate, TDRH periodically inspected nuclear facilities to insure compliance with its safety standards. TDRH had the legal authority to close a facility through suspension or revocation of the facility's license to operate a nuclear plant in the state.

To protect against potential injury or illness from exposure to DU, TDRH adopted the official dose limits set by the NRC for both external and internal exposure. Employees' external exposure (also referred to as "whole body" exposure) was not to exceed 5 rems[10] per year or 1.25 rems per calendar quarter. Internal exposure, measured by "in vivo" lung scans, was not to exceed 15 rems per year. With respect to the allowable amount of DU in the kidneys, the NRC maintained only published "guidelines" but had no official limits. The guidelines (reg. guide 8.22) stated that kidney damage may occur if an employee had a single urine sample with more than 130 micrograms of uranium per liter of urine (ug/l), or 4 or more samples with levels exceeding 30 ug/l. The proposed "notice" level was 15 ug/l and the "action" level was 30 ug/l.[11] Rather than these guidelines, however, the Respondent followed TDRH-approved standards set by the U.S. Army (DARCOM), which had notice and action levels of 50 and 100 ug/l respectively. In addition, TDRH required facilities under its jurisdiction to subscribe to the ALARA principle, which required that they keep all exposures to DU "as low as is reasonably achievable."[12]

To comply with TDRH regulations, the Respondent used a contaminant control system to reduce DU dust in the plant's atmosphere. Because radiation inevitably escapes into the work area, TDRH had established standards for the "maximum permissible concentration" (MPC) of airborne DU particles, beyond which no worker is to be exposed for 40 hours a week for 13 weeks. TDRH required licensees to keep airborne DU dust to a maximum of 25 percent of MPC. If an employer was unable to reduce emissions to the 25 percent level, TDRH authorized the use of respirators, provided that their use conformed with TDRH regulations.

TDRH used NRC Regulatory Guide 8.15 as a standard for respirator use. These regulations required a written statement of policy; use of respirators yielding a certain level of protection; medical approvals and fittings for all employees using respirators; established procedures for choosing, supervising, and training employees who will use them; proper facilities and procedures for cleaning, maintaining, and storing respirators, and notice to employees that they can leave their work stations if their respirators malfunction or are uncomfortable.

Some aspects of the Respondent's respirator program were admittedly in violation of TDRH regulations, as detailed in the judge's findings. In March, some employees staged a brief wildcat strike in protest of the respirator program, but the Union persuaded them to return to work.

In the fall of 1979, TDRH began to make regular, semiannual inspections of the Respondent's facility, which revealed that the Respondent was failing to comply with TDRH regulations in certain respects. Between September 1979, and the employees' walkout on May 1, 1981, TDRH conducted eight inspections of varying detail at TNS. Each inspection disclosed deficiencies in the Respondent's commitment to the ALARA concept and to employee safety in general, as well as specific instances in which the Respondent was failing to meet the minimum standard set for exposure to DU.[13] In October or November 1980, some employees pressed the Union for a strike to protest health and safety conditions, but the Union cautioned against it in the belief that because the contract contained a no-strike clause, a walkout might jeopardize the employees' jobs.

Meanwhile, TDRH instructed the Respondent's management to correct the deficiencies uncovered during the inspections. In January, after a finding of airborne DU concentrations above MPC levels, the Respondent instituted compulsory, full-time respirator use for employees in certain areas of the plant. The Respondent planned to continue the respirator program until August, at which time new air filtering equipment as well as shielding devices to minimize airborne DU particles were to be installed.

In March, the parties commenced negotiations for a contract to succeed the current one set to expire on April 30.[14] On March 10, the Union notified the Respondent that unit employees would stop work after the contract expired at midnight on April 30, and would stay out until the Respondent corrected the safety violations discovered by past TDRH inspections and any new violations uncovered during its upcoming April inspection. On May 1, unit employees began a work stoppage and the Respondent discontinued operations.

The Respondent's facility underwent further inspections following the walkout. In May, the Respondent hired radiation management consultants (RMC), a private consulting firm, to survey its plant. RMC reported that the Respondent was deficient in "six areas of non-

[9] 42 U.S.C. § 202(j)(1).

[10] A "rem" is a measurement of radioactive exposure.

[11] See *TNS, Inc.,* 309 NLRB 1348, 1349 fn. 9 (1992), for the definition of action and notice levels.

[12] ALARA is a cost-benefit analysis defined in Federal regulations as maintaining levels "as low as is reasonably achievable taking into account the state of technology, and the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to the utilization of atomic energy in the public interest." 10 CFR § 20.1(c).

[13] The Board's previous decision sets out in fuller detail a description of these inspections. See 309 NLRB at 1350–1351.

[14] The history of these negotiations is set forth at 309 NLRB 1351–1352.

compliance": limiting concentrations of airborne materials to restricted areas; respiratory protection; surveys of emissions; release of effluents to unrestricted areas; personnel monitoring; and training and calibration. The report also stated that

> [T]here seems to be a lack of management commitment to a radiation safety program . . . . We observed many areas of noncompliance. These coupled with the past history of whole body and extremity overexposure should be of great concern to management. The plant health physics staff . . . is working to improve the program. However, plant management has to support these changes and has to pay strict attention to the program.

TDRH and NRC conducted investigations of the plant in mid-October and December, which resulted in citations for several violations, including air contamination above MPC in the foundry during the first and last quarters of 1981, and the failure to notify employees of exposure to excessive levels of airborne radioactivity. The investigative report concluded that "it appears that your safety program was inadequate to protect workers from unnecessary radiation." In addition, the National Institute of Occupational Safety and Health (NIOSH) inspected the facilities in November and December, at TDRH's request. NIOSH examined employees' exposure readings and found that external whole body exposure levels, while "for the most part within legal limits" of 5 rems per year, were higher than doses sustained by workers in other facilities in U.S. nuclear industries. From in-vivo testing data, NIOSH further determined that between 1978–1981 32 percent of the employees had exposure levels that, while below the maximum annual dose of 15 rems per year, reflected an "inadequate margin of safety." Finally, NIOSH concluded from its review of urine bioassays that 52 percent of the employees had one or more urine samples greater than the DARCOM notice level of 50 ug/l and 19.5 percent had one or more samples above the action level of 100 ug/l.[15]

In February 1982, the Union unconditionally offered on behalf of all employees to return to work. The Respondent, which had partially resumed operations in August, declined the offer because all positions were held by permanent replacements. After receiving a decertification petition on May 3, 1982, signed by a majority of employees then working at the plant, the Respondent withdrew recognition from the Union and has since refused to bargain.

B. Discussion

1. Abnormally dangerous conditions in the TNS plant

The threshold issue in this case is whether the work stoppage was protected by Section 502 of the Act. As previously stated, the judge found that the TNS employees quit work in the good-faith belief, based on objective evidence, that conditions at the plant were abnormally dangerous within the meaning of Section 502. She interpreted precedent as placing on the General Counsel the burden of showing that the employees' perceptions were reasonably based on verifiable grounds; rejected a test placing on the General Counsel the burden of demonstrating danger in fact; found that the General Counsel could cite an employer's failure to correct or abate the danger as evidence of abnormally dangerous conditions; and found that, although the standards and judgments of regulatory agencies and other expert opinions are relevant to whether there is an objective basis for the belief that abnormally dangerous conditions exist, the General Counsel does not have the burden of showing consistent violations of such standards to establish a prima facie case.

We agree with the judge that Section 502 is applicable to abnormally dangerous threats to employee health and safety caused by cumulative exposure to radioactive and toxic substances, even where, as here, there may be no immediate, quantifiable physical injury. We further agree that the factors on which the judge relied in finding that the walkout at TNS was protected by Section 502 are relevant and sufficient for a finding of abnormally dangerous conditions; and that her formulation of the General Counsel's burden of proof was legally correct.

We see no reason to limit the protection of Section 502 because of the peculiar risks inherent in working with radioactive or cumulatively toxic substances, despite the length of time it may take for injury to employees to become evident, provided that the General Counsel can demonstrate that Section 502 applies at the time of their walkout. Although no legislative history exists to facilitate interpretation of Section 502, its broad and absolute language excepting certain types of work stoppages from the definition of a strike gives no indication that Congress intended the provision to cover only certain types of abnormally dangerous threats to employee safety or that it would apply only in certain circumstances. Thus, as the court noted in remanding the case, the Board's responsibility, guided by the general policies underlying the labor laws and by the Supreme Court's interpretation of the statute, is to give the provision concrete meaning and scope in terms of the realities of the workplace.

[15] Thus, NIOSH concluded that uranium in urine was above NRC guidelines, but not those set by DARCOM. The NIOSH report stated that:

> Because the NRC guidelines are set to protect workers from the toxic effect of uranium to the kidneys, we may infer that there is some possibility of renal damage among TNS workers who had urine uranium concentrations exceeding this level . . . . Since the majority of TNS workers had very short durations of employment it is unlikely that they have measurably altered changes in renal function. We have therefore concluded that a medical study of renal function in this population would not be useful.

With those principles as our starting point, we look first to the Supreme Court's only discussion of Section 502 in its *Gateway Coal* decision.[16] In that case the Supreme Court held that a union must arbitrate a dispute over the employer's continued employment of foremen who had been criminally negligent in monitoring safety conditions. The Court further held that Section 502, in the circumstances of that case, did not prohibit the issuance of an injunction to enforce a contractual no-strike clause,[17] because the district court below had conditioned the injunction on the suspension of the foremen, thus mooting the safety issue. In the context of determining Section 502's effect on a no-strike clause, the Court interpreted it as "[providing] a limited exception to an express or implied no-strike obligation. . . . [A] work stoppage called solely to protect employees from immediate danger is authorized by [Section] 502 and cannot be the basis for either a damages award or a *Boys Markets* injunction." *Gateway Coal*, 414 U.S. at 385. The Court found Section 502 inapplicable to the facts in *Gateway Coal* because the "claim concerns not some identifiable, presently existing threat . . . but rather a generalized doubt in the competence and integrity of company supervisors." Id. at 386. The Court expressly did not pass on whether the presence of the foremen would have been sufficient to block the injunction, noting that the action of the lower court had removed any immediate danger and mooted the issue.

In *Gateway Coal*, the Court quoted with approval the dissent's analysis in the underlying circuit court case. The majority in the Third Circuit Court of Appeals had denied injunctive relief to the employer, in part on the basis that Section 502 applied, concluding that "an honest belief, no matter how unjustified, in the existence of 'abnormally dangerous conditions for work' necessarily invokes the protection of Section 502."[18] The Court agreed with the dissenting judge that a union seeking Section 502 justification for an unprotected work stoppage "must present 'ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.'"[19]

Although the actual Section 502 issue became moot in *Gateway Coal,* the case and the Court's comments on Section 502 are significant and have been consistently useful to the Board in applying the provision to various factual scenarios. The test that we today announce for work stoppages protesting exposure to radioactive or toxic substances is derived in large part from the language of *Gateway Coal*, and its progeny. To repeat, we hold that in order to establish that a work stoppage is protected under Section 502,

> [T]he General Counsel must demonstrate by a preponderance of the evidence that the employees believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees' belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety.

Under the test we have announced today, it is only necessary that the abnormally dangerous conditions be a contributing cause of the employee work stoppage. The court's opinion in this case fully explains why it is legally unreasonable to require proof that the safety issue be the sole cause of a work stoppage. 46 F.3d at 91–92. The same reasoning applies to and warrants rejection of the dissent's view that Section 502 should apply "only where the abnormally dangerous conditions are the proximate cause of the work stoppage, i.e., but for the abnormally dangerous conditions, the employees would not have stopped work." We find that the dissent's proximate cause test is as "hopelessly shortsighted" as the sole-cause test that the court harshly criticized. It is particularly so in cases where abnormally dangerous conditions result from cumulative exposure to slow-acting conditions in the workplace where there is no one exact moment at which employees can determine that those conditions would justify a work stoppage within the meaning of Section 502. If they simultaneously had a dispute with their employer over bargaining demands, they would rarely, if ever, be able to walk out in protest over abnormally dangerous conditions without risking a finding that their walkout would not have occurred "but for" the coincidental existence of the economic dispute. As a result, under either the sole cause or proximate cause test, employees would have to foreswear their statutory right to strike in support of bargaining demands in order to secure their statutory right to escape abnormally dangerous conditions in the workplace. As the court stated, "[e]mployees cannot be made to promise to return to work from a lawful economic strike in order to prove the legitimacy of their concern over the unsafe conditions." Id. at 92.

Contrary to the dissent, we do not find that our test makes it easy for a union and employees to insulate economic protests from Section 8(d), contractual no-strike provisions, or the risk of permanent replacement. Abnormally dangerous conditions, as defined by the Board and courts, are, as stated, abnormal and not readily available to confer what the dissent calls "super-protection" when striking for economic gains. In those few instances where the quitting of work because of abnormally dangerous conditions may coincide with economic objectives, the congressional concern for employee safety manifest in Section 502 should not be diminished by the coincidence of these other causes for a work stoppage.

[16] *Gateway Coal v. Mine Workers*, 414 U.S. 368 (1974).
[17] See *Boys Market, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970).
[18] See *Gateway*, supra at 386–387.
[19] Id. at 387 (citation omitted).

As the court has stated in this case, that "employees also desired better wages is irrelevant." Id. at 91. Cf. *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990) (in an unfair labor practice strike, "[t]he employer's unfair labor practice need not be the sole or even the major cause or aggravating factor of the strike; it need only be a contributing factor"). The dissent misconstrues the basis for our reference to the causation test for unfair labor practice strikes. The common thread between that test and the causation test for a Section 502 work stoppage is the statutory protection of employee rights; i.e., the right to be free from unfair labor practices and the right to quit work when faced with the risk of serious illness or injury. In both instances, it is within the employer's control to eliminate the noneconomic causes of a work stoppage, either by remedying the unfair labor practices or abating the abnormally dangerous conditions. Any work stoppage continuing after such employer action would ordinarily revert to the status of an economic strike.

That the test we announce today closely tracks the language of Section 502 should be readily apparent. Perhaps the most difficult task in applying Section 502 to health and safety risks such as those that existed at TNS is determining the type of ascertainable objective evidence that will be sufficient to support employees' good-faith belief that the perceived dangers at their workplace pose an immediate threat of harm to their health and safety.

In *Fruin-Colnon Construction Co*.,[20] the Board adopted the administrative law judge's definition of "abnormal" as "deviating from the normal condition or from the norm or average." We adhere to that settled and reasonable standard. In the past, the Board has found abnormal danger in cases in which risks that are ordinarily present have been intensified. Examples include a natural seepage of water that became a steady flow causing interference with footing at the base of a mine shaft, coupled with an unusually forceful updraft of dust and dirt which made it difficult for miners to keep their eyes open;[21] an improperly operating exhaust blower which caused the temperature in the workplace to rise to 110 degrees Fahrenheit with "dust, lint, dirt, and abrasives . . . flying all over the room, making it difficult for the [men] to breathe,"[22] operation of equipment that was either inappropriate or appeared to be dangerously impaired, i.e., unloading cargo from pallets rather than customary slings;[23] working in a railyard with ineffectual stops for moving freight cars and inadequately functioning respirators;[24] and driving a truck when the transmission appeared unsafe.[25] Generally, the Board has found abnormally dangerous conditions in working environments that already contained some risks, such as the coal shaft in *Fruin-Colnon* and the dock in *Philadelphia Marine* where employees were routinely called on to unload heavy, unwieldy cargo. However, the Board has also found that abnormally dangerous conditions did not exist in facilities in which the work carried inherent dangers. See, e.g., *Beker Industries Corp.,*[26] where the effects of a chemical explosion had dissipated several hours before the employee was to begin work at a neighboring plant; *Mine Workes District 6*,[27] where a supervisor's safety violations, while a genuine cause for concern, did not rise to the level of abnormal danger; and *Union Independiente de Empleados de Servicios*,[28] where the Board found that a fight between a supervisor and an employee was not serious enough to give rise to an "imminent and dangerous employee safety condition." The variety of the circumstances to be evaluated, even in this small number of cases, demonstrates the wisdom of a case-by-case approach within the guidelines set forth in *Gateway Coal*.

We recognize that some jobs and worksites contain inherent dangers that even the most careful employers may find difficult to eliminate entirely. Such inherent routine dangers, however, do not fall under the aegis of Section 502. It is when such risks escalate to the point, or are maintained at a point, at which they pose a presently existing threat to employee health or safety that Section 502 comes into play. Such was the case in *Philadelphia Marine*: transferring heavy, unwieldy objects from ships to wharves will never be without risk; the additional element, however, of a management decision to substitute an unreliable method of performing the work transformed the "normal" danger into the "abnormal" danger covered by Section 502.[29] In the case at hand, it may be that manufacturing armor-piercing warheads out of depleted uranium cannot be made risk free. However, the facts here, summarized above and presented more fully by the judge, show that the risks the employees faced at TNS went beyond what might or should reasonably be expected in such a plant.

In assessing whether the employees believed in good faith that their conditions of work were abnormally dangerous, our standard will be, as noted above, whether ascertainable, objective evidence exists to support their belief. As in *Gateway Coal*, a purely subjective impression of danger will not suffice; nor will a speculative doubt about safety in general. The General Counsel,

[20] 139 NLRB 894 (1962), enf. denied on other grounds 330 F.2d 885 (8th Cir. 1964).

[21] Id. at 898.

[22] *Knight Morley Corp*., 116 NLRB 140, 142 (1956), enfd. 251 F.2d 753 (6th Cir. 1957), cert. denied 357 U.S. 927 (1958).

[23] *Philadelphia Marine Trade Assn.*, 138 NLRB 737 (1962), enfd. 330 F.2d 492 (3d Cir. 1964).

[24] *Richmond Tank Car Co*., 264 NLRB 174 (1982).

[25] *Roadway Express*, *Inc.*, 217 NLRB 278 (1975).

[26] 268 NLRB 975, 976–977 (1984).

[27] 217 NLRB 541, 551 (1975).

[28] 249 NLRB 1044 (1980).

[29] See also *Fruin-Colnon*, supra.

however, will not be required to show that injury has already occurred; as the Board stated in *Knight Morley*, the fact that employees were not actually injured or made ill may simply reflect the fact they escaped injury or illness by leaving when they did.[30] Rather, the reference point for assessing Section 502 coverage will be the conditions in a facility as they presented themselves to the employees. When presented with the dangers such as those that existed at TNS, we will decide whether a work stoppage is protected by Section 502 by examining, on a case-by-case basis, factors that, taken together or separately, would alert employees to safety threats beyond the norm. Such indicators would include, but would not be limited to, whether conditions appeared to be deviating from the norm or from a reasonable level of risk; whether equipment intended to protect employees from exposure to toxic substances appeared to be operating in a manner sufficient to afford such protection; whether employees had received sufficient instruction in the use of safety equipment to render that equipment effective; and whether management policies mandated and supported the proper use of safety equipment and standards for handling dangerous substances; any negative evaluations from regulatory agencies and any failure of the employer to correct serious infractions. In short, we will consider whether employees' observations of their workplace and its practices as they related to exposure to toxic and radioactive substances reasonably led them to conclude that the dangers they faced in the workplace had reached a level beyond those reasonably to be expected in the industry and that their continued exposure to harmful substances subjected them to a risk of future serious illness or injury. We will also consider evidence of significant deviation from industry standards for a workplace safe for employees, expert testimony as to the risks faced by employees, and analyses of the level of exposure employees had reached at the time they walked out.[31]

With respect to the issue of whether the employees were facing an "immediate, presently existing danger," we emphasize that the danger must have been presently existing and direct, but we do not interpret the term "immediate" as meaning that the employees had to depart the workplace in one moment or face grave injury in the next. In the case of cumulative exposure to radioactive and toxic substances, there will probably not be a single moment when "immediate" departure from the workplace is obviously necessary. Where the danger is cumulative, the issue will not be whether employees should suddenly leave, but rather whether a presently existing, reasonable possibility of serious incipient or future illness or injury existed. In some instances, when latency periods have run their course, historical analysis may sadly prove that employees waited far too long to cease work in order to protect themselves from such immediate dangers.

In accord with the foregoing standards, we examine in this case the conditions of the Respondent's facility from the perspective of the employees to determine whether they believed in good faith that their working environment had become abnormally dangerous. Although, as the judge noted, employees had little insight into how the radiation and chemically toxic properties of DU affected the body, they did understand that working with the substance presented potential health risks which were best avoided by minimal contact with it. Employees testified, however, that the Respondent's production process involved frequent exposure to DU. "Greensalt," the powdered form of DU prior to its transformation to a metallic state following a pressurized heating or "firing" process, often spilled on them as it was delivered to the plant and unloaded and transported to other departments. Left uncleaned, the spilled greensalt was tracked through the plant, including into the employees' locker room resulting in further contact by employees to DU. The "firing" process exposed employees to additional DU in the form of contaminated smoke and vapors that escaped from furnaces and other machinery. Protective equipment enclosures designed to prevent emission of the contamination during the firing stage and subsequent stages of the production process either did not exist or were in disrepair.

There is no dispute that the greensalt spills and the airborne emissions of DU were the source of the hazardous contamination at the Respondent's facility. There is also no dispute that employees considered this hazard as the principal threat to their well being. They made this clear during joint labor-management safety tours conducted each month by repeatedly referring to the spilled greensalt and atmospheric DU dust. Written reports of the tours summarizing these perceived dangers were posted for review by all employees above their timeclock. Further, in union meetings held during the weeks immediately prior to their walkout, the main topic of discussion among employees centered on their fears of continuous exposure to DU—specifically, the Respondent's failure to correct the deficiencies highlighted in the health and safety reports and its imposition of a mandatory respirator program which the employees considered an inade-

[30] 116 NLRB 140, 144 (1956).

[31] We recognize that, as in the present case, some of this evidence may arise after the work stoppage takes place. None of the parties here have objected to the after-the-fact nature of such evidence. In fact, the parties have relied on such evidence in support of their opposing positions. Where such objections are raised, we shall consider them in deciding the relevance and weight to be accorded the evidence under the totality of circumstances presented in that particular case. Such evidence could very well be relevant, as in this case, in confirming that the employees' belief that they were being subjected to abnormally dangerous working conditions was indeed supported by "ascertainable, objective" facts. In addition, after-the-fact evidence could be helpful in determining whether the General Counsel has met the burden of showing that the perceived danger posed an immediate threat of harm to employee health or safety.

quate measure to protect them from exposures. As one employee put it, "[o]n the last date when they took the final strike vote, we all discussed the unsafe dirty conditions in the plant and decided we needed to do something if we were going to work there. We had to do something to get it cleaned up."

As did the judge, we cannot conclude from the record before us that the employees' stated beliefs regarding their working conditions were not genuine, i.e., held in good faith. A question remaining to be answered affirmatively to gain coverage under Section 502 is whether their good-faith belief was supported by objective evidence. The judge found that it was, citing the following four factors:

> (1) air quality at the facility exceeded MPC at 11 work stations for at least the last quarter preceding the strike; (2) the protracted use of respirators by a substantial number of employees was deleterious to their health; (3) the employees' average whole body uranium exposures were far greater than those typical for the nuclear industry; and (4) that repeated and excessive uranium-in-urine levels indicated serious risk of kidney damage . . . . [And] that these conditions came about and were not soon abated because Respondent failed to comply diligently with governmental codes prescribing sound health physics practices.

We find this evidence, confirmed by either scientific testing or regulatory oversight, and some of which was readily observable and thus known to employees in the months leading up to their walkout, constitutes objective proof supporting their belief that their workplace had become too unsafe an environment to continue working. The evidence likewise substantiates the immediacy of the danger presented. When TNS employees ceased work on May 1, 1981, they had already endured a substantial period of sustained exposure to conditions which they reasonably believed were abnormally dangerous. For that reason, we find that there was a presently existing, reasonable possibility of serious incipient or future illness or injury. In agreement with the judge, therefore, we conclude that abnormally dangerous working conditions were a cause of the work stoppage and that the employees were therefore engaged in a work stoppage protected by Section 502.

2. Permanent replacement of employees engaged in a Section 502 work stoppage

We agree with the judge that, under Congress' explicit language and policy, employers are not free to hire permanent replacements for employees who cease work under Section 502. Section 502's broad and positive language establishes a significant policy: employees who engage in Section 502 work stoppages are not strikers; thus, they are not subject to the risk faced by economic strikers that their struck employer will invoke the privilege announced in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), and permanently replace them. Stated differently, because a Section 502 work stoppage is for the purpose of escaping abnormally dangerous working conditions, it is not an economic weapon in support of bargaining demands, and there can therefore be no basis for *Mackay's* balancing of employers' economic interests against employees' interests in their own health and safety. As the Sixth Circuit observed in *Clark Engineering v. Carpenters*,[32] "[w]hen a work stoppage properly results from abnormally dangerous working conditions, an employer cannot resort to the weapons available to him in an economically motivated work stoppage"—including permanent replacement. Effectuating Section 502's policies, as expressed in the provision's language, requires that the Board protect the right of employees, forced to leave their jobs because of *abnormally dangerous* conditions, to return to work. To rule otherwise could even result in the anomaly of permanent replacements benefiting from improvements in working conditions denied to those who walked out. We view anything less than full protection of the right of employees engaged in a Section 502 work stoppage to return to work as contradicting both Section 502's plain language and the basic principles of the Act at work both at the time Congress passed the provision and today.

Section 502 was part of the 1947 Taft-Hartley amendments to the 1935 National Labor Relations Act. Congress considered and passed these amendments in the context of a widespread reexamination of the strike as an economic weapon. One major element of Congress' purposes in passing Taft-Hartley was to remove certain kinds of strikes, such as secondary boycotts, from the protection of the statute in order to protect the public from interruptions in the flow of commerce. Taft-Hartley's declaration of purpose and policy states in part that it should "promote the legitimate rights of both employees and employers in their relations . . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce" (emphasis added). Taft-Hartley also added to the Wagner Act's original "[f]indings and declaration of policy" the observation that

> Experience has . . . demonstrated that certain practices by some labor organizations . . . burden . . . or obstruct . . . commerce . . . through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public. . . . The elimination of

[32] 510 F.2d 1075, 1080 (6th Cir. 1975) (citations omitted). *Clark Engineering* further describes the purpose of Sec. 502: "When an employee is exposed to abnormally dangerous working conditions and quits work in good-faith because of such conditions the Section protects him or her from employer retaliation. The employee cannot be discharged. . . . The employer cannot resort to a lockout." Id. at 1079 (citations omitted).

> such practices is a necessary condition to the assurance of the rights herein guaranteed.[33]

The amendments define a strike broadly as "any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees."[34]

It is in the context, then, of congressional sensitivity to the interruptions in commerce caused by certain types of economic actions, that Section 502 excepts from the definition of a strike the "quitting of labor by an employee or employees in good-faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees." It is particularly significant that Congress, in outlawing some forms of economic weaponry that it had come to view as potentially deleterious to the public good, explicitly excepted quitting of work because of abnormally dangerous conditions.

In passing Section 502, Congress knew that, when employees strike over economic issues, they risk permanent replacement. Fifteen years earlier, and only 3 years after Congress had passed the Act, the Supreme Court stated in *Mackay* that, although the Act expressly protects the right to strike, "it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers . . . to create places for them."[35]

In *Mackay*, the Court interpreted the Act as leaving open to employers who have not committed unfair labor practices the powerful economic weapon of permanent replacement. *Mackay* thereby balanced the right of employees to strike over economic demands with a corresponding economic privilege of employers to continue business operations during the strike by replacing economic strikers.

Mackay extends a limited privilege only to employers engaged in economic warfare who have not committed unfair labor practices. Early cases involving unfair labor practice strikes make clear that *Mackay* sets out an exception to the Act's general prohibition on interference with the right to strike and to engage in protected activities involving the cessation of work.[36] After *Mackay* and before Taft-Hartley, the Board consistently ordered backpay and reinstatement for strikers who had walked out because of their employer's unfair labor practices, and the courts consistently enforced these orders.

Moreover, the Taft-Hartley Congress was well acquainted with the distinction between the strike as economic action as opposed to a reaction to noneconomic causes, i.e., an employer's unfair labor practices. As the Supreme Court noted in *Mastro Plastics Corp. v. NLRB*:[37]

> The record [of Taft-Hartley's legislative history] shows that the supporters of the bill were aware of the established practice which distinguished between the effect on employees of engaging in economic strikes and that of engaging in unfair labor practice strikes. If Congress had wanted to modify that practice, it could readily have done so by specific provision.

Further, the Court emphasized that, despite Taft-Hartley's removal of statutory protections from certain types of strikes, it did not alter the "affirmative emphasis that is placed by the Act upon freedom of concerted action."[38]

Section 502 must be read in light of Congress' continuing affirmative emphasis on employee concerted action and the distinction between economic action, with its attendant risks, and noneconomic work stoppages. In *Mastro Plastics*, the Supreme Court reaffirmed this distinction in holding that an employer may not replace employees whose strike is caused by unfair labor practices. Even Section 8(d), which deprives strikers of their status as employees under the Act for violating the waiting period before striking, does not apply if the strike is in response to their employer's serious unfair labor practices. The Court noted that to find otherwise would deprive strikers of statutory protection when their need for representation is greatest and would remove their freedom to strike against unfair labor practices aimed at their representative rights. The Court emphasized the "inherent inequity" that would result from penalizing employees for engaging in "conduct induced solely by the unlawful conduct of the [employer]." 350 U.S. at 287.[39] Thus, under Board and court law, permanent replacement is an economic weapon and can be used as a defense against a

[33] 29 U.S.C. § 151. Congress had not expressed such a view when the Act was passed in 1935. In the Act's original statement of findings and policies, Congress had, while acknowledging that the purpose of the Act was to promote industrial peace and the free flow of commerce, seen fit to further those goals only by setting out and protecting the rights of employees to self-organization, collective bargaining, and concerted activity, among other things. No mention was made of the need to limit employee or union access to economic weapons.

[34] 29 U.S.C. § 142(2).

[35] 304 U.S. at 344–345.

[36] See, e.g., *NLRB v. Poultrymen's Service Corp*., 138 F.2d 204, 210 (3d Cir. 1943) (strike caused by employer's unfair labor practices; Board authorized to order that strikers be reinstated with backpay); *NLRB v. Carlisle Lumber Co*., 99 F.2d 533 (9th Cir. 1938) (Board can remedy unfair labor practices with backpay and reinstatement; these remedies apply to employees who struck because of unfair labor practices).

[37] *Mastro Plastics Corp. v. NLRB*, 350 US. 270, 288, 289 (1956) (citations omitted).

[38] Id. at 287.

[39] "Unfair labor practice strikers are ordinarily entitled to reinstatement even if the employer has hired permanent replacements," *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375, 379 fn. 5 (1967), explaining *Mastro Plastics.*

strike under one circumstance only: the strike over economic issues.

We view the Court's analysis in *Mastro Plastics* as a valuable guide to our determination of whether it is appropriate to balance an employer's interest in continuing operations by permanently replacing employees against the right of employees to leave their jobs without economic consequences under Section 502. If, in the Court's view, there would be an "inherent inequity" in permitting an employer to hire permanent replacements for unfair labor practice strikers, even when they strike during a statutorily mandated waiting period, it would be equally inequitable to permit an employer to hire permanent replacements for employees engaged in a statutorily sanctioned work stoppage to escape abnormally dangerous working conditions. To permit the hiring of permanent replacements for employees engaged in a Section 502 work stoppage would essentially render meaningless the special protections afforded employees by that statutory provision.

While we do not suggest that TNS committed an unfair labor practice, analogous to *Mastro Plastics*, it is nonetheless solely responsible for the maintenance of working conditions at the plant, and it is those working conditions that the employees reasonably perceived to be abnormally dangerous, driving them to quit work. Correspondingly, the TNS employees are innocent of responsibility for these conditions. Contrast this to the economic strike where both sides bear some responsibility for the situation that leads to the employees' decision to walk out. Where economic warfare results because both parties, despite good-faith bargaining, cannot reach agreement, then, and only then, does the employer have a right to employ the economic weapon of permanent replacement.

In sum, as a matter of statutory interpretation and congressional policy, we hold that an employer cannot permanently replace employees engaged in a Section 502 work stoppage. The *Mackay* employer privilege, and its underlying rationale, apply only to the circumstances of a pure economic dispute. It would be particularly inappropriate to extend it to employers whose employees are forced to leave their workplace because of potentially life-threatening, abnormally dangerous working conditions, such as those which prompted the TNS employee work stoppage.

CONCLUSION

We have found that the work stoppage at TNS was protected by Section 502 and that the Respondent was not entitled to hire permanent replacements for the employees who walked off the job because of conditions that they reasonably believed were abnormally dangerous. Accordingly, we find that the Respondent was without a legitimate business justification when it refused to reinstate the unit employees upon their unconditional offer to return to work and, thereby, violated Section 8(a)(3) and (1). In addition, by withdrawing recognition from and refusing to bargain with the Union based on the contention that the decertification petition signed by the replacement employees evidenced the Union's loss of majority support, the Respondent further violated Section 8(a)(5) and (1).

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5), (3), and (1) of the Act, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, with respect to the 8(a)(3) violations, the Respondent shall be ordered to offer full reinstatement to all employees who participated in the Section 502 work stoppage to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed. The Respondent shall also make these employees whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination practiced against them from February 15, 1982, the date that their unconditional offer to return to work was rejected by the Respondent, until the date that the Respondent makes them a valid offer of employment, less net interim earnings.[40] Backpay shall be computed, with interest, in the manner set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950). Interest on or after January 1, 1987, shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest on amounts accrued prior to January 1, 1987, shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).[41]

With respect to the Respondent's withdrawal of recognition from, and refusal to bargain with, the Union on or about May 4, 1982, in violation of Section 8(a)(5) and (1), the Respondent shall be ordered, on request, to bar-

[40] The commencement date of this make-whole remedy is different from the one ordered by the judge. She treated the employees herein as unlawfully discharged unfair labor practice strikers and ordered backpay beginning from the date of discharge in accord with *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979). However, the violation which she found and which we adopt is the permanent replacement of employees. The commencement date of make-whole relief for such a violation is the date on which a respondent refuses an unconditional offer by permanently replaced employees to return to work. *Ancor Concepts*, *Inc.*, 323 NLRB 742 (1997). That date in this case was February 15, 1982.

[41] The foregoing remedial provisions do not apply to the employees who were working in the penetrator shop on the day of the work stoppage. In its original decision the Board dismissed the complaint allegation that the Respondent violated Sec. 8(a)(3) by failing to reopen and reinstate penetrator shop employees to their positions after the Sec.502 walkout. 309 NLRB 1366–1367. This issue is not before us on remand, nor is the independent 8(a)(1) complaint allegation, also dismissed by the Board, regarding the Respondent's statement to employees pertaining to the seniority status of employees returning to work after the walkout. Id. at 1367.

gain in good faith with the Union and to incorporate in an executed agreement any understanding which may be reached. This is the traditional and appropriate remedy for an unlawful withdrawal of recognition from an incumbent union. See, e.g., *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1289 (4th Cir. 1995), enfg. 312 NLRB 937 (1993) ("when a . . . company refuses to recognize or bargain with an incumbent union, only an affirmative bargaining order can restore the status quo ante").

ORDER

The National Labor Relations Board orders that the Respondent, TNS, Inc., Jonesboro, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in the Oil, Chemical and Atomic Workers International Union, AFL–CIO, or in any other labor organization, by threatening to permanently replace and, on their unconditional offer to return to work, refusing to reinstate its employees who engaged in good faith in a work stoppage over abnormally dangerous conditions, or by discriminating in any other manner in regard to their hire or tenure of employment or any other term or condition of employment.

(b) Refusing to bargain collectively with respect to rates of pay, wages, hours, and terms and conditions of employment with the Union as the exclusive bargaining representative of all hourly paid production and maintenance employees employed by the Respondent at its Jonesboro, Tennessee facility, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to all employees who participated in the work stoppage which commenced on May 1, 1981, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of this decision.

(b) On request, bargain collectively with the Union as the exclusive representative of all its employees in the above-described unit with respect to rates of pay, wages, and hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Preserve and, within 14 days of a request, make available to the Board and its agents, for examination and copying, all payroll and other records necessary to compute the backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Jonesboro, Tennessee facility, copies of the attached notice marked "Appendix."[42] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by its authorized representative, shall be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 1982.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting.

Unlike my colleagues, I do not find that the Respondent violated Section 8(a)(3) and (1) of the Act by permanently replacing, and later refusing to reinstate, employees who engaged in a work stoppage allegedly in response to abnormally dangerous conditions. I would therefore dismiss the complaint.

1. Abnormally dangerous conditions were not the proximate cause of the strike

Section 502 provides that "the quitting of labor by an employee or employees in good-faith *because of* abnormally dangerous conditions for work" shall not be deemed a strike. (Emphasis added.) Clearly, there must be a causal nexus between the abnormally dangerous conditions and the "quitting of labor." The Board must decide the appropriate test for determining such causality. As set forth below, I believe that Section 502 applies only where the abnormally dangerous conditions are the proximate cause of the work stoppage, i.e., but for the abnormally dangerous conditions, the employees would not have stopped work. That causality test is not met here.[1]

I disagree with the causation test propounded by my colleagues for determining the applicability of Section 502 of the Act. With respect to causation, my colleagues

[42] If 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."

[1] I accept arguendo the validity of my colleagues' definition of "abnormally dangerous conditions." My point is that such a condition, if it existed, was not the proximate cause of the work stoppage.

find it sufficient that "abnormally dangerous working conditions were *a* contributing cause of the work stoppage." (Emphasis added.) In my view, this sets the causation bar too low. Under the majority test, a work stoppage would enjoy protection under Section 502 even if the abnormally dangerous condition were only a minor or insignificant cause of the work stoppage.

In support of their view, my colleagues rely on a supposed analogy between an unfair labor practice strike (ulp) and a 502 work stoppage. Thus, inasmuch as a work stoppage can be an unfair labor practice strike if only one of its causes is an unfair labor practice, so too, it is said, a work stoppage falls within the ambit of Section 502 if only one of its causes is an abnormally dangerous condition.

The analogy does not withstand scrutiny. There is an important difference between a Section 502 work stoppage and an unfair labor practice strike. One of the Act's fundamental purposes is to prevent and remedy unfair labor practices. If an employer commits unfair labor practices, and this unlawful conduct is a cause of a strike, it would be inconsistent with a fundamental purpose of the Act for the Board to let the wrongdoer operate with permanent replacements during a strike caused at least in part by his own unlawful conduct. In contrast, the Board has no statutory duty to prevent or remedy abnormally dangerous working conditions. These matters are outside the Board's remedial province. Thus, there is no showing that the conditions in this case were unlawful under the Act or under any other law. Accordingly, there is neither need nor warrant for the Board to transplant the lenient causality test employed in unfair labor practice strike cases to the context of Section 502. My colleagues say that the "common thread" between the "ulp" strike and the Section 502 work stoppage is the statutory protection of employee rights. However, the issue is not whether the strike and work stoppage are protected. Clearly both are protected. The issue is whether there are special protections for Section 502 work stoppages, as there are for "ulp" strikes. The answer is in the negative, for only "ulp" strikes protest unlawful conditions.

In addition, the majority's test would permit needless departure from the sanctity of no-strike clauses. If, during a contract, a dispute arose as to non-safety contractual matters and as to a perceived abnormally dangerous condition, the majority would sanction a work stoppage and its attendant industrial instability. Although arbitration would be available as to the nonsafety contractual matters, and perhaps as to the perceived abnormally dangerous condition, such arbitration would occur in the context of industrial warfare. The very goal that arbitration is supposed to achieve, viz, a peaceful means of resolving disputes, would be undermined.

Similarly, after the expiration of the contract, the work stoppage could occur without the salutary notice, waiting, and mediation provisions of Section 8(d).

My approach would not foster such a relatively easy escape from no-strike clauses and from Section 8(d). At the same time, my approach does not deprive employees of their Section 502 rights. Even in a situation where there are several causes of the work stoppage, the employees will be accorded Section 502 protection if they can show that the abnormally dangerous condition was the proximate cause of the work stoppage.

My colleagues say that their test is simpler to apply than the proximate cause test. But mere simplicity of a rule is not itself a reason for adopting it. We must take into account a panoply of statutory goals, including the sanctity of no-strike clauses and the importance of Section 8(d).

My colleagues also note the difficulty of determining the precise point in time at which employees will reasonably perceive abnormally dangerous conditions. However, that difficulty is inherent in the test that my colleagues themselves have devised for defining that term. They also concede that causation must be shown. The sole difference between my colleagues and me is the test for causation. I am simply saying that where the work stoppage would have occurred in any event for other reasons it cannot be meaningfully said that the work stoppage is "because of" the abnormally dangerous conditions.

I also disagree with my colleagues' contention that, under my test, employees "would rarely, if ever" be able to engage in a Section 502 work stoppage. If the employees had walked out on March 10, and made it clear that they would return when conditions improved, that would presumably be a Section 502 work stoppage. In this regard, I am not saying that the employees would have "to promise to return to work from a lawful economic strike." Because of the no-strike clause, the work stoppage would not be a lawful economic strike. It would be a lawful 502 work stoppage.

In my view, all of these considerations counsel in favor of a higher causation standard than the one set forth by my colleagues. Accordingly, I would require that the employees' belief be the proximate ("but for") cause of the work stoppage.[2]

The General Counsel has not established such causality. Indeed, the timing of the work stoppage supports the conclusion that there were additional matters which, standing alone, would have caused the work stoppage in any event. Throughout the negotiations for a new contract, which began in March 1981, as well as at the time of the work stoppage, the parties remained far apart on various issues, many of which did not concern health and safety matters. On March 10, the Union threatened to strike on April 30, the expiration date of the contract.

[2] The D.C. Circuit rejected the view that the abnormally dangerous condition must be the "sole cause" of the work stoppage. The court did not pass on what lesser test of causality would be appropriate.

Clearly, if the Union wished to stop work because of such conditions, it could have done so then, i.e., on March 10. The fact that the Union threatened that the work stoppage would occur on April 30 speaks volumes as to the cause of such work stoppage. That fact clearly demonstrates that, even in the Union's view, the work stoppage was not proximately tied to abnormally dangerous conditions.

Further, there is no showing that plant conditions worsened between the March 10 threat, and the April 30 work stoppage. Thus, the proximate cause of the April 30 work stoppage, like the March 10 threat, was the bargaining dispute between the parties.

Finally, I note that the employees made an unconditional offer to return to work, at a time when conditions had not improved.

I recognize that the judge found that: "The overwhelming weight of the testimony establishes that the employees rejected the Respondent's final proposal and voted to strike because they believed that the working conditions at TNS were endangering their health."

However, that finding is based on the subjective testimony of employees, given long after the work stoppage had occurred. In my view, the causality test should be based on objective evidence at the time of the work stoppage.

In sum, the "but for" causation standard is not met here. Thus, the employees' work stoppage did not meet the criteria of Section 502.

2. Section 502 does not prohibit permanent replacement

Even if I found that the "but for" standard was met, or if I agreed with my colleagues' lower causation standard, I would still find that the Respondent acted lawfully here. In this regard, I disagree with my colleagues' view that permanent replacement is precluded by Section 502.

For purposes of this discussion, I will assume that, whatever test is applied, we confront here the quitting of work by employees in good faith because of abnormally dangerous conditions for work. My colleagues' view essentially amounts to this syllogism: pursuant to Section 502, the employees at issue were not strikers; because they were not strikers, they were not economic strikers; because they were not economic strikers, they could not lawfully be permanently replaced. It is, however, just as logical to hold that because the employees at issue were not strikers they were not unfair labor practice strikers and were therefore not immune from permanent replacement. The fact is that they were neither economic strikers nor unfair labor practice strikers. Indeed, they were not strikers at all; they were "quitters." The issue is whether these "quitters" should be immune from permanent replacement.

Section 502 was intended to permit employees to engage in a work stoppage without running the risks of (1) being discharged for breaching a no-strike clause or (2) losing all protection of the Act because of the "loss of status" provision of Section 8(d). These purposes are achieved without according the employees the "superprotection" of immunity from permanent replacement. That is, it is sufficient that these employees can walk out and be protected from discharge, even if there is a no-strike clause, and even though they failed to comply with Section 8(d).

As noted supra, there are good reasons for not treating Section 502 stoppages like unfair labor practice strikes. That is, the employer is not a wrongdoer at all, at least insofar as the Act is concerned. Such an employer should be allowed to attempt to persuade potential replacement employees to come to work. And, such employees should be free to accept permanent employment, if they are of the view that the employees who walked out had an exaggerated view of the danger (if any) at the workplace.

By contrast, a wrongdoing employer (i.e., one who has committed unfair labor practices) should not be permitted to benefit from his own malfeasance through the mechanism of permanent replacement. Unfair labor practice strikers are accorded the "superprotection" of immunity from permanent replacement because their actions vindicate the most fundamental policies of the Act. That is not true of those who are not unfair labor practice strikers.

With respect to the legislative history adduced by my colleagues, I will limit myself to a few observations. In my view, although it is not certain what Congress intended by enacting Section 502, my review of this provision and its legislative context leads me to believe that the more reasonable view is that Congress did not intend to protect Section 502 work stoppage participants from permanent replacement. This belief is founded on: the absence of specific language conferring such protection; the historical origin of the specific language of the third clause in Section 502 as a response to loss-of-employee-status sanctions of Section 8(d), rather than to permanent replacement; the fact that, among all work stoppage participants, only unfair labor practice strikers enjoyed such special protection at the time of the passage of Section 502; the failure of Congress to make the maintenance of abnormally dangerous conditions an unfair labor practice or to prevent an employer from continuing operations under such conditions; the total absence of any indication of congressional intent to limit the *Mackay*[3] doctrine permitting permanent replacement of employees engaged in work stoppages; and the identification of protections accorded by Section 502 which give substance and meaning to Congress' protective intent without prohibiting permanent replacement of Section 502 work stoppage participants. These protections include the guarantee of immediate reinstatement for Section 502 work

[3] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

stoppage participants who are *not* replaced, on their offering to return to work, without fear of any retaliation by the employer, even if they quit work during an 8(d) notice period or during the term of a contract with a no-strike provision.

Precedent also counsels a restrained reading of the scope of Section 502. The cases suggest that Congress was concerned about the perceived evil of having a no-strike clause apply under abnormally dangerous conditions. In *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974), the Supreme Court held that the safety dispute at issue was not a Section 502 work stoppage. In discussing Section 502, the Court stated that Section 502 "provides a limited exception to an express or implied no-strike obligation." Id. at 385. The Court reiterated this view in *Whirlpool Corp. v. Marshall*, 445 U.S. 1 fn. 29 (1980), stating that the "effect of [Sec. 502] is to create an exception to a no-strike obligation in a collective-bargaining agreement."

The Board has likewise interpreted Section 502 as being confined to creating a limited defense for employees who engage in work stoppages despite a no-strike ban. In *Knight Morley Corp.,* 116 NLRB 140 (1956), enfd. 251 F.2d 753 (6th Cir. 1957), cert. denied 357 U.S. 927 (1958), a blower system in a plant buffing room broke down allowing dirt and abrasives from plant machinery to be blown into employees' faces and causing the temperature to rise to 110 degrees. The Board found that the conditions were abnormally dangerous. Accordingly, it held that employees who walked out in response to such conditions were protected under Section 502 "even in the face of a no-strike clause in their contract with an employer." Id. at 146. The Board stated further that it could "conceive of no other reasonable purpose" for Section 502 beyond the declaration by Congress that a 502 work stoppage is "not to be a 'strike' in order to give protection to such a walkout, without regard to limitations on strikes such as those imposed by 'no-strike' clauses or by Section 8(d)." Id. The prevalent view among the courts of appeals also is that Section 502 simply provides a limited exception to a no-strike obligation. See, e.g., *NLRB v. Tamara Foods, Inc.,* 692 F.2d 1171, 1183 (8th Cir. 1982) (there was no collective-bargaining agreement in this case, to make Sec. 502 applicable).[4]

In *Philadelphia Marine Trade Assn.*, 138 NLRB 737 (1962), enfd. 330 F.2d 492 (3d Cir. 1964), the Board held that the Respondents' method for unloading cargo from the ship *Caribe* was abnormally dangerous. Consequently, a refusal by longshoremen to unload the ship "under Section 502 of the Act was not a strike, even assuming the existence of a no-strike contract." Id. at 739. Furthermore, the Board held that the Respondents violated Section 8(a)(3) when they retaliated against the protected Section 502 work stoppage by locking out all area longshoremen and by insisting that the lockout would remain in effect until the *Caribe* longshoremen agreed to return to work under the same abnormally dangerous conditions. In my view, this case does not support a prohibition of permanent replacement. The work stoppage was not a strike. It was therefore not in breach of any no-strike clause. And, the lockout was not in pursuit of a bargaining objective but rather was in retaliation for the protected work stoppage.

In the instant case, the judge originally dismissed as unpersuasive the restrictive definition of Section 502 by the Supreme Court in *Gateway Coal* and in *Whirlpool* by stating that "neither of these cases hold that the sole effect of [Sec. 502] is to create an exception to a no-strike obligation in a collective-bargaining agreement." I agree that those cases do not so hold, but neither do they hold the contrary. And, as discussed above, the legislative purpose of Section 502 can be accomplished without denying the employer the privilege of permanent replacement. Further, the limited exception to a no-strike clause reinforces my view, based on the language and legislative history of Section 502, that an employer is not prohibited from permanently replacing employees who quit work pursuant to Section 502.

Although finding that the work stoppage was not a "strike" and that the maintenance or failure to correct abnormally dangerous conditions was not an unfair labor practice, the judge found the Respondent's hiring of permanent replacements was "inherently destructive" of the employees' Section 7 rights, in violation of Section 8(a)(3) and (1). In my view, the judge has mischaracterized the legal presumptions arising from the act of replacement during a lawful work stoppage. As the Supreme Court first explained in *Mackay*, permanent replacement, in and of itself, is not an unfair labor practice. 304 U.S. at 346. Rather, it has traditionally been regarded as a permissible employer response to an employee walkout in order to promote the fundamental right of an employer to "protect and continue his business." Id. Further, as noted by the Supreme Court, absent evidence of an independent unlawful purpose, the Board presumes that an employer's motive in permanently replacing its employees is to serve its legitimate business interest of continuing operations. *Belknap v. Hale*, 463 U.S. 491, 504 fn. 8 (1983), citing with approval, *Hot Shoppes, Inc.,* 146 NLRB 802 (1964). Given this interest, the Board does not require employers to justify the choice of permanent, as opposed to temporary, replacement.

[4] *Clark Engineering v. Carpenters*, 510 F.2d 1075, 1080 (6th Cir. 1975), is not to the contrary. There, the court stated in passing that "[w]hen a work stoppage properly results from abnormally dangerous working conditions, an employer cannot resort to the weapons available to him in an economically-motivated work stoppage." The court provided no explanation of this dictum, including whether it was meant to encompass the "weapon" of permanent replacement. It did state that "the policy of LMRA Sec. 502 is not involved in the present case," id., which was a Sec. 303 damages suit against the union for an alleged secondary boycott.

NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), relied on by the judge, is not to the contrary. There, in addition to hiring permanent replacements during a strike, the employer granted them 20 years of superseniority. It was this additional independent act, not permanent replacement, which the court found inherently destructive of employee rights and bearing its own indicia of improper intent, suggesting that the probable motive behind the replacement decision was to punish the employees. Absent the unlawful grant of superseniority, the court was unequivocal in reaffirming the permanent replacement principle of *Mackay*. Particularly pertinent here, the court stated that although "it may be . . . that 'such a replacement policy is obviously discriminatory and may tend to discourage union membership' . . . the employer's interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers." 373 U.S. at 232.

Thus, the Supreme Court in *Erie Resistor* has defined the act of permanent replacement as less than inherently destructive of the statutory right to strike, a right which lies at the very core of Section 7. See *United Steelworkers v. NLRB,* 376 U.S. 492, 499 (1961). Assuming that the right to engage in a Section 502 work stoppage is entitled to the same deference as the right to strike, it is reasonable to conclude that an employer's decision to continue business with permanent replacements during such a work stoppage is not inherently destructive of this protected right.

I further disagree with the judge's assessment that permanent replacement is equivalent to discharge, and that both acts operate as an unlawful "penalty" against the exercise of the protected Section 502 right. The difference between discharge and permanent replacement is now well established in the law. The discharged striker has no rights to reinstatement. The permanently replaced striker has a right to reinstatement as soon as the replacement leaves or there is otherwise a vacancy in his prior position. Thus, there is meaning to the legal principle that the striker cannot be discharged for striking but he can be permanently replaced.

For these reasons, the act of permanent replacement of strikers is not inherently destructive of employee rights. The striker retains rights of reinstatement. As the Board stated in *Torrington Construction Co.*, 235 NLRB 1540, 1541 (1978), "[a]lthough earlier cases, including [*Rockaway News*], have sought to diminish the distinction between discharge and replacement," in light of the preferential rehiring status given there exists a substantial difference between replacement and discharge."

I do not gainsay the adverse impact of permanent replacement, but it can no longer be reasonably maintained that this action is equivalent to discharge. With the principles of *Fleetwood Trailer* and *Laidlaw* now firmly established,[5] it becomes even more reasonable to interpret Section 502 as prohibiting retaliatory discharges but permitting the hiring of permanent replacements. The remaining cases relied on by the judge are consistent with this interpretation. For instance, both *Knight Morley*, supra, and *Combustion Engineering, Inc.*, 224 NLRB 542 (1976), involved the unlawful *discharge* of employees engaged in a Section 502 work stoppage. *NLRB v. Washington Aluminum Co.,* 370 U.S. 9 (1962), again involved the discharge of striking nonunion employees who ceased work in protest of uncomfortable, but not abnormally dangerous, work conditions. Finally, as previously discussed, *Philadelphia Marine* involved the punitive and retaliatory lockout of employees, who had not previously participated in any work stoppage, in order to compel the return to work under continuing abnormally dangerous working conditions of employees participating in a protected Section 502 work stoppage.

It may well be that permanent replacement has some impact on the right to engage in a Section 502 work stoppage. However, as set forth *in NLRB v. Great Dane Trailers,* 388 U.S. 26 (1967), the employer's interest in operating its business during the work stoppage is an economic justification that outweighs the limited impact on employee rights.

In sum, I find that an employer, whose employees have quit work because of abnormally dangerous working conditions within the meaning of Section 502, does not violate the Act by choosing to hire permanent replacements to continue business. It is clearly reasonable to permit the hiring of permanent replacements, in light of the foregoing review of Section 502's language, its legislative background, and relevant Board and judicial precedent. Accordingly, I find that the Respondent did not violate Section 8(a)(3) and (1) by permanently replacing and failing to reinstate employees who ceased work in protest of alleged abnormally dangerous working conditions.[6] Consequently, I conclude that the Respondent also did not violate Section 8(a)(5) by withdrawing recognition from the Union based on the decertification petition signed by the replacement employees.

I would dismiss the complaint in its entirety.

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[5] *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375 (1967); *Laidlaw Corp.,* 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

[6] I take this position where, as my colleagues find here, it is shown that employees have walked out because of their good-faith belief, supported by ascertainable, objective evidence, that their working conditions are abnormally dangerous. I express no view as to whether an employer who maintains conditions that are, objectively, abnormally dangerous (i.e., "danger in fact") may lawfully hire permanent replacements for employees who have quit work because of those conditions.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in or adherence to the Oil, Chemical and Atomic Workers International Union, AFL–CIO, or to any other labor organization, by threatening to permanently replace or, on their unconditional offer to return to work, failing to reinstate our employees who in good faith engaged in a work stoppage over abnormally dangerous working conditions, or discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT refuse to bargain collectively with the Union as the exclusive representative of employees in the following appropriate unit:

> All hourly paid production and maintenance employees employed at our Jonesboro, Tennessee facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL offer all eligible employees who engaged in the work stoppage protesting abnormally dangerous conditions which commenced on May 1, 1981, immediate and full reinstatement to their former, or substantially equivalent, positions without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of pay they may have suffered by reason of our discriminatory conduct.

WE WILL, on request, bargain collectively with the Oil, Chemical and Atomic Workers International Union as the exclusive bargaining representative of all our employees in the above-described appropriate unit with respect to rates of pay, wages, hours, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

TNS, INC.