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NOTES

EXPRESS NO-STRIKE CLAUSES AND THE REQUIREMENT OF CLEAR AND UNMISTAKABLE WAIVER: A SHORT ANALYSIS

INTRODUCTION

Express no-strike clauses in collective bargaining agreements have been the subject of conflicting interpretation. One group of circuits has limited the scope of these clauses in actions for damages and in actions charging unfair labor practices. These courts have held that express no-strike clauses cover only arbitrable disputes despite contract language that seems more extensive. This limitation of the scope of no-strike clauses is known as “coterminous interpretation.”¹ Another group of circuits has interpreted no-strike clauses as broadly as the contract language provides, holding that these clauses can govern nonarbitrable as well as arbitrable disputes.² This Note concludes that a court should employ coterminous interpretation in nonarbitrable disputes unless it finds clear and unmistakable evidence of a waiver of the right to strike.

The Note first examines two contexts in which the Supreme Court has concluded that the obligation not to strike is coterminous with the arbitration provisions: the determination of the scope of implied no-strike clauses and the determination of the availability of injunctive relief. The Note then examines the scope of express no-strike clauses in cases where the employer has sought damages instead of injunctive relief. Next, it argues that a court should find clear and unmistakable evidence of a waiver of the right to strike before interpreting an express no-strike clause broadly. Finally, the Note applies the “clear and unmistakable” standard in reviewing previous circuit court decisions.

I

THE DEVELOPMENT OF COTERMINOUS INTERPRETATION

A. The Scope of Implied No-Strike Clauses

An examination of the use of coterminous interpretation in cases involving *implied* no-strike clauses provides a useful base for considering the proper scope of *express* no-strike clauses. In *Local 174, Teamsters v.*

¹ See *infra* text accompanying notes 24-36; see also Note, *Coterminous Interpretation: Limiting the Express No-Strike Clause*, 67 VA. L. REV. 729 (1981) (tracing the development of coterminous interpretation).

² See *infra* text accompanying notes 46-56.

Lucas Flour Co.,³ the Supreme Court found an implied no-strike clause in a collective bargaining agreement⁴ containing terminal arbitration procedures⁵ but no express no-strike clause.⁶ In *Lucas Flour*, the union called a strike to protest an allegedly unlawful employee dismissal, even though the legality of the dismissal was subject to mandatory arbitration procedures. The company sued the union for breaching the collective bargaining agreement.⁷ In affirming the lower court's award of damages,⁸ the Supreme Court held that the mandatory, terminal arbitration procedures imposed a duty upon both parties to arbitrate. The arbitration clause therefore created an implied no-strike clause.⁹ The Court emphasized that its decision was "not [meant] to suggest that a no-strike agreement is to be implied beyond the area . . . covered by compulsory terminal arbitration."¹⁰ Thus, the Court found the scope of the implied clause to be coterminous with that of the arbitration provision.¹¹

B. The Use of Coterminous Interpretation to Grant Injunctive Relief

The Supreme Court has also applied coterminous interpretation to

³ 369 U.S. 95 (1962).

⁴ *Id.* at 105.

⁵ The agreement provided that "any difference as to the true interpretation of this agreement . . . shall be submitted to a Board of Arbitration," and "[s]hould any difference arise between the employer and the employee, [the] same shall be submitted to arbitration by both parties." *Id.* at 96.

⁶ The union argued that "there could be no violation [of the agreement] in the absence of a no-strike clause . . . explicitly covering the subject of the dispute." *Id.* at 104-05.

⁷ *Id.* at 97.

⁸ *Lucas Flour Co. v. Local 174, Teamsters*, 57 Wash. 2d 95, 356 P.2d 1 (1960).

⁹ *Lucas Flour*, 369 U.S. at 105 ("[A] strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement.") (footnote omitted).

The Court stated two reasons for finding an implied no-strike clause. First, it reasoned that both parties must have intended to prohibit strikes over arbitrable disputes because they agreed to the mandatory arbitration procedures. *Id.* Second, the Court believed that recognizing an implied no-strike clause covering arbitrable disputes would promote the peaceful settlement of labor disputes. *Id.* See also Note, *supra* note 1, at 731.

¹⁰ *Lucas Flour*, 369 U.S. at 106. This was the first time the Court had suggested that a no-strike agreement, either express or implied, would cover only arbitrable disputes. See also Note, *supra* note 1, at 730.

¹¹ The Supreme Court followed the *Lucas Flour* decision in *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974). In *Gateway Coal*, the union called a strike demanding the company suspend two foremen who allegedly had forged information about the safety of the air pressure in the mine shafts. *Id.* at 372. The company contended that the strike violated an implied no-strike clause because the dispute was subject to the contractual arbitration provisions. Accordingly, it sought an injunction to end the work stoppage. The Court implied a no-strike clause into the agreement and expressly limited it to arbitrable disputes, citing its prior decision in *Lucas Flour*. *Id.* at 381-82. Moreover, the Court expanded the remedies available to enforce implied no-strike clauses by affirming the district court's injunction against the union. *Id.* at 381 n.14, 387-88.

decide whether to enjoin a striking union from violating an express no-strike clause. The fact that courts have granted injunctive relief only against strikes concerning arbitrable disputes demonstrates a desire to protect the right to strike.

In *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,¹² the Supreme Court affirmed a district court's decision to enjoin a striking union. This was the Court's first authorization of injunctive relief after Congress passed the Norris-LaGuardia Act.¹³ In *Boys Markets*, the union struck to protest work assignments the company had given to non-union personnel, contending that these jobs were reserved for union personnel.¹⁴ The company contended that the strike violated the express no-strike clause in the arbitration provision and sought an injunction.¹⁵ The Court held that section 301(a) of the Labor Management Relations Act (LMRA) created an exception to the provisions of the Norris-LaGuardia Act that prohibit federal courts from granting injunctive relief in labor disputes.¹⁶ This section gives federal district courts jurisdiction over breach of contract actions between labor organizations and employers.¹⁷ The Court argued that unless federal courts are permitted to issue injunctions, section 301(a) would enable striking unions to circumvent state

¹² 398 U.S. 235 (1970).

¹³ Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-110, 113-115 (1982)).

¹⁴ *Boys Markets*, 398 U.S. at 239-40.

¹⁵ The agreement provided that "there should be 'no cessation or stoppage of work, lock-out, picketing or boycotts.'" *Id.* at 239 (quoting art. XIV, § D of the collective bargaining agreement). In addition to the express no-strike clause, the collective bargaining agreement required "[a]ny and all matters of controversy, dispute or disagreement . . . arising out of or . . . involving the interpretation or application of the terms of this Agreement . . ." to be submitted to arbitration. *Id.* at 238 n.3 (quoting art. XIV, § A of the collective bargaining agreement).

¹⁶ Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1982), prohibits courts from issuing injunctions against certain conduct in labor disputes. It provides in part:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:

- a. ceasing or refusing to perform any work or to remain in any relation of employment

Id. § 104(a). *Boys Markets* overruled the Court's earlier decision in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962). In *Sinclair*, the company and the union entered into a collective bargaining agreement that provided for binding arbitration of disputes regarding wages, hours, or working conditions. *Id.* at 197. The agreement also contained a no-strike clause covering these arbitrable disputes. Despite this agreement, the union engaged in nine work stoppages over a 19 month period. The company contended that each dispute was subject to arbitration and sought an injunction. The Court, however, held that § 4 of the Norris-LaGuardia Act barred injunctive relief even when the dispute is arbitrable. *Id.* at 203.

¹⁷ LMRA, § 3001(a), 29 U.S.C. § 185(a) (1982), provides in part: "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

court ability to issue injunctions. The unions would simply remove all cases to federal court.¹⁸ The Court, however, expressly limited injunctive relief to arbitrable disputes.¹⁹

The Supreme Court refined its position in *Buffalo Forge Co. v. United Steelworkers of America*²⁰ when it upheld the district court's refusal to enjoin the Steelworkers' sympathy strike, despite the existence of a broadly worded express no-strike clause.²¹ Although the legality of the sympathy strike was subject to arbitration, the Court held that a sympathy strike could be enjoined only if the underlying dispute was arbitrable.²² Because the dispute underlying the strike at issue was between the company and a sister union and, therefore, not subject to the defendant union's arbitration provisions, the Court agreed with the district court's decision not to enjoin the sympathy strike.²³ Although courts need not apply coterminous interpretation in actions for damages caused by breach of an express no-strike clause solely because of the Supreme Court decisions, the Court's analysis in these cases suggests that coterminous interpretation is necessary to protect employees' right to strike.

II

DEFINING THE SCOPE OF EXPRESS NO-STRIKE CLAUSES

The circuit courts have developed two methods of defining the scope of express no-strike clauses. Several circuits presume that express no-strike clauses are coterminous with the collective bargaining agreements arbitration provisions. These courts hold that such clauses extend beyond the arbitration provisions only if explicit evidence supports a waiver of the right to strike. Other circuits, however, interpret no-strike clauses as broadly as the contract language provides unless the union

¹⁸ *Boys Markets*, 398 U.S. at 246.

¹⁹ *Id.* at 254. The Court noted that an employer would not agree to an arbitration provision in a collective bargaining agreement if that provision could not be specifically enforced. The Court also noted that the amount of damages caused by a strike may be hard to calculate and, therefore, hard to recover. Furthermore, employers may hesitate to exacerbate problems in their relationship with the union and, therefore, may not attempt to sue the union after the strike is over. *Id.* at 247-48 & n.17.

²⁰ 428 U.S. 397 (1976). In *Buffalo Forge*, the union struck in support of a sister union's dispute with their employer. The company attempted to enjoin the strike, claiming it violated an express no-strike clause in their collective bargaining agreement. *Id.* at 401. It did not claim, however, that the dispute underlying the strike was subject to arbitration.

²¹ *Id.* at 399 n.1. In a sympathy strike, there is no dispute between the employer and the union. Instead, the union strikes in sympathy with a dispute elsewhere. *See, e.g., Carbon Fuel Co. v. United Mine Workers*, 582 F.2d 1346, 1348 n.2 (1978) (holding that work stoppages for such reasons as political protests or intraunion disputes are sympathy strikes).

²² *Buffalo Forge*, 428 U.S. at 407-11.

²³ Strikes triggered by political events totally outside the control of the company are also not enjoinable. *See Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702 (1982) (work stoppage by Longshoremen triggered by Soviet invasion of Afghanistan and not by arbitrable dispute could not be enjoined).

proves that the parties intended to limit the scope of an express no-strike clause.

The Third Circuit, in *Delaware Coca-Cola Bottling Co. v. General Teamsters Local Union 326*,²⁴ was the first court to extend coterminous interpretation from implied to express no-strike clauses in a suit for damages. In *Delaware Coca-Cola*, the union engaged in a sympathy strike²⁵ even though it had agreed to a broad, general no-strike clause in the collective bargaining agreement.²⁶ The employer sued to recover damages caused by the strike, contending that the express no-strike clause alone was enough to prohibit all work stoppages. In further support of its position that the strike violated the collective bargaining agreement, the company introduced two statements by union officials that allegedly demonstrated that the union had intentionally waived the right to strike.²⁷ The first statement, by the union president, indicated that the local union leaders "didn't care"²⁸ whether the strike violated the no-strike clause.²⁹ The second was a warning from a union shop steward that the strike violated the no-strike provision.³⁰ The company did not introduce any evidence of the parties' intent during the negotiations re-

²⁴ 624 F.2d 1182 (3d Cir. 1980).

²⁵ The union was certified as the bargaining representative for both the production and maintenance (P & M) workers and the drivers. The P & M workers negotiated with the company and came to an agreement. The drivers never came to an agreement and they struck on several occasions. The P & M workers walked out in support of these strikes.

²⁶ The no-strike clause provided in part:

"Section 1. The union will not cause nor will any member of the bargaining unit take part in any strike, sit-down, stay-in, slow down in any operation of the Company or any curtailment of work or restriction of service or interference with the operation of the Company or any picketing or patrolling during the term of this Agreement."

624 F.2d at 1183 (quoting art. XIV, § 1 of the collective bargaining agreement). The agreement also included arbitration procedures. *Id.*

²⁷ The company also introduced into evidence a telegram from the Eastern Conference of Teamsters "stating that the sympathy strike violated the [P & M workers'] contract." The court found this telegram unpersuasive as evidence of the company's claim that the union had waived the right to engage in a sympathy strike because "[t]he Eastern Conference was not involved in negotiating the 1976 contract." *Id.* at 1189-90.

²⁸ *Id.* at 1189.

²⁹ The general manager of the plant stated that when he told the union president that a strike would constitute a breach of the P & M workers' contract, the president responded that "he didn't care; that the time to strike the Coca-Cola plant was in the summertime, and he wasn't going to wait until the issue was resolved." *Delaware Coca-Cola Bottling Co. v. General Teamsters Local Union 326*, 474 F. Supp. 777, 780 (D. Del. 1979). On appeal, however, the Third Circuit took care to point out that the general manager testified that the union president had actually stated "it didn't matter" whether the strike breached the P & M workers' contract. *Delaware Coca-Cola*, 624 F.2d at 1189. The court argued that the entire exchange was ambiguous because it was not clear whether the president was talking about a strike by the drivers, the production and maintenance workers, or both. *Id.*

³⁰ *Delaware Coca-Cola*, 624 F.2d at 1190. The court subsequently ruled that the steward's statement was not evidence that the steward thought a sympathy strike would violate the contract.

garding the scope of the no-strike clause.³¹

The Third Circuit reasoned that normally an express no-strike clause is the quid pro quo for arbitration procedures and should, therefore, be interpreted coterminously with these procedures in the absence of explicit evidence establishing a more extensive waiver of the right to strike.³² Thus, the court effectively created a presumption favoring coterminous interpretation.³³ Furthermore, the court held that a general, broadly worded express no-strike clause alone cannot establish this waiver.³⁴ The court found that the statements by the union officials were ambiguous and, thus, did not constitute a waiver of the right to strike.³⁵ By applying the no-strike clause coterminously with the arbitration provisions, the court found that the union had not violated the contract and was not liable for damages.³⁶

In *Pacemaker Yacht Co. v. NLRB*,³⁷ the Third Circuit applied the analytical framework for coterminous interpretation developed in *Delaware Coca-Cola*, but rejected the earlier holding that a broadly worded no-strike clause could never by itself establish waiver of the right to strike.³⁸ In *Pacemaker*, the employees struck when the independent insurance carrier refused to pay the claims of employee beneficiaries. The insurer's refusal stemmed from the union's failure to pay its premiums and not from any wrongdoing by the company. After notifying all employees that the strike violated the collective bargaining agreement, the company dismissed the 126 employees who continued to strike. The com-

³¹ *Id.* at 1188.

³² *Id.* at 1186.

³³ The court stated that:

Without evidence to the contrary, it is proper to presume that the no-strike clause is not broader than the arbitration clause. Thus we feel that where the sympathy strikers and their employer cannot arbitrate the subject matter of the primary dispute, a generally worded no-strike clause does not bar the sympathy strike.

Id. at 1187.

In *NLRB v. Gould Inc.*, 638 F.2d 159 (10th Cir. 1980), *cert. denied sub nom. Brown Boveri Elec. Co. v. NLRB*, 452 U.S. 930 (1981), the Tenth Circuit also effectively adopted a presumption in favor of coterminous interpretation. The court found that the express no-strike clause covered only arbitrable disputes because the company did not present extrinsic evidence supporting waiver of the right to strike. The company was found guilty of unfair labor practices for discharging employees who had engaged in a sympathy strike not covered by arbitration.

³⁴ *Delaware Coca Cola*, 624 F.2d at 1187.

³⁵ *Id.* at 1189-90.

³⁶ This is the only decision that applies coterminous interpretation to absolve a union from liability for a breach of their no-strike clause. Although the Sixth Circuit applied coterminous interpretation to find that a union had not breached its no-strike agreement in *Ryder Truck Lines v. Teamsters Freight Local Union No. 480*, 705 F.2d 851 (6th Cir. 1983), this decision was vacated and then reversed on rehearing en banc. *Ryder Truck Lines v. Teamsters Freight Local Union No. 480*, 727 F.2d 594 (6th Cir. 1984).

³⁷ 663 F.2d 455 (3d Cir. 1981).

³⁸ *Id.* at 459-60.

pany contended that these employees had violated the no-strike clause in their collective bargaining agreement. In response, the union filed unfair labor practice grievances against the company, contending that the no-strike clause did not apply to this strike.³⁹ The administrative law judge found that the union had waived its right to strike and dismissed the grievance. On appeal, the National Labor Relations Board disagreed with the ALJ's finding of waiver and upheld the union's grievance.⁴⁰ The company then appealed this decision.

The *Pacemaker* court agreed that coterminous interpretation was applicable to express no-strike clauses in the absence of explicit evidence establishing waiver.⁴¹ However, it rejected the idea "that a general no-strike clause may never waive the right to strike over unspecified, non-arbitrable disputes."⁴² This language suggests that an employer must meet a less rigorous standard to establish a waiver of the right to strike, but the court's decision did not depend on this relaxed standard. Instead the court focused on the structure of the collective bargaining agreement. The agreement actually contained two no-strike clauses. The arbitration section included one that covered only arbitrable disputes.⁴³ The other, independent of the arbitration section, was more broadly worded than the first.⁴⁴ According to the court, the presence of these *two* clauses constituted sufficient evidence to establish a broad waiver of the right to strike.⁴⁵ Therefore, the court reasoned that the

³⁹ The union alleged that the no-strike clause did not cover this strike and, therefore, that the strike remained protected activity under § 7 of the NLRA, 29 U.S.C. § 157 (1982). *Pacemaker Yacht Co.*, 663 F.2d at 457. The union then argued that the company was guilty of unfair labor practices under § 8(a)(1) of the NLRA, 29 U.S.C. § 158 (a)(1) (1982). 663 F.2d at 457.

⁴⁰ *Pacemaker Yacht Co.*, 663 F.2d at 457.

⁴¹ *Id.* at 458.

⁴² *Id.* at 459-60. The court stated, "We believe there is no basis for limiting employees' ability to waive the right to strike over nonarbitrable disputes simply because they were unforeseeable at the time the contract was negotiated." *Id.* at 460.

⁴³ The narrowly worded no-strike clause provided: "Should difference arise between the Company and its employees . . . as to the interpretation or application of the provisions of this Agreement, there shall be no suspension or stoppage of work and an earnest effort shall be made to settle such differences immediately or in the manner described below." *Id.* at 458 (quoting art. IX, § 9.1 of the collective bargaining agreement) (subsequent clauses set forth grievance procedures).

⁴⁴ The broadly worded no-strike clause provided:

"10.1 So long as this Agreement is in effect, the Company agrees that there shall be no lockouts and the Union agrees that there will be no strikes, picketing, slow downs, deliberate curtailment of production, work stoppages of any kind or other interruption of the Company's operations. In the event one or more employees fail to abide by the provisions of this article, the Company retains full right to take any disciplinary action it deems necessary, including discharge."

Id. (quoting art. X, § 10.1 of the collective bargaining agreement).

⁴⁵ *Id.* at 458-59.

union had waived its right to strike and the employer was not guilty of unfair labor practices for dismissing these employees.

Unlike the Third Circuit, the Eighth Circuit, in *Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters*,⁴⁶ favored a broad interpretation of express no-strike clauses. In *Iowa Beef Processors*, strikers from two of the company's plants set up picket lines at a third plant that was not involved in the strike. Virtually all of the workers at the third plant honored the picket line even though the union had agreed to a broadly worded express no-strike clause⁴⁷ and to a supplemental clause that contained language specifically waiving the union's right to honor picket lines.⁴⁸ Furthermore, a union vice-president had warned the employees that the strike violated the contract.⁴⁹ The company brought an action to recover damages sustained because of the strike, contending that the union had violated the no-strike clause. Following a jury trial, the district court awarded the company breach of contract damages.⁵⁰

On appeal, the Eighth Circuit held that the scope of an express no-strike clause is "analytically distinct" from the scope of the arbitration provisions.⁵¹ Noting that the extent of the union's obligation not to strike "depends on the intent of the contracting parties,"⁵² the court held that the scope of the no-strike clause was as broad as the contract language provided.⁵³ Furthermore, the court indicated that it would limit the scope of the clause only if the union presented some evidence showing that the parties intended the clause to have a limited effect.⁵⁴ Because the union did not present any such evidence, the court held that the union had waived its right to honor picket lines⁵⁵ and awarded the employer damages.⁵⁶

⁴⁶ 597 F.2d 1138 (8th Cir.), cert. denied, 444 U.S. 840 (1979).

⁴⁷ The no-strike clause provided: "During the term of this Agreement there shall be no strike, stoppage, deliberate withholding of production, or suspension of work on the part of the union or its members." 597 F.2d at 1143-44 (quoting art. VI of the collective bargaining agreement).

⁴⁸ The supplement provided: "In the implementation of Article VI of the agreement the following rules shall be binding on the parties. . . . (2) the Union shall promptly order its members to resume their normal duties notwithstanding the existence of any picket line." *Id.* at 1144 (quoting art. VI of the collective bargaining agreement).

⁴⁹ *Id.* at 1142.

⁵⁰ *Id.* at 1141.

⁵¹ *Id.* at 1145.

⁵² *Id.* (quoting *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974)).

⁵³ *Id.* at 1144.

⁵⁴ *Id.* at 1144-45 (citing *Montana-Dakota Utilities Co. v. NLRB*, 455 F.2d 1088 (8th Cir. 1972)).

⁵⁵ "[W]e agree with the district court's conclusion that the language of the bargaining agreement barred sympathy strikes." *Id.* at 1144.

⁵⁶ See also *United States Steel Corp. v. NLRB*, 711 F.2d 772 (7th Cir. 1983) (coterminous interpretation not applicable when determining if broadly worded express no-strike clause prohibited sympathy strike when union charged company with unfair labor practices for suspending sympathy striker).

The Seventh Circuit followed the Eighth Circuit's method of interpreting express no-strike clauses in *W-I Canteen Service v. NLRB*⁵⁷ although it suggested that it was following a method similar to the Third Circuit's analysis. In *Canteen*, the company fired twelve employees for honoring another union's picket line at the company's plant. It contended that the strike violated the express no-strike clause in their collective bargaining agreement.⁵⁸ This agreement also contained a clause allowing the employees to honor picket lines at the facilities of other employers.⁵⁹ During the contract negotiations, however, the company rejected a union proposal to expand this picket line clause to permit employees to honor picket lines at the employer's premises.⁶⁰ After the dismissals, the union filed unfair labor practice grievances against the company, contending that the employees had not waived their right to honor picket lines at the employer's premises.⁶¹ The National Labor Relations Board (NLRB) found that the dismissals were unfair labor practices and the company appealed.⁶²

The Seventh Circuit's statement that coterminous interpretation is "a rule of contract interpretation and the parties may by express language indicate their intent to interpret the no-strike and arbitration clauses differently"⁶³ suggested that it would use coterminous interpretation in the absence of explicit evidence establishing a waiver of the right to strike. Before considering any extrinsic evidence of a waiver, however, the court held that the language of the no-strike clause was "sufficiently clear to preclude sympathy strikes" at the employer's premises.⁶⁴ Furthermore, the court held that the scope of the no-strike clause

⁵⁷ 606 F.2d 738 (7th Cir. 1979).

⁵⁸ The collective bargaining agreement contained a no-strike clause requiring the parties to submit all disputes not covered by the agreement to arbitration. It provided:

"The Company and the Union agree that there will be no strike or lockout during the life of this Agreement so long as the Company and the Union abide by the terms of this Agreement or submit to arbitration any differences which may arise which are not covered by this Agreement."

Id. at 740 (quoting art. XVIII of the collective bargaining agreement).

⁵⁹ This clause, however, did not include the company's own facilities. It provided:

"Section 3. The Company will not, as a condition of continued employment, require the employees to cross any picket line established on or in front of the premises of any other company. The individual or concerted refusal to pass such a picket line shall not constitute grounds for discipline, discharge, and is not to be considered as violating any provision written or implied which prohibits the Union from striking."

Id. (quoting art. VII, § 3 of the collective bargaining agreement).

⁶⁰ *Id.* at 746 & n.11.

⁶¹ As in *Pacemaker Yacht Co.*, 663 F.2d at 455, the union argued that the strike was protected activity under § 7 of the NLRA, 29 U.S.C. § 157 (1982), and, therefore, the dismissals violated § 8(a)(1) of that Act, 29 U.S.C. § 158(a)(1) (1982). 606 F.2d at 739. *See supra* note 39.

⁶² 606 F.2d at 743.

⁶³ *Id.* at 744.

⁶⁴ *Id.* at 746.

and the scope of the arbitration provisions must be determined separately.⁶⁵ This analysis indicates the court's intention to interpret express no-strike clauses as broadly as the contract language provides unless the union introduces evidence that the parties intended to limit the scope of the clause. Thus, despite its language supporting coterminous interpretation, the Seventh Circuit applied here the Eighth Circuit's analysis in *Iowa Beef Processors*, interpreted the no-strike clause broadly, and held that the company did not commit an unfair labor practice by discharging the strikers.⁶⁶

III

THE PROPER SCOPE OF NO-STRIKE CLAUSES

A. Consideration of Labor Law Policies

When determining the proper scope of an express no-strike clause, a court should go beyond ordinary rules of contract interpretation⁶⁷ and consider the policies underlying the national labor laws.⁶⁸ In cases requiring interpretation of express no-strike clauses, these policies conflict. Specifically, the policies of freedom of employee organization guaranteed by section 7 of NLRA⁶⁹ and the right to strike guaranteed by sec-

⁶⁵ *Id.* at 744.

⁶⁶ *Id.* at 749. *But see* *Amcar Div., ACF Indus. Inc. v. NLRB*, 641 F.2d 561, 566 (8th Cir. 1981) (broad no-strike clause by itself insufficient to establish waiver, but may constitute waiver when examined in light of facts surrounding agreement).

⁶⁷ A court should not interpret an express no-strike clause as it would an ordinary contract; collective bargaining agreements are instruments of self-government affecting the future relationship between the parties rather than instruments like ordinary contracts designed to obtain one specific objective. *See* *Hendricks v. Airline Pilots Ass'n*, 696 F.2d 673, 676 (9th Cir. 1983) (injecting private contract law into process of enforcing labor/management agreements not likely to effectuate policy objectives of Congress). *See also* *Cox, Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1492-93 (1959); *Feller, A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 790-91 (1973).

⁶⁸ In *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957), the Supreme Court held that the federal substantive law applicable in labor cases decided in federal courts should be based on national labor policy, as reflected in federal labor laws. In *Lincoln Mills*, the company and the union had a collective bargaining agreement containing grievance and arbitration procedures. The union filed several grievances concerning work loads and work assignments, but it was not satisfied with the results and requested arbitration. The company refused to submit the disputes to the arbitrator. The union brought suit to compel arbitration. In deciding for the union, the Court held that the federal judiciary has the power to apply federal substantive law in actions brought under § 301 of the LMRA, 29 U.S.C. § 185 (1982), and that they should fashion this law from the policies underlying federal labor law. 353 U.S. at 456.

⁶⁹ 29 U.S.C. § 157 (1982). Congress enacted both the Norris-LaGuardia Act and the NLRA to further the policy of freedom of organization by protecting employees' right to strike. The policy statement of the NLRA, § 1, provides:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association, self-organization,

tion 13⁷⁰ collide with the policy favoring preservation of industrial peace expressed in section 1 of the LMRA.⁷¹ Advancement of these conflicting policies seemingly requires different methods for interpreting express no-strike clauses.

To advance the policies of protecting employees freedom to organ-

and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment

29 U.S.C. § 151 (1982).

Furthermore, § 7 of that Act provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" 29 U.S.C. § 157 (1982). Finally, the policy statement in the LMRA, § 1, indicates that Congress did not reject its concern with preserving employees' freedom of organization. It provides: "It is the purpose and policy of this chapter . . . to protect the rights of individual employees in their relations with labor organizations" 29 U.S.C. § 141 (1976).

Congress felt that freedom of organization would foster more efficient communications between employers and employees, and, therefore, "promote rational and responsible settlement of labor disputes by peaceful means." C. MORRIS, *THE DEVELOPING LABOR LAW* 13 (2d ed. 1983). *See also* *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978) ("[T]he right to organize is at the very core of the purpose for which the NLRA was enacted."); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965) ("The central purpose of [the NLRA] was to protect employee self-organization . . . from disruptive interferences by employers."); *Division 1287, Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Missouri*, 374 U.S. 74, 82 (1963) ("Collective bargaining, with the right to strike at its core, is the essence of the federal scheme."); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) ("[T]he right of employees to organize for mutual aid . . . is the principle of labor relations which the Board is to foster."); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1936) (employees have fundamental right to organize and § 7 of NLRA is meant to safeguard this right).

Employers can be held liable for interfering with their employees' § 7 rights regardless of whether they intended to do so. *See NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 22-23 (1964) (employer breached employees' § 7 rights by discharging them for allegedly threatening to blow up plant when threats were never actually made).

⁷⁰ Section 13 of the NLRA explicitly preserves the right to strike. It provides: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163 (1982); *see also NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234 (1963) ("[T]he right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.") (footnote omitted); *NLRB v. Local Union No. 639, International Bhd. of Teamsters*, 362 U.S. 274, 282 (1960) ("[Section] 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation of [unfair labor practice statutes] which safeguards the right to strike . . .").

⁷¹ Congress enacted the LMRA, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended in scattered sections of 26 U.S.C.), because unions had matured into powerful economic forces and were using this power to disrupt the national economy. *See A. COX, D. BOK & R. GORMAN, LABOR LAW CASES AND MATERIALS* 89-93 (8th ed. 1977). The policy statement of the LMRA indicates that labor law policy now includes the preservation of industrial peace. It provides: "It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers . . . and to protect the rights of the public in connection with labor disputes affecting commerce." 29 U.S.C. § 141 (1982). Furthermore, § 301(a) of the LMRA, 29 U.S.C. § 185(a) (1982), gives federal courts jurisdiction over disputes between employers and labor organizations. *See supra* note 17.

ize and the right to strike, courts should use coterminous interpretation of express no-strike clauses. By limiting the scope of no-strike clauses to arbitrable disputes, coterminous interpretation allows employees to strike over any nonarbitrable dispute.⁷² In contrast, to advance the policy of protecting industrial peace, courts should use a broad interpretation of no-strike clauses. The threat that courts may hold unions liable for striking over a broad range of issues may deter unions from engaging in some strikes. This fundamental conflict in labor law policies forces courts to favor one policy or the other.

B. A Suggested Method for Interpreting Express No-Strike Clauses

The right to strike is labor's most effective economic weapon, and without economic power, labor's right to organize would have little meaning. To protect labor's power, courts should be hesitant to find that a union has bargained away the right to strike; courts should presume that express no-strike clauses and arbitration clauses are coterminous. An employer should be able to defeat this presumption only by presenting clear and unmistakable evidence of a waiver of the right to strike. Such evidence, combined with the policy of protecting industrial peace, justifies a broader interpretation of a no-strike clause. In the absence of clear and unmistakable evidence of waiver, however, courts should apply coterminous interpretation.

The Supreme Court has recognized that the clear and unmistakable waiver standard affords vigorous protection to employees' right to strike. The Supreme Court first applied this standard in *Mastro Plastics Corp. v. NLRB*,⁷³ to decide whether a broadly worded express no-strike clause prohibited a strike over an unfair labor practice. In *Mastro Plastics*, the union struck to protest the company's discharge of an employee who had openly supported the union's organizational efforts. The union contended that the discharge was an unfair labor practice and that the no-strike clause did not cover strikes protesting unfair labor practices.⁷⁴

⁷² Because coterminous interpretation allows a union to strike over nonarbitrable disputes, a court's interpretation of the scope of arbitration provisions becomes important. In a series of cases following the *Lincoln Mills* decision, *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), and *United Steelworkers v. Enterprise Wheel & Car Co.*, 363 U.S. 593 (1960), the Court fashioned its second principle of federal substantive labor law, *see supra* note 68, when it decided to construe arbitration provisions to include "all disputes concerning the terms of the labor contract, unless the parties clearly negate such construction." R. GORMAN, *BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING* 606 (1976). This expansive interpretation of arbitration procedures means that even with coterminous interpretation of no-strike clauses, unions lose the right to strike over many disputes.

⁷³ 350 U.S. 270 (1956).

⁷⁴ Section 7 of the NLRA guarantees employees the right to engage in concerted activities. 29 U.S.C. § 157 (1982); *see supra* note 69. It is, therefore, an unfair labor practice under

The Court held that a union retains the right to strike over an unfair labor practice in the absence of an explicit waiver of that right.⁷⁵ The Court acknowledged the paramount importance of the right and reasoned that it complements the policy of protecting industrial peace because effective negotiations depend on employees having "full freedom of association."⁷⁶

Although the *Mastro Plastics* Court dealt with the narrow issue of whether to enjoin an unfair labor practice strike,⁷⁷ its reasoning applies to other contexts. The right to strike in support of other unions or in protest of unsafe working conditions is also part of full and fair freedom of association and is important in the negotiation process. Moreover, the Court's recognition that a policy protecting the right to strike enhances the negotiation process supports the statutory protection already given the right to strike by both section 7⁷⁸ and section 13⁷⁹ of the NLRA.⁸⁰

The Court also has protected the right to strike by limiting the availability to employers of injunctive relief against strikes.⁸¹ In *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,⁸² for example, the Court interpreted section 301(a) of the LMRA⁸³ narrowly, forbidding federal courts from enjoining striking unions unless the strike is over an arbitrable dispute.⁸⁴ In *Buffalo Forge Co. v. United Steelworkers of America*,⁸⁵ the Court narrowed its interpretation of section 301(a) even further, holding that an injunction is permissible only if the dispute underlying the strike

§ 8(a)(1) of the NLRA for a company to discharge an employee for supporting a union. 29 U.S.C. § 158(a)(1) (1982).

⁷⁵ 350 U.S. at 283 (waiver requires "compelling" expression); see also *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983) (applying clear and unmistakable evidence standard to waiver of union officers' right to be protected against more severe sanctions than those accorded employees).

⁷⁶ 350 U.S. at 280 (quoting 29 U.S.C. § 151(b)).

⁷⁷ The *Mastro Plastics* decision was based on serious unfair labor practices. The NLRB held in *Arlan's Dep't Store*, 133 N.L.R.B. 802 (1961), that a similar no-strike clause prohibited a strike over a minor unfair labor practice. In applying the holding of *Mastro Plastics*, the NLRB recognized a rule of reason approach: "[O]nly strikes in protest against serious unfair labor practices should be held immune from general no strike clauses." 133 N.L.R.B. at 807. Thus, the breadth of the *Mastro Plastics* decision has been narrowed further.

⁷⁸ 29 U.S.C. § 157 (1982); see *supra* note 69.

⁷⁹ 29 U.S.C. § 163 (1982); see *supra* note 70.

⁸⁰ The statutory protection of the right to strike does not apply to all strikes. Unprotected strikes include wildcat strikes, strikes with aggravated violence, repeated partial strikes or work stoppages and strikes amounting to unfair labor practices by the union. See Gies, *Employer Remedies for Work Stoppages that Violate No-Strike Provisions*, 8 EMPLOYEE REL. L.J. 178, 179-80 (1982).

⁸¹ See *supra* notes 12-23 and accompanying text.

⁸² 398 U.S. 235 (1970).

⁸³ 29 U.S.C. § 185(a) (1982); see *supra* note 17.

⁸⁴ 398 U.S. at 253-54.

⁸⁵ 428 U.S. 397 (1976).

is arbitrable.⁸⁶ Because a union engaging in a sympathy strike has no arbitrable dispute with its employer, but is only supporting another union's dispute, the Court effectively eliminated the possibility of enjoining a sympathy strike. The protection of sympathy strikes from injunctions further illustrates the Court's eagerness to protect the right to strike.

In light of the cogent policy and statutory support for the right to strike, any waiver of this right must be supported by clear and unmistakable evidence.⁸⁷ A broad no-strike clause by itself does not indicate conclusively that the union intended to waive the right to strike in all situations.⁸⁸ Nor does a union's failure to negotiate for a contractual confirmation of its right to strike constitute a waiver.⁸⁹ The right to strike is too vital a part of the collective bargaining process to allow ambiguous evidence to establish a waiver of the right.

Courts should investigate thoroughly the collective bargaining process to determine whether the evidence establishes a waiver.⁹⁰ The language and structure of the agreement, previous company practices, and evidence of the negotiation process provide courts with valuable assistance in determining whether a union has actually waived its right to strike. Without such an investigation, the natural desire of courts to maintain industrial peace may lead to reliance on weak evidence to interpret a no-strike clause broadly and thereby jeopardize the union's right to strike.⁹¹

A requirement that courts find clear and unmistakable evidence of a waiver of the right to strike before interpreting a no-strike clause broadly will not deprive the employer of the true benefit of his bargain.

⁸⁶ *Id.* at 408-10. Supreme Court precedent applying coterminous interpretation to implied no-strike clauses should not govern in an express no-strike clause context. When a no-strike clause is implied by the existence of arbitration procedures, the clause is necessarily coterminous with them. Such symmetry by definition is not present in express no-strike clauses. *See supra* text accompanying notes 3-11.

⁸⁷ *Cf.* *United Steelworkers v. NLRB*, 536 F.2d 550, 555 (3d Cir. 1976) (waiver of statutory right to have union representative present at employee grievance hearing must be clearly and unmistakably established).

⁸⁸ Courts should be wary of accepting broad no-strike clauses as conclusive evidence of a waiver of the right to strike because collective bargaining agreements are not simply contracts. *See supra* note 67 and accompanying text. *E.g.*, *NLRB v. C.K. Smith & Co.*, 569 F.2d 162, 167 (1st Cir. 1977), *cert. denied*, 436 U.S. 957 (1978).

⁸⁹ *E.g.*, *NLRB v. Southern Cal. Edison Co.*, 646 F.2d 1352, 1366 (9th Cir. 1981); *cf.* *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 750-51 (6th Cir. 1963) (statutory right to wage information did not have to be included in collective bargaining agreement).

⁹⁰ This time consuming method of interpreting express no-strike clauses applies only to actions for damages or to unfair labor practice grievances. In actions where the employer seeks a temporary restraining order or an injunction, the time limitations prohibit an in depth factual inquiry. The Supreme Court has decided, however, that coterminous interpretation always applies to these cases. *See supra* notes 12-23 and accompanying text.

⁹¹ *See infra* notes 102-04 and accompanying text; *supra* notes 57-66 and accompanying text.

An express no-strike clause is not necessarily the quid pro quo for arbitration procedures; an employer may make concessions to obtain a no-strike clause that extends beyond the agreement to arbitrate.⁹² If a court always applied coterminous interpretation, employers could complain that they were being deprived of the benefit of their bargain. The existence of further employer concessions, however, will constitute sufficient evidence of a waiver. The union's right to strike therefore remains protected. The clear and unmistakable evidence standard thus satisfies the expectations of both parties.

Finally, the clear and unmistakable evidence standard allows the no-strike clause and arbitration provisions in a collective bargaining agreement to remain analytically distinct.⁹³ The no-strike clause and the arbitration provisions will have the same scope only if the company cannot produce evidence adequate to support waiver. Therefore, the scope of the arbitration provisions does not automatically determine the scope of the no-strike clause.

IV APPLICATION OF CLEAR AND UNMISTAKABLE WAIVER STANDARD TO RECENT CIRCUIT COURT DECISIONS

This section applies the analytical framework developed in the previous section to recent circuit court decisions defining the scope of express no-strike clauses. Application of this framework yields the same conclusion as the court reached in both *Delaware Coca-Cola Bottling Co. v. General Teamsters Local Union 326*⁹⁴ and *Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters*.⁹⁵ Application of the framework to the facts of *W.I. Canteen Service v. NLRB*,⁹⁶ however, would lead to a conclusion different from the court's and serves as an example of the enhanced protection this method of analysis affords the right to strike.

In *Delaware Coca-Cola*,⁹⁷ the extrinsic evidence supporting a broad interpretation of a no-strike clause consisted only of statements by union officials. One statement, by a regional officer, warned the local that the strike violated the contract with the employer while a statement by a local official indicated that the union would strike regardless of any vio-

⁹² See *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 407 (1976) (quid pro quo for employer's promise to arbitrate was union's obligation not to strike over issues subject to arbitration).

⁹³ See *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 382 (1974) ("Absent an explicit expression . . . the agreement to arbitrate and the duty not to strike should be . . . coterminous . . .") (emphasis added).

⁹⁴ 624 F.2d 1182 (3d Cir. 1980).

⁹⁵ 597 F.2d 1138 (8th Cir.), cert. denied, 444 U.S. 840 (1979).

⁹⁶ 606 F.2d 738 (7th Cir. 1979).

⁹⁷ See *supra* notes 24-36 and accompanying text.

lation of the no-strike clause. Each statement merely represented the individual speaker's views and did not necessarily mirror those of the union. Consequently, neither statement provided clear and unmistakable evidence of waiver by the union of the right to strike. Because neither party introduced any other evidence supporting waiver, the Third Circuit correctly applied coterminous interpretation.

In *Iowa Beef Processors*,⁹⁸ the contract language by itself established a waiver of the right to strike under the clear and unmistakable waiver theory. The collective bargaining agreement contained a broadly worded no-strike clause and a supplemental clause that explicitly required union members " 'to resume their normal duties notwithstanding the existence of *any* picket line.' "⁹⁹ Although the broad no-strike clause by itself does not meet the clear and unmistakable standard, the supplement explicitly restricts the union's right to honor picket lines.¹⁰⁰ This specific contractual waiver satisfies the clear and unmistakable evidence test.¹⁰¹ Thus, when applied to these facts, the *Iowa Beef Processors* court's analysis and the clear and unmistakable waiver theory arrive at the same conclusion.

When applied to the facts of *W.I. Canteen*,¹⁰² the suggested framework indicates that the employer was guilty of unfair labor practices, a conclusion contrary to that reached by the court and more supportive of the employees' right to strike. In *Canteen*, the extrinsic evidence supporting waiver consisted of a picket line clause allowing the employees to honor picket lines at the facilities of other employers and a union proposal, rejected by the company, to include the employer's premises in the picket line clause. Neither factor is clear and unmistakable evidence that the parties agreed to a broad waiver of the right to strike. Section 7 of the NLRA¹⁰³ guarantees employees the right to honor picket lines. A union does not have to negotiate for a contractual confirmation of this right.¹⁰⁴ Thus, the rejected union proposal does not clearly establish a waiver of the right to strike. Furthermore, the presence of the picket line clause, which expressly included the facilities of employers other than

⁹⁸ See *supra* notes 46-56 and accompanying text.

⁹⁹ 597 F.2d at 1144 (emphasis supplied by court) (quoting collective bargaining agreement).

¹⁰⁰ *Id.*; see *supra* notes 67 & 88 and accompanying text.

¹⁰¹ In *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455 (3d Cir. 1981), the court made a similar finding. In *Pacemaker*, however, it was the structure of the agreement rather than the language of the agreement that constituted an explicit waiver of the right to strike. See *supra* notes 37-45 and accompanying text.

¹⁰² See *supra* notes 57-66 and accompanying text.

¹⁰³ 29 U.S.C. § 157 (1982); see *supra* note 69.

¹⁰⁴ In *NLRB v. Southern Cal. Edison Co.*, 646 F.2d 1352, 1366 (9th Cir. 1981) the court faced the question of whether the company's rejection of a union proposal to allow the union to honor any official AFL-CIO picket line constituted explicit evidence of the union's waiver of the right to strike. The court held that this evidence was insufficient to establish waiver.

the contracting one, does not imply that the union waived the right to honor picket lines at the contracting employer's premises. Thus it does not establish a waiver of the right to strike. Otherwise, a union would forfeit all unconfirmed statutory rights by successfully negotiating for a contractual confirmation of some statutory rights. Because neither the rejected picket line proposal nor the final restricted picket line clause provides clear and unmistakable evidence of waiver, a court addressing the *W.I. Canteen* facts should interpret the no-strike clause coterminously with the arbitration provisions, thereby giving the employees' right to strike greater protection.

CONCLUSION

Although created as a tool to define the scope of implied no-strike clauses, coterminous interpretation is also valuable in defining the scope of express no-strike clauses. Courts should presume that an express no-strike clause is coterminous with the arbitration provisions in a collective bargaining agreement. They should disregard this presumption *only if* the employer clearly and unmistakably establishes that the union has waived its right to strike. Although some circuit courts have adopted this approach to interpreting express no-strike clauses, others have rejected it, presuming instead that express no-strike clauses are as broad as the contract language provides. The latter framework does not adequately protect the employee's right to strike in all cases and should be abandoned in favor of the clear and unmistakable waiver standard.

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