

Of *Mastro* and *Marathon*: Waiver of the Right to Strike Over Unfair Labor Practices in a *Boys Markets* World

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The two major policies of American labor law—protecting organizational freedom and preserving industrial peace—converge and conflict in the area of unfair labor practice strikes. The author argues that the proper accommodation of these policies requires that the right to strike over employer conduct that is “destructive of the collective bargaining relationship” be made non-waivable, regardless of contractual language. Moreover, according to the author, the current availability of Boys Markets relief makes such a non-waivability standard imperative: under current law there is a danger that lawful, protected strikes will be enjoined. Finally, the author argues that the material-breach doctrine, sometimes invoked by employers during unfair labor practice strikes to rescind bargaining agreements, be completely discarded, since it undermines both of these federal policies.

I

INTRODUCTION

The twin goals of American labor law are the promotion of organizational freedom and the encouragement of industrial peace. Never are these policies more deeply implicated than when employees strike in protest of alleged unfair labor practices during the life of a collective bargaining agreement which contains both grievance-arbitration and no-strike clauses. Nevertheless, the remedial structure of the law in this situation is potentially contradictory and inconsistent.

If an employer commits an unfair labor practice that also violates

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the bargaining agreement, the parties may settle the dispute through the grievance machinery. Or, the union may file charges with the National Labor Relations Board (the Board), alleging violations of section 8 of the National Labor Relations Act (the NLRA).¹ If the employer's unfair labor practice is "serious" under *Mastro Plastics Corp. v. NLRB*² and the later Board decision in *Arlan's Department Store of Michigan, Inc.*,³ a general no-strike clause in the collective bargaining agreement will not have waived the union's right to strike in protest. In such a case, the union may engage in an unfair labor practice strike.

If, however, the employer believes that the union has breached its no-strike commitment, the employer may discharge the striking employees.⁴ Alternatively, under *Boys Markets, Inc. v. Retail Clerks Union*,⁵ the employer can sue under section 301 of the Labor-Management Relations Act⁶ (the LMRA) to enjoin the strike and compel arbitration of the dispute.⁷ Finally, and most drastically, the employer may, under the "material breach" doctrine of *Marathon Electric Manufacturing Co.*,⁸ rescind the collective bargaining agreement in retaliation for the union's violation of the no-strike clause.

The existence of these various remedies has produced uncertainty

1. 29 U.S.C. § 158 (1976).

2. 350 U.S. 270, 281 (1956). In *Mastro* the Court held that the general no-strike clause at issue in the case did not waive the union's right to strike against employer unfair labor practices designed to oust the employer's bargaining representative, but indicated that a more specific waiver might be given effect. See *infra* text accompanying notes 53-57 and 63-78.

3. 133 N.L.R.B. 802, 808, 48 L.R.R.M. (BNA) 1731, 1735 (1961). In *Arlan's* the Board held that *Mastro's* non-waiver principle applied only to "serious" unfair labor practices, that is, those which are "destructive of the foundation upon which collective bargaining must rest." See *infra* text accompanying notes 79-88.

4. *Joseph Dyson & Sons, Inc.*, 72 N.L.R.B. 445, 19 L.R.R.M. (BNA) 1187 (1947); *Scullin Steel Co.*, 65 N.L.R.B. 1294, 17 L.R.R.M. (BNA) 286 (1946), *enforced as modified*, 161 F.2d 143 (8th Cir. 1947). The *Scullin-Dyson* doctrine is still the law. See, e.g., *Woodlawn Hosp. v. NLRB*, 596 F.2d 1331, 1336 (7th Cir. 1979). See also *Mastro Plastics*, 350 U.S. at 280.

5. 398 U.S. 235 (1970). In *Boys Markets* the Court held that strikes over disputes that are arbitrable under a collective bargaining agreement can be enjoined by the federal courts, the Norris-La Guardia Act notwithstanding. See *infra* text accompanying notes 125-27.

6. 29 U.S.C. § 185 (1976).

7. See *Educational & Recreational Servs., Inc. v. United Steelworkers, Local 8751*, 90 Lab. Cas. (CCH) ¶ 12,623 (D. Mass. 1980); *Southwestern Bell Tel. Co. v. CWA, Local 6222*, 343 F. Supp. 1165 (S.D. Tex. 1972).

8. 106 N.L.R.B. 1171, 32 L.R.R.M. (BNA) 1645 (1953), *enforced sub nom. IUE, Local 1113 v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 (1956). In *Marathon*, the Board held that a strike during the term of a collective bargaining agreement containing a no-strike clause is a material breach of contract, justifying the employer's subsequent rescission of the agreement. See *infra* text accompanying notes 185-90. Although the doctrine derives its name from the cited case, several earlier cases anticipated the *Marathon* holding. See, e.g., *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939), discussed *infra* at note 187. See also *Boeing Airplane Co. v. Aeronautical Indus. Dist. Lodge, No. 751*, 188 F.2d 356 (9th Cir. 1951); *United Biscuit Co. v. NLRB*, 128 F.2d 771 (7th Cir. 1942); *NLRB v. Columbian E & S Co.*, 96 F.2d 948 (7th Cir. 1938), *aff'd*, 306 U.S. 292 (1939); *United Elastic Corp.*, 84 N.L.R.B. 768, 24 L.R.R.M. (BNA) 1294 (1949).

in this important area of labor law. This article will show that much of the confusion stems from an improper understanding of the relationship between the Act's twin goals of organizational freedom and industrial peace.

A good example of the confusion in this area arose in litigation following a strike by the United Steelworkers Union against Dow Chemical Company several years ago.⁹ For many years Dow Chemical had recognized the Steelworkers as the representative of its employees at the Allyn's Point plant in Ledyard, Connecticut. Prior to May 1971, sixteen employees in Dow's latex department had worked seven days on and two days off, while three employees had worked regular five-day weeks. During May, the company put all latex department employees on five-day weeks, citing economic reasons and claiming that its decision was authorized by the management-rights clause of the collective bargaining agreement. Upon notification of the change, the union demanded negotiations, protesting that the new work schedule was a prospective modification of the agreement.¹⁰ When the company refused to bargain, the union filed a grievance.

The collective bargaining agreement provided for a five-step grievance procedure in which arbitration, though final and binding, was not mandatory.¹¹ The contract also contained a limited no-strike clause that preserved the union's right to strike where the grievance process had been completed, the union requested arbitration, and arbitration had been completed or denied.¹²

By the time the revised work plan was to begin on June 7, four steps of the grievance procedure had been completed. On that day, a company and a union representative met with 100 production employees to discuss the situation. After the meeting, the employees vowed not to return to work unless the company withdrew its plan. Picketing began the following day.¹³ The company requested several times that

9. See Dow Chemical Co., 212 N.L.R.B. 333, 87 L.R.R.M. (BNA) 1279 (1974) [hereinafter cited as *Dow I*]. See also Gould, *Recent Developments Under the National Labor Relations Act: The Board and the Circuit Courts*, 32 LAB. L.J. 424, 435 (1981).

10. The company estimated that each affected employee would earn approximately \$570 less per year as a result of fewer hours worked, lost overtime, and lost holiday and weekend premiums. The union estimated the loss per employee at \$1500 to \$2000 annually. See *United Steelworkers v. NLRB*, 530 F.2d 266, 268 n.2 (3d Cir.), cert. denied, 429 U.S. 834 (1976), rev'g in part, aff'g in part *Dow I*.

11. *Id.* at 269 n.4.

12. The no-strike clause provided:

The Union will not cause or engage in or authorize its members to engage in any strike against the Company, nor will any members of the Union take part in any other strike or stoppage or curtailment of work or restriction of production or interference with production of the Company, unless and until all of the Bargaining and Grievance Procedures outlined in this Agreement have been exhausted. . . .

Id.

13. 212 N.L.R.B. at 336.

the grievance process continue, though it refused to bargain over the change, and rejected arbitration as too time-consuming.¹⁴

During June and July, the company sent three letters to striking employees asking them to return to work. On July 23, the company notified the employees that replacements would be hired within the week. In early August, the company formally rescinded the collective bargaining agreement and fired the strikers. Some time later, a majority of the workers notified the employer that they no longer wished to be represented by the Steelworkers and, accordingly, the company withdrew its recognition of the union.¹⁵

The union filed unfair labor practice charges with the Board.¹⁶ The union argued before the Administrative Law Judge (ALJ) that under *Mastro Plastics*¹⁷ the company's unilateral action in changing the work schedule was an unfair labor practice which justified the strike.¹⁸ Thus, the union claimed, the employer's subsequent actions were also unfair. In contrast, the General Counsel argued that while the initial action was not "serious" enough under *Arlan's*¹⁹ to justify the strike, the contract rescission violated section 8(a)(5) of the Act²⁰ and converted the strike into an unfair labor practice strike.²¹ The later discharges and withdrawal of recognition therefore violated section 8(a)(3) of the Act.²²

The ALJ agreed with the union that the unilateral change in the work schedule violated section 8(a)(5). Nevertheless, he found the strike unprotected because the employees had struck before completing the grievance procedure and because the employer's action was not "serious" enough to come within the *Arlan's* rule.²³ The ALJ rejected the General Counsel's theory, and concluded that, because the union had materially breached the agreement, the *Marathon Electric* doctrine applied.²⁴ Thus, the rescission, termination, and withdrawal of recognition were insulated from any possible statutory violation. A three-member panel of the Board affirmed the ALJ's ruling in a two-to-one decision.

When the case came before the Third Circuit, Judge Aldisert, speaking for the court, stated that the major issue in the case was

14. *Id.* at 337.

15. *Id.*

16. *Dow I.*

17. *See supra* note 2 and *infra* text accompanying notes 53-57, 63-78.

18. 212 N.L.R.B. at 338.

19. *See supra* note 3 and *infra* text accompanying notes 79-88.

20. 29 U.S.C. § 158(a)(5) (1976).

21. 212 N.L.R.B. at 338.

22. 29 U.S.C. §§ 158(a)(1), (3) (1976).

23. 212 N.L.R.B. at 339-40.

24. *See supra* note 8 and *infra* text accompanying notes 185-90.

"whether the Board should have considered the effect of *Boys Markets*."²⁵ The court believed that the case should not be resolved by simply pigeon-holing it as within the rule of *Mastro Plastics* or that of *Arlan's* . . . [B]oth *Mastro Plastics* and *Arlan's* . . . must be understood in terms of their *legal* settings. We perceive fundamental developments in national labor policy since *Mastro* . . . and *Arlan's* . . . that should have commanded the Board's attention. Specifically, the Board did not evaluate whether the company could have avoided abrogating the collective bargaining agreement and terminating the employees had it sought to arbitrate the dispute. We turn . . . to a consideration of the developments in national labor policy which we believe militate against reliance on *Mastro Plastics* or *Arlan's* in determining whether the company's post-strike actions were permissible.²⁶

In short, even though *Boys Markets* relief was unavailable in this case because arbitration was not mandatory,²⁷ the court asked the Board to consider whether the employer's actions after the strike should be sanctioned since the employer had engaged in the "tooth and claw of industrial warfare" without actively seeking a more peaceful resolution of the dispute.²⁸ The court believed industrial peace to be the *sine qua non* of contemporary labor law. Accordingly, it found that the *Marathon Electric* rule was "inconsistent" with national labor policy and should therefore be "disapproved."²⁹ The court then remanded to the Board for reconsideration of all but the initial finding of an 8(a)(5) violation.³⁰

The Board interpreted the Third Circuit's opinion as a directive to consider the *Mastro-Arlan's* rule on remand.³¹ Two members adhered to *Arlan's*, and concluded that the employer's conduct was sufficiently serious to protect the strike.³² Two members continued their long-standing rejection of the *Arlan's* gloss on *Mastro Plastics*, but agreed that the company's conduct was nevertheless "serious."³³ Finally,

25. 530 F.2d at 268. See *supra* note 5 and *infra* text accompanying notes 125-27.

26. 530 F.2d at 272 (emphasis in original).

27. Although the court recognized that *Boys Markets* relief was unavailable, the court apparently thought that the company could have compelled compliance with the grievance procedure. *Id.* at 277.

28. *Id.* at 276.

29. *Id.* at 280.

30. *Id.* at 281.

31. Dow Chemical Co., 244 N.L.R.B. 1060, 1061, 102 L.R.R.M. (BNA) 1199, 1201 (1979) [hereinafter cited as *Dow II*]. Apparently, this belief was prompted by the court's criticism of the rule's uncertainty. See 530 F.2d at 279. In fact, the court had accepted *Arlan's*, requesting only that the Board alter its remedial policies.

32. 244 N.L.R.B. at 1061, 102 L.R.R.M. (BNA) at 1201 (Members Murphy and Truesdale, concurring). In *Buffalo Forge*, the Court emphasized that *Boys Markets* injunctions are not available against all strikes in breach of a no-strike clause, but only against strikes over disputes subject to the grievance arbitration machinery.

33. *Id.* at 1061 n.8 (opinion of Members Fanning and Jenkins).

Member Penello in dissent argued for retention of the *Arlan's* rule, but agreed with the *Dow I* Board that the strike was unprotected.³⁴

The entire Board sidestepped the *Boys Markets* issue. It decided that the availability of injunctive relief, limited by the intervening Supreme Court decision in *Buffalo Forge Co. v. United Steelworkers*,³⁵ was not a proper matter for the Board to consider when granting relief in unfair labor practice litigation.³⁶ Only Member Truesdale in concurrence and Member Penello in dissent discussed the *Marathon Electric* material-breach question, and they reached different conclusions.³⁷

On appeal,³⁸ only two judges from the Third Circuit's original panel remained. In a drastic retreat, a divided court stated that it had assumed all along that the strike had breached the agreement³⁹ and that the court had merely asked the Board to consider *Marathon Electric*.⁴⁰ Then the court apparently abandoned even this position, holding that the *Marathon* rule continued to fill an important need in the law of labor contracts.⁴¹ Finally, the court agreed that *Buffalo Forge* might prevent the applicability of *Boys Markets* to cases like *Dow*.⁴² The court then concluded that the company's response to the strike was not unfair after all, refused to remand a second time, and denied enforcement of the Board's order.⁴³

The *Dow* litigation is important not so much for its result but as a starting point for a discussion of the interplay among the policies favoring organizational rights and industrial peace and the doctrine of material breach. This article argues that, contrary to the court's opinion in *Dow I*, industrial peace is *not* the overriding concern of the law. It coexists with and greatly depends on the goal of preservation of organizational freedom. The search for a proper accommodation of the right to strike and the policies favoring arbitration and industrial peace must begin by protecting employees' organizational integrity and statutory rights.

If section 7⁴⁴ rights are to be fully protected, the right to strike

34. *Id.* at 1065, 102 L.R.R.M. (BNA) at 1203.

35. 428 U.S. 397 (1976).

36. 244 N.L.R.B. at 1062 n.11, 1072, 1078, 102 L.R.R.M. (BNA) at 1201 n.11, 1209, 1213.

37. Truesdale would hold *Marathon Electric* inapplicable to situations as in *Dow* where the employer's initial misconduct prompts the strike. *Id.* at 1078, 102 L.R.R.M. (BNA) at 1213. Penello would retain the *Marathon* rule. *Id.* at 1070 n.59, 102 L.R.R.M. (BNA) at 1207 n.59.

38. *Dow Chemical Co. v. NLRB*, 636 F.2d 1352 (3d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981).

39. *Id.* at 1357-58.

40. *Id.* at 1357.

41. *Id.* at 1362.

42. *Id.*

43. *Id.* at 1363.

44. 29 U.S.C. § 157 (1976). It provides in pertinent part: "Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through repre-

against unfair labor practices that threaten the bargaining relationship must not be waivable.⁴⁵ The need for such a non-waivability standard becomes even more apparent given that, after *Boys Markets*, injunctive relief is available against strikes in breach of contract, sometimes on the basis of the presumed arbitrability of the underlying dispute.⁴⁶ This article will demonstrate that a non-waivability standard is the most effective method to prevent unwarranted injunctions in this area by ensuring that strikes in protest of serious unfair labor practices are not enjoined.⁴⁷ On the other hand, where employees strike over "nonserious" unfair labor practices, the policies favoring stability in industrial relations should prevail. A non-waivability standard would require that such non-serious unfair practices be resolved through the contractual grievance procedures.⁴⁸ Strikes over non-serious unfair labor practices would be enjoined as strikes in breach of contract.⁴⁹

Finally, the material-breach doctrine threatens *both* organizational rights and industrial peace. Given the employer's rights to injunctive relief and damages under section 301, as well as the right to discharge or discipline employees who strike in breach of contract, the *Marathon Electric* rule is inapplicable to current labor law.⁵⁰ Despite both policy and case law calling its vitality into question,⁵¹ the rule survives. It should be overturned at the first opportunity.

The results suggested here will effectuate the twin policies of protecting employee organizational rights and furthering industrial peace,⁵² while harmonizing to some extent the relationship between section 301 suits and unfair labor practice litigation. Both unions and employers will know that significant protection will be given to the right to strike. At the same time, employers will retain their statutory remedies against unions and employees striking in breach of contract where organizational rights are not protected. Both parties will thus continue to be encouraged to arbitrate those disputes which are cognizable only under the collective bargaining agreement.

sentatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

45. See *infra* text accompanying notes 100-21.

46. See *infra* text accompanying notes 122-73.

47. See *infra* text accompanying notes 173-84.

48. See *infra* text accompanying notes 90-93, 170-72.

49. See *infra* text following note 173.

50. See *infra* text accompanying notes 185-235.

51. See *infra* note 193 and accompanying text.

52. 29 U.S.C. § 151 (1976) expresses these policies and provides in part:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

II

THE *MASTRO-ARLAN'S* RULE: TOWARD A NON-WAIVABILITY STANDARD

In *Dow II* the Third Circuit Court asked: "Is [the *Mastro Plastics* doctrine] a rule of contract interpretation, looking to the actual intention of the draftsmen of the no-strike clause, or a substantive rule of the law of unfair labor practices?"⁵³ As the court and others have recognized,⁵⁴ the *Mastro Plastics* rule has not always been completely understood. In *Mastro Plastics*, the Supreme Court first indicated that employees might waive the right to strike against unfair labor practices.⁵⁵ Although the Court determined that the no-strike clause in that case pertained only to economic matters, it suggested that a union could explicitly waive its right to strike against unfair labor practices.⁵⁶ If such a waiver were possible, an employer could discharge the strikers, sue for damages, enjoin the unfair labor practice strike, or rescind the agreement. A careful reading of *Mastro*, however, makes clear that employees should be fully protected in their right to strike against conduct "destructive of the foundation on which collective bargaining must rest,"⁵⁷ regardless of the grievance, arbitration, and no-strike provisions.

The waiver problem first arose several years before *Mastro* in *National Electric Products Corp.*⁵⁸ In that case a member of the International Brotherhood of Electrical Workers (IBEW) began organizing for a rival union. The IBEW suspended him for dual unionism and, pursuant to the union-shop provision of the contract,⁵⁹ the employee was discharged. In response, a group of employees established a picket line, disrupting operations at the plant. The employer then suspended the picketing employees for breach of the no-strike clause.⁶⁰ The Board found that, because the employer knew that the employee had sought to organize another union, his discharge violated section 8(a)(3) of the Act. The subsequent suspension of the strikers, however, did not violate the Act since the contract contained both a no-strike clause and a grievance procedure:

It is true . . . that the wrongful action of the complainants was caused

53. 636 F.2d at 1358.

54. See, e.g. *Poloron Prods. of Ind., Inc.*, 177 N.L.R.B. 435, 438 (1969).

55. See *supra* note 2.

56. *Id.*

57. *Mastro Plastics*, 350 U.S. at 281.

58. 80 N.L.R.B. 995, 23 L.R.R.M. (BNA) 1148 (1948).

59. *Id.* at 1016.

60. The no-strike clause provided in pertinent part: "[S]hould any dispute arise between the Company and the Union or any employee and the Company . . . there shall be no interruption or impeding of the work, work stoppages, strikes or other lockouts on account of such differences in accordance with [the established grievance] procedure." *Id.* at 999, 23 L.R.R.M. (BNA) at 1148.

by the Respondent's unfair labor practice in discharging employee Marfia. However, the Respondent's conduct although regrettable, does not, in our opinion, excuse the complainant's breach of their agreement. The Act was designed to encourage collective bargaining as a substitute for strike action. The right to strike, although protected by the Act, may be waived by employees in an agreement concluded through the collective bargaining process. Thus, in our opinion, there is no basis for the conclusion . . . that we have deprived the employees "of a basic right" to strike, since the *employees themselves have waived their right to strike during the life of the agreement*.⁶¹

Although the Board recognized that it might have been "futile" for the rival union organizer to grieve the discharge given his taint of dual unionism, it found that the striking employees were sufficiently protected by the usual remedial provisions in section 8 of the Act.⁶²

When the Board decided *Mastro*⁶³ several years later, *National Electric* was the most significant authority with which it had to contend. In *Mastro* the employees were represented by the Carpenters Union. In August of 1950, though, Local 65 of the Wholesale and Warehouse Workers Union began an organizing campaign at the company. The employer opposed Local 65 but, believing that the Carpenters did not have the strength to fend off the rival union, asked the Carpenters to transfer their bargaining rights to a third union, Local 318 of the Paper Mill Workers. When the Carpenters refused, the employer tried to convince the employees to join Local 318.

Local 65 then petitioned for an election and Local 318 intervened, requesting certification. At that point a number of employees revoked their membership in Local 318 and reaffirmed their allegiance to the Carpenters. The employer then discharged a staunch supporter of the Carpenters who had opposed Local 318. A strike followed and the striking workers were discharged for allegedly breaching the no-strike clause.⁶⁴

61. *Id.* at 999-1000, 23 L.R.R.M. (BNA) at 1148 (emphasis added). Member Houston, dissenting in part, *id.* at 1002, 23 L.R.R.M. (BNA) at 1149, argued that the Board had effectively abrogated the right to strike against unfair labor practices, contrary to the expressed policy of the LMRA in § 13, 29 U.S.C. § 163 (1976), and in the Act's legislative history. An early version of the LMRA would have precluded strikes "to remedy practices for which an administrative remedy is available under the Act." H.R. REP. NO. 245, 80th Cong., 1st Sess., reprinted in HOUSE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 79, 335 (1974). This provision, however, was eliminated in the Senate. *See id.* at 264.

62. 80 N.L.R.B. at 1000.

63. 103 N.L.R.B. 511, 31 L.R.R.M. (BNA) 1494 (1953), enforced, 214 F.2d 462 (2d Cir.), *aff'd*, 350 U.S. 270 (1956).

64. The clause provided:

The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of

At first blush the case would seem to have been controlled by *National Electric*. The Board, however, thought otherwise:

In [*National Electric*], the discharge which instigated the strike was an action required by and in accord with the contract between the representatives of the employees and their employer. In the present situation, the strike was in protest of matters and actions not covered or in any respect demanded by the contract—matters which constituted serious violations of the Act by the Respondents.⁶⁵

Although the contract contained arbitration provisions, they were held not to apply to the matters in dispute.⁶⁶ While distinguishing *National Electric* on contractual grounds, the Board let stand the earlier case's holding that the right to strike against unfair labor practices could be waived by agreement. The Board's *Mastro* holding, however, suggested that the contrary might be true. Its finding that the employer's conduct was extra-contractual could mean that unfair labor practices destructive of the foundations of collective bargaining should never be treated strictly in contractual terms.

The Supreme Court only partially clarified these issues in its *Mastro* opinion. Stressing that "[i]n the absence of some contractual or statutory provision to the contrary,"⁶⁷ the strikers were protected in their conduct, the Court noted that the right to strike in the case turned "upon the proper interpretation of the particular contract before us. Like other contracts, it must be read as a whole and in the light of the law relating to it when made."⁶⁸ National labor policy favored both freedom of association and industrial peace, but the Court stressed that the latter could not be achieved without strict protection of the former. It stated: "The two policies are complementary. They depend for their foundation upon assurance of 'full freedom of association.' *Only after that is assured* can the parties turn to effective negotiation as a means of maintaining 'the normal flow of commerce and . . . the full production of articles and commodities.'"⁶⁹

Although the Court assumed that a union could specifically waive the right to strike in unfair labor practice situations,⁷⁰ it stated that the general no-strike clause in this case applied only to the economic relations between the parties. Thus the Court seemed to affirm the holding

production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppages during the term of this agreement.

103 N.L.R.B. at 513, 31 L.R.R.M. (BNA) at 1495.

65. 103 N.L.R.B. at 514, 31 L.R.R.M. (BNA) at 1495.

66. *Id.* See also *NLRB v. Wagner Iron Works*, 220 F.2d 126 (7th Cir. 1955).

67. 350 U.S. at 278.

68. *Id.* at 279. See also *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 429 (1967).

69. 350 U.S. at 280 (emphasis in original). See also Dunbar, *Labor Law—Reinstatement—No-Strike Clause—Strike Precipitated by Unfair Labor Practice*, 28 Miss. L.J. 91, 92 n.12 (1956); *supra* note 52.

70. 350 U.S. at 279.

of *National Electric* while overruling the case on its facts.⁷¹

As a matter of contract interpretation the Court's reading of the no-strike clause appears strained.⁷² "No strikes" would seem to mean no strikes. The Court, however, read the contract "in light of the law" to reach the preferable result. As the Court stressed, industrial freedom and organizational freedom are complementary. Industrial peace requires that employees be free to join and participate in the labor organization of their choice and to feel secure that their representative will be protected from wholesale attacks and interference by the employer. Otherwise, production would likely be disrupted by open conflict between contending employee groups or employees endeavoring to protest their employer's actions. By refusing to find a waiver in this case, the Court advanced the federal policy of protecting the whole range of section 7 rights. While the parties clearly intended that the no-strike clause govern their economic relations, in no event could the union, at least, have intended the clause to cover the dispute in *Mastro*.⁷³

Even though the Court seemed to stress contractual interpretation, it nevertheless studiously avoided a firm stance on the waiver issue. In doing so, the Court left unclear exactly what, if any, sort of waiver *would* be effective:

To adopt petitioners' all-inclusive interpretation of the [no-strike] clause [to mean all strikes] would eliminate, for the whole year, the employees' right to strike, even if petitioners, by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union. *Whatever may be said of the legality of such a waiver when explicitly stated*, there is no adequate basis for implying its existence without a more compelling expression of it than appears in . . . this contract.⁷⁴

This language has been interpreted to validate general waivers of less than a "whole year,"⁷⁵ to uphold only explicit waivers,⁷⁶ and to invalidate waivers of the right to strike against severe employer interference

71. In fact, because the Court did not discuss *National Electric*, it was unclear whether—and to what extent—"a relationship between the unfair practice and the contract [would] be the deciding factor in the application of no-strike clauses in the future." Beumer, *Labor Law—Labor Management Relations Act—Effect of Sixty-Day "Cooling Off" Period and No-Strike Clause on Status of Unfair Labor Practice Striker*, 9 ALA. L. REV. 115, 117 (1956).

72. Note, *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 180 (1956) [hereinafter cited as *1955 Term*].

73. See *Dow II*, 636 F.2d at 1360.

74. 350 U.S. at 283 (emphasis added).

75. See, e.g., *Mid-West Metallic Prods., Inc.*, 121 N.L.R.B. 1317, 42 L.R.R.M. (BNA) 1552 (1958).

76. Some commentators subscribe to this view. See Beumer, *supra* note 71, at 117; Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 17 (1956); Fairweather, *Employer Actions and Options in Response to Strikes in Breach of Contract*, 18TH ANN. N.Y. CONF. ON LAB. 129 (1965). See also *Delaware Coca-Cola Bottling Co. v. General Teamster Local Union*

with employee rights under any circumstances.⁷⁷ Although the Court failed to clarify how far its holding would extend, it did succeed in establishing a presumption against waiver in a general no-strike clause.⁷⁸

Following the *Mastro* decision the Board began to delineate standards for waiver. The leading case of *Arlan's Department Store*⁷⁹ involved the discriminatory discharge of a union steward who the employer believed was organizing another union. A group of employees struck in protest. The contract required just cause for discharge and provided for grievance and arbitration procedures. Holding that *Mastro Plastics* applied only to "serious" unfair labor practices which are "destructive of the foundation on which collective bargaining must rest,"⁸⁰ the Board determined that this isolated discharge, apparently caused in part by personal conflicts, did not fall within the new standard. The Board went on to hold that, in the future, seriousness would be tested by resort to "experience, good sense, and good judgment."⁸¹ Non-serious unfair labor practices were to be handled through the grievance machinery or a Board charge. In effect, the *Arlan's* Board implied in every general no-strike clause the waiver which the Court in *Mastro* had suggested should, at the very least, be specific.

The *Arlan's* decision prompted a stinging dissent from Member Fanning,⁸² who took a position to which he remained faithful as late as *Dow II*.⁸³ Fanning read *Mastro* to mean that a general no-strike

326, 624 F.2d 1182, 1196 (3d Cir. 1980) (Rosenn, J., concurring); *Kellogg Co. v. NLRB*, 457 F.2d 519 (6th Cir.), cert. denied, 409 U.S. 850 (1972).

Fairweather, at 136, went so far as to argue that, under *Mastro*, employers should bargain for a contract provision similar to the following:

If during the term of the agreement, the union believes that the employer has engaged in conduct which constitutes an unfair labor practice but does not raise an arbitrable matter under the agreement, it shall seek its remedy exclusively by filing a charge with the National Labor Relations Board.

77. See *Dow II*:

The *Mastro Plastics* Court speculated about the legality of a waiver of the right to strike over an attempted ouster of a chosen bargaining representative, but it did not suggest that a union could lawfully bargain away the employees' right to freely choose their bargaining representative. An agreement curtailing the employees' free choice would be illegal. . . .

636 F.2d at 1360.

78. See Harper, *Union Waiver of Employee Rights Under the NLRA, Part I*, 4 INDUS. REL. L.J. 335, 364-67 (1981).

79. 133 N.L.R.B. 802, 48 L.R.R.M. (BNA) 1731 (1961).

80. *Id.* at 808, 48 L.R.R.M. (BNA) at 1735 (quoting *Mastro Plastics*, 350 U.S. at 281). The Supreme Court has apparently accepted the Board's interpretation of its *Mastro* decision. See *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974); *Drake Bakeries, Inc. v. Bakery Workers*, 370 U.S. 254, 265 (1962).

81. 133 N.L.R.B. at 807, 48 L.R.R.M. (BNA) at 1735.

82. *Id.* at 811, 48 L.R.R.M. (BNA) at 1736.

83. 244 N.L.R.B. at 1061 n.8, 102 L.R.R.M. (BNA) at 1201. By the time of the *Dow* decision Member Jenkins also subscribed to Fanning's view. *Id.*

clause deals only with economic matters. Thus, an unfair labor practice strike is always protected, absent an explicit waiver, because "such a strike is outside the scope of the contract."⁸⁴ Unless the contract explicitly governs unfair practice strikes, there is no ground for testing the reach of the no-strike clause by reference to the seriousness of the employer's conduct.⁸⁵ In any event, Fanning argued that all unfair labor practices are serious and thus undermine the "foundation on which collective bargaining must rest."⁸⁶ In short, since even a "bit of unilateral action" or a "single discriminatory discharge"⁸⁷ may have potentially disastrous effects on collective bargaining, the right to strike in protest ought to be protected. Thus, Member Fanning and now Member Jenkins believe that a *per se* approach to all unfair labor practices will advance the cause of industrial peace because employers will be discouraged from engaging in illegal activity which the Board may nevertheless find to be "non-serious."⁸⁸

The dissenting position has the virtue of clarity and predictability. While it leaves room for a waiver, that waiver must be explicit. The argument has additional merit in that it seeks to preserve Board jurisdiction over all questions of unfair labor practices, rather than leave them to arbitrators.⁸⁹ The practical effect of the dissenting position, of course, is that virtually all unfair labor practice strikes will be protected since few, if any, unions will agree to an explicit waiver.

But the *per se* approach presents numerous problems. As even the dissenters recognize, during the life of a collective bargaining agreement the line between "mere" contract violations and technical unfair labor practices is difficult to draw.⁹⁰ To give employees the right to strike over every contract violation that can be framed as an unfair labor practice would encourage strike activity over minor matters better resolved through the grievance procedure.⁹¹ For example, if an angry employer discharged a union steward over her handling of a

84. 133 N.L.R.B. at 813, 48 L.R.R.M. (BNA) at 1736.

85. *Id.* at 813-14, 48 L.R.R.M. (BNA) at 1736; *see also Dow I*, 212 N.L.R.B. at 334, 87 L.R.R.M. (BNA) at 1283 (Member Fanning, dissenting).

86. 133 N.L.R.B. at 814, 48 L.R.R.M. (BNA) at 1737.

87. *See Cox, supra* note 76, at 18.

88. *Dow II*, 244 N.L.R.B. at 1061 n.8, 102 L.R.R.M. (BNA) at 1201 n.8.

89. *Dow II*, 636 F.2d at 1360-61. *See also* General Am. Transp. Co., 228 N.L.R.B. 808, 809, 94 L.R.R.M. (BNA) 1483, 1485 (1977); Atlantic Richfield Co., 199 N.L.R.B. 1224, 1226-27, 81 L.R.R.M. (BNA) 1412, 1415-16 (1972) (Members Fanning and Jenkins, concurring and dissenting).

90. Atlantic Richfield Co., 199 N.L.R.B. at 1226-27, 81 L.R.R.M. (BNA) at 1415-16. *See also Dow II*, 244 N.L.R.B. at 1069, 102 L.R.R.M. (BNA) at 1206 (Member Penello, concurring and dissenting).

91. Savett, *Labor Law—Right to Strike—No-Strike Clause Bars Strike Where Unfair Labor Practice is Not Serious in Nature*, 7 VILL. L. REV. 489, 493 (1962). *See also* NLRB v. Laborer's Int'l Union, Local 721, 649 F.2d 33, 35 (1st Cir. 1981).

grievance, the employer's action would probably be considered an unfair labor practice. But absent other aggravating circumstances, there is no reason the discharge should not be effectively resolved through the grievance machinery. Similarly, where an employer in good faith unilaterally makes a small change in the working conditions and then willingly submits the dispute to arbitration, a strike to protest such unilateral action should not be protected. If employers cannot be assured that truly minor infractions will be resolved peacefully through the contractually established machinery, then grievance arbitration will become less attractive, perhaps even useless. As a result, industrial peace will be wholly subordinated to section 7 rights.⁹² Further, it is likely that when unions and employers agree to grievance arbitration, they assume that such "routine" matters are within the scope of both the no-strike and arbitration provisions.⁹³ Thus, contrary to the thrust of the Fanning theory, disposition of these minor matters would reflect the contractual intent of the parties.

The standards adopted by the *Arlan's* majority are not without their own difficulties. Foremost is the vagueness of the test for determining seriousness—"experience, good sense and good judgment."⁹⁴ This test makes it extremely difficult to predict what conduct will be considered serious.⁹⁵ Parties to a labor dispute have some right to expect predictability from Board standards,⁹⁶ current decision-making under the *Arlan's* test, however, appears to be ad hoc.⁹⁷ Partly for this reason, the *Dow I* court was reluctant to adhere blindly to the *Mastro-Arlan's* rule.⁹⁸ Unless the *per se* rule urged by the *Arlan's* dissent is adopted, though, the standard must have some flexibility. The infinite variety of labor disputes inevitably results in gray areas in which the

92. Savett, *supra* note 91, at 493.

93. Cox, *supra* note 76, at 17; see also *Dow II*, 636 F.2d at 1361.

94. Member Fanning, dissenting in *Arlan's*, called the seriousness test no "real test at all." 133 N.L.R.B. at 817 n.38; see also *id.* at 817 n.28. Cf. Savett, *supra* note 91, at 493 (arguing that although the seriousness test creates difficulty, there is no suitable alternative, and Fanning's test would undermine objective of industrial peace).

95. To illustrate the difficulties with the test, Member Fanning, dissenting in *Dow I*, used the Board standard to arrive at a plausible result, opposite from that of the majority in the case:

"Experience" informs us that wage reductions are among the most sensitive issues in labor relations. "Good sense" tells us that an unlawfully imposed wage cut will provoke employees into withholding their labor. "Good judgment" demands that before a no-strike clause be construed as applying to strikes protesting unfair labor practices there be clear and unmistakable language in the contract to that effect.

212 N.L.R.B. at 334.

96. *Dow I*, 530 F.2d at 279. The uncertainty of the seriousness test is increased by the relative rapidity with which Board membership changes. Presently (March 1983), only one member (Jenkins) from the *Dow II* case remains on the Board.

97. See cases cited *infra* note 101.

98. 530 F.2d at 279.

Board's experience should be accorded deference.⁹⁹ Because a finding of seriousness or non-seriousness will have enormous consequences, it is especially important to establish firmer guidelines defining the perimeters of lawful conduct.¹⁰⁰

Some employer conduct is so "destructive of the foundation" of the collective bargaining relationship that a strike over it should be protected no matter how explicit the waiver. For example, a wholesale attack on the union through discharges or repudiation of the collective bargaining agreement would be serious under any circumstances. Similarly, employer interference with the employees' choice of a bargaining representative should, as in *Mastro*, be found to be serious. Most of the cases in which the Board has found the employer's conduct to be serious fall into these categories.¹⁰¹ Attacks on the union, however, should not be the only conduct which is *per se* serious. Any interference with organizational activity aimed at protesting or supplanting the existing bargaining representative should also be considered serious.¹⁰² Unlike the result in *Arlan's*, therefore, a discriminatory discharge of the leader of an insurgent minority in the union should be considered serious, since such a discharge may chill the employees in their rights to

99. Savett, *supra* note 91, at 493. As the court said in *NLRB v. Laborer's Int'l Union, Local 721*, 649 F.2d 33 (7th Cir. 1981):

The Board . . . can best determine what unfair labor practices by an employer threaten a union's ability to represent a bargaining unit effectively and which do not. The Board's expertise is best applied in areas such as this, which emphasize factfinding and call for a flexible, case-by-case approach, and is best deferred to by the courts, subject of course to general supervisory review.

Id. at 35.

While I do not totally agree that a case-by-case approach is always the most satisfactory in the unfair labor practice situation, *see infra* text accompanying notes 100-06, the courts should defer in those circumstances where the Board must engage in analysis of the facts.

The cases demonstrate that "supervisory review" currently can range from simple affirmance of the Board's findings, *see NLRB v. Northeast Oklahoma City Mfg. Co.*, 631 F.2d 669, 677 (10th Cir. 1980), to an independent determination of the employer's conduct, *see Caterpillar Tractor Co. v. NLRB*, 108 L.R.R.M. (BNA) at 2464.

100. *Dow I*, 530 F.2d at 278-79. Thus, rather than merely affirm its allegiance to the *Arlan's* rule, the Board in *Dow II* could have reviewed its past decisions with an eye toward extracting principles to guide future cases. Having failed to undertake the task at that time, perhaps the Board should now use its rule-making authority to set prospective guidelines. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW 15-20 (1976); *see also* *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

101. *See Caterpillar Tractor Co.*, 250 N.L.R.B. 527, 104 L.R.R.M. (BNA) 1421 (1980) (history omitted); *Dow II*; *Adroit Mfg. Co.*, 236 N.L.R.B. 1358, 98 L.R.R.M. (BNA) 1578 (1978) (history omitted); *Television Wisconsin, Inc.*, 224 N.L.R.B. 722, 93 L.R.R.M. (BNA) 1494 (1976); *Dow I*; *Kellstone, Inc.*, 206 N.L.R.B. 156, 84 L.R.R.M. (BNA) 1193 (1973) (history omitted); *Atlantic Richfield Co.*, 199 N.L.R.B. 1224, 81 L.R.R.M. (BNA) 1412 (1972); *Daisy Originals, Inc.*, 187 N.L.R.B. 251, 75 L.R.R.M. (BNA) 1561 (1970) (history omitted); *Cincinnati Penthouse Club, Inc.*, 168 N.L.R.B. 969, 67 L.R.R.M. (BNA) 1112 (1967); *MV Liberator*, 136 N.L.R.B. 13, 49 L.R.R.M. (BNA) 1700 (1962) (alternative holding) (history omitted).

102. Ironically, this might mean that *Arlan's* itself would be overruled on its facts. This would be the better result. *See infra* text accompanying notes 114-15.

choose their representative. And, since the union may be unwilling to actively pursue a grievance over such a discharge, there is good reason to permit employees to resort to a strike in such a situation.

The foregoing examples of seriousness deal with the very essence of organizational rights in that they involve the ability of employees to structure and maintain the union of their choice and to thereby engage in meaningful collective bargaining. In such cases, where the employer treads upon such important rights, employees who engage in the traditional response—the strike—should be *per se* protected.

Where core section 7 rights are not involved, or the employer's conduct is more subtle, the Board should scrutinize all the circumstances. The past and present relationship among the union, the employees, and the employer, as well as the employer's past behavior, should be examined. For example, if the employer has a history of committing "bits of unilateral action" or undertaking "isolated" discriminatory discharges, a single violation of the contract, which standing alone is a non-serious unfair practice, could nonetheless be grounds for protecting employees who strike in response.¹⁰³ Employees who are continually attacked in small ways and who have tired of repeatedly and unsuccessfully invoking the grievance procedure should be permitted to strike over the proverbial straw that breaks the camel's back.

The Board should also consider the employer's willingness to arbitrate the grievance.¹⁰⁴ Since *Arlan's* relies on grievance and arbitration as the legitimate alternative to strike action, the employer who commits otherwise minor unfair labor practices should not then be allowed to obstruct or undermine the grievance procedure and still rely on a finding of non-seriousness. Thus, in assessing the seriousness of the employer's conduct, the Board in *Dow II* properly considered the company's refusal to arbitrate and insistence on implementing its plan before completion of all steps of the grievance procedure.¹⁰⁵ Similarly, if the grievance procedure could not grant effective relief to the employees, a lower threshold for seriousness should be used.¹⁰⁶

The scope of the no-strike clause should be irrelevant to the Board's finding of seriousness. If the employer's conduct is "serious," the employees should be allowed the right to strike regardless of the contract. Only if the employer's conduct was not serious should the

103. Member Truesdale, concurring in *Dow II*, suggested his willingness to consider a pattern of employer conduct when utilizing the "seriousness" test. 244 N.L.R.B. at 1076 n.100, 1077 n.103.

104. See *State Elec. Serv., Inc.*, 198 N.L.R.B. 592, 80 L.R.R.M. (BNA) 1763 (1972), *enforced*, 477 F.2d 749 (5th Cir. 1973), *cert. denied*, 414 U.S. 911 (1973).

105. 244 N.L.R.B. at 1062; *id.* at 1078 n.112 (Member Truesdale, concurring); see also *Dow I*, 212 N.L.R.B. at 344 (Member Fanning, dissenting).

106. See *supra* text accompanying note 62.

Board decide whether the no-strike clause covers the dispute. Under the *Arlan's* rule, which tacitly accepts the waiver of the right to strike, the scope of the no-strike clause is always considered. If one agrees that the *Mastro-Arlan's* rule is only a matter of contract interpretation, the scope of the no-strike clause is the single most important factor in testing the lawfulness of an unfair labor practice strike.¹⁰⁷ The argument here, however, is that strikes over serious unfair labor practices should be protected *as a matter of law*.¹⁰⁸

At least one commentator has suggested that little harm would follow from allowing unions to expressly waive the right to strike against unfair labor practices.¹⁰⁹ But such a waiver involves interests different from those implicated in a waiver of the right to strike over economic issues. Unions and employees have good reason to believe that a limitation on the right to strike, as part of the consideration for a collective bargaining agreement mandating arbitration of economic disputes, *further* their statutory interests in organization. Obtaining the agreement in the first place is a victory born of organizational strength. Grievance procedures save union resources that would otherwise be expended in strikes over the many disputes bound to arise. Limiting the right to strike simply protects the union as the effective bargaining representative of the employees.¹¹⁰

Waiving the right to strike over serious unfair labor practices, however, could undermine collective interests by threatening core organizational rights. If, for example, an employer successfully bargained for a clause which limited employees to their statutory remedies for unfair labor practices, the employer's attacks on the union might not be deterred by the remote threat of an adverse Board order two years

107. *Dow II*, 636 F.2d at 1361. But see the court's discussion at *id.* at 1360. Suffice it to say that the court was not entirely clear on what it believed the *Arlan's* rule to be. See also *infra* note 173.

108. Just as the Board has created unprotected status for employees who strike in violation of the no-strike clause, *Scullin Steel Co.*, 65 N.L.R.B. 1294, 17 L.R.R.M. (BNA) 286 (1946), it could create fully protected status for employees who strike to protest employer actions destructive of the collective bargaining relationship.

109. *1955 Term*, *supra* note 72, at 180.

110. It is worth noting that allowing waivers of the right to strike over economic issues also furthers the law's interest in exclusive representation. 29 U.S.C. § 159(a) (1976). In other words, a union majority may protect itself by limiting the right to strike of all members. In this way, a competing minority is prevented from disrupting production and threatening the entire collective bargaining relationship by striking during the agreement. *Cf.* *Emporium Capwell v. Western Addition Community Org.*, 420 U.S. 50, 70 (1975) (picketing by minority union members is unprotected where not authorized by union). The same considerations do not apply in the serious unfair labor practice situation, since attacks on employee rights—whether of a minority or the majority—undermine the ability of employees to effectively engage in concerted activity to carry out a productive collective bargaining relationship.

down the road.¹¹¹ Such an employer might discharge union leaders or make wholesale unilateral changes in the terms and conditions of employment,¹¹² safe in the knowledge that the inevitable delay involved in Board litigation would effectively chill employee interests in organizational activity. This result would make a mockery of section 7 rights. By contrast, a standard of non-waivability would support "free and effective collective bargaining by insuring that economically strong employers cannot force unions to sacrifice at the bargaining table any of the rights upon which the union's continue existence as effective bargaining agents may depend."¹¹³ This rule would further *Mastro's* policy of protecting free association.

A waiver of the right to strike against serious unfair labor practices could also threaten dissidents and other employees not popular with the union. If a contract contained a waiver, and the employer discharged a dissident leader with the tacit approval of the union, the grievance procedure, as the Board recognized in *National Electric*, would be of limited utility. The discharged employee and her supporters would only be able to pursue the claim through slow and complicated Board proceedings. Meanwhile, the message to the minority employees would not be missed. Note that section 7 of the Act grants *employees*, not unions, the right to "mutual aid or protection."¹¹⁴ A strike protesting conduct that seriously undermines the ability of employees to engage in collective activity should be no less protected where the employer conduct does not disrupt relations with the elected union representative.¹¹⁵

Fully protecting the right to strike against destructive intrusions on employee activity would greatly discourage unfair employer activity, as any group of employees could safely strike in such a situation regardless of the language of the no-strike clause. At the same time, because

111. *Cf.* *National Elec. Prods. Corp.* (Member Houston, dissenting in part). Houston stated that no-strike commitments

are found in agreements which must have some inhibitory effect not only on the employees but also on employers. It is something less than just to say that an employer who has secured from his employees a relinquishment of their basic right to strike may remain, nevertheless, quite unhampered in whatever arrangements he has made to impose heavy penalties on his employees solely because they protested, in a traditional way his disposition to violate the law. And it is something less than equitable to hold that he may do so with impunity merely by insisting that he has a contract forbidding his employees to protest.

80 N.L.R.B. at 1003-04. *See also id.* at 1001 (Member Herzog, concurring).

112. Unilateral changes were held to be a *per se* refusal to bargain in *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

113. Harper, *supra* note 78, at 345.

114. 29 U.S.C. § 157 (1976).

115. *Cf.* *Cincinnati Penthouse Club, Inc.*, 168 N.L.R.B. 969, 67 L.R.R.M. (BNA) 1112 (1967) (strike protected even though not officially authorized by union). *See also* *Lustrelon, Inc.*, 242 N.L.R.B. 561, 571, 101 L.R.R.M. (BNA) 1231 (1979) (ALJ found strike protected where union neither authorized nor expressed interest in employees' plight).

employers would be discouraged from taking actions tending to disrupt industrial relations, the policies favoring industrial stability would also be furthered.

Taking the step from a presumption of non-waivability to full non-waivability would also flesh out the protection of important employee rights. In *NLRB v. Magnavox*,¹¹⁶ the Supreme Court held that a union may not waive its members' rights to engage in activity which could affect the choice of bargaining representative, such as distributing literature on company property. If employees' section 7 rights to organize to defeat or support the union are absolutely protected from contractual waiver, their section 7 rights to strike to protect each other and their union should also be non-waivable. To hold otherwise would be to protect employee efforts to establish or change their bargaining representative while leaving employees vulnerable to waivers that may threaten the very existence of the union.

In contrast to the opinion of the *Dow I* court, then, the argument here is that "pigeon-holing"¹¹⁷ an unfair labor practice strike into the framework of *Mastro-Arlan's* is the most critical determination in an unfair labor practice strike case. Strikes over non-serious conduct would still be governed by the no-strike clause. For practical reasons and to fulfill the intent of the parties, the contract should control disputes which technically involve unfair labor practices, but are essentially "contractual."¹¹⁸ This approach carries out the national interest in peaceful resolution of industrial disputes. Once the employer's conduct transgresses the threshold of "seriousness," however, the no-strike clause should be irrelevant. The employees have not "violated" the contract, only to have their strike "excused" by the unfair practice. Instead, their right to strike is derived from the statute and thus transcends any contractual limits placed on it. To protect section 7 rights, the employees' ability to respond quickly and forcefully to such attacks must not be limited.

As a practical matter, the Board decisions in *Dow II*¹¹⁹ and the more recent case of *Caterpillar Tractor Co.*¹²⁰ have brought the Board close to acceptance of a non-waivability standard. In both cases the contract provided that employees would not strike pending completion of the grievance procedure, implying a short-term waiver of all strikes.

116. 415 U.S. 322 (1974); see also *Gale Prods.*, 142 N.L.R.B. 1246, 53 L.R.R.M. (BNA) 1242 (1963), *enforcement denied*, 337 F.2d 390 (7th Cir. 1964). For a full discussion of *Magnavox* and its potential applicability to other areas, see generally Harper, *supra* note 78.

117. See *supra* text accompanying note 26.

118. See *supra* text accompanying notes 90-93.

119. See *supra* text accompanying notes 31-37.

120. 250 N.L.R.B. 527, 104 L.R.R.M. (BNA) 1421 (1980), *enforcement denied*, 108 L.R.R.M. (BNA) 2460 (7th Cir. 1981).

And in both cases the Board held that the employer's conduct was sufficiently serious to excuse compliance with the grievance procedure before the employees struck.¹²¹ Nevertheless, until the Board affirmatively states that it has adopted a non-waivability standard, the question of whether waivers will be given effect remains open.

The Board should, therefore, declare its support for a full non-waivability approach. At the same time it should begin to clarify what actions will be considered serious in the future. In doing so, the Board will remain faithful to the policies of both *Mastro* and *Arlan's*. A non-waivability standard will ensure that employees' rights to free association and collective strength will be protected, while at the same time encourage the development of useful grievance and arbitration machinery.

III

NON-WAIVABILITY AND INJUNCTIONS AGAINST UNFAIR LABOR PRACTICE STRIKES

Perhaps the single strongest reason why a non-waivability standard for unfair labor practice strikes is necessary is the present availability of injunctions against strikes over arbitrable grievances.¹²² Non-waivability becomes all the more imperative when it is realized that some courts have enjoined strikes based upon a *presumption* that the underlying dispute was arbitrable, an approach which even the Supreme Court has apparently utilized.¹²³ Adopting a standard of non-waivability should, in effect, render a strike over an unfair labor

121. *Caterpillar*, 250 N.L.R.B. at 527, 104 L.R.R.M. (BNA) at 1422; *Dow II*, 244 N.L.R.B. at 1061, 102 L.R.R.M. (BNA) at 1201. In two other cases the issue could have been, but was not, presented. In *San Juan Lumber Co.*, 154 N.L.R.B. 1153, 1154-55, 60 L.R.R.M. (BNA) 1102 (1965), the Board noted that because the grievance procedure covered only disputes respecting the operation of the agreement and that the no-strike provision applied only until all "peaceful means" had been exhausted, the two clauses were interlocking. In a series of holdings, the Board first held that the employer's failure to pay agreed upon wages was not a dispute respecting the operation of the agreement and therefore the contract provisions did not apply. Even if they did apply, the failure to pay was a material breach and released the union from its obligation not to strike. But, in any event, the union *had* sufficiently complied with the grievance procedure before striking.

In *Atlantic Richfield Co.*, 199 N.L.R.B. 1224, 81 L.R.R.M. (BNA) 1412 (1972), the no-strike provision was two-tiered. It prohibited all strikes over arbitrable grievances and delayed strikes *over other disputes* for a period of several months while negotiations to resolve the issues could continue. *Id.* at 1241. Since the Board found the disputes, and the resulting strike, arbitrable, it deferred to arbitration and did not have to pass on the waiver issue.

122. Harper, *supra* note 78, argues that the presumption of non-waivability under *Mastro* *Plastics* will provide sufficient protection against injunctions in unfair labor practice strike cases. He cites nothing in support of this assertion. I am considerably less sanguine, especially since the presumption of arbitrability may be and has been used to justify injunctions against alleged unfair practice strikes. See *infra* text accompanying notes 133-34, 138-45.

123. See *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974).

practice non-enjoinable if a union can make a "colorable claim" that the unfair labor practice is "serious" and that the strike is thus protected. A court would then be ousted from jurisdiction to consider the injunction.¹²⁴ The full measure of protection would thus be accorded employees' statutory rights and the threat that otherwise lawful activity would be enjoined would be drastically reduced.

In *Boys Markets, Inc. v. Retail Clerks Union*,¹²⁵ the Supreme Court sought to "accommodate" section 301 injunctive relief against strikes in breach of contract with the anti-injunction provisions of the Norris-LaGuardia Act.¹²⁶ To reach that accommodation, the Court narrowed its holding to apply only to disputes which are arbitrable under the collective bargaining agreement.¹²⁷ Whatever might be said of this accommodation in other contexts, it can be argued that section 8 of Norris-LaGuardia¹²⁸ should totally preclude injunctions where the union raises an employer's unfair labor practice as a defense. Section 8 provides:

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.¹²⁹

In his report to the Senate, Senator Norris expressly stated that section 8 would bar an injunction where an employer has committed what are now called unfair labor practices:

It has often occurred, where employers have refused to confer with their employees, as required by law; or where they have refused to comply with the requirements of the law for the protection of employees, that they have nevertheless sought to have the court restrain the employees from promoting their interests properly in the resulting dispute. An employer who has himself brought on a controversy by wrongful conduct is not entitled to the aid of equity in advancing his interests in the resulting conflict.¹³⁰

The Norris-LaGuardia Act was aimed at preventing federal courts

124. See *infra* text accompanying notes 173-83.

125. 398 U.S. 235 (1970). See *supra* note 5.

126. 29 U.S.C. §§ 101-115 (1976).

127. 398 U.S. at 253.

128. 29 U.S.C. § 108 (1976).

129. It has been argued that, although most courts apply § 8 as a general exhaustion of remedies provision, it should be thought of as a "clean hands" provision which would require the court to inquire into the merits of a dispute before issuing an injunction and ordering arbitration. See Axelrod, *The Application of the Boys Markets Decision in the Federal Courts*, 16 B.C. INDUS. & COM. L. REV. 933 (1975). See also *infra* text accompanying notes 131-32.

130. S. REP. NO. 163, 72d Cong., 1st Sess. 22 (1932). See also H.R. REP. NO. 669, 72d Cong. 1st Sess. 9-10 (1932).

from using injunctions to align themselves with employers in labor disputes.¹³¹ Section 8 furthers this policy by refusing the employer's requested relief whenever the employer is guilty of misconduct. This perspective would appear to allow no room for *any* accommodation between Norris-LaGuardia and section 301 in an unfair labor practice situation. Since the National Labor Relations Act specifically establishes that certain behavior is *per se* unlawful, the prohibitions in Norris-LaGuardia would seem to prevent all injunction, even against unprotected strikes.

Despite Norris-LaGuardia's appeal to the equitable doctrine of "clean hands," it nonetheless appears that unfair labor practice strikes may be enjoined under current Board doctrine. The Board itself laid the groundwork for such injunctions in *Arlan's* and through its policy of deferral to arbitration.¹³² Both doctrines reflect the belief that arbitration is the proper and preferable forum for settling "routine" industrial disputes, even where those disputes implicate the Act.

Several circuit courts, including the Third Circuit in *Dow*, have assumed the availability of *Boys Markets* relief during unfair labor practice strikes,¹³³ and at least two courts have enjoined strikes which the union claimed were in protest of unfair labor practices.¹³⁴ Without a clearer and more definitive standard establishing the non-waivability of the right to strike over serious unfair labor practices, many strikes in fact protected under the *Mastro-Arlan's* rule could be enjoined in the name of effectuating the federal policy favoring arbitration. Such a result would seriously threaten employee rights and eviscerate both Norris-LaGuardia and section 8 of the NLRA in favor of section 301.

The spectre of injunctions against protected strikes looms even larger if a presumption of arbitrability is applied in the unfair labor practice strike situation. In the *Steelworkers Trilogy*,¹³⁵ the Supreme Court established that orders to arbitrate could be based upon a pre-

131. 398 U.S. at 251.

132. See *Collyer Insulated Wire Co.*, 192 N.L.R.B. 837, 77 L.R.R.M. (BNA) 1831 (1971); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 36 L.R.R.M. (BNA) 1152 (1955).

133. See *Dow II*, 636 F.2d at 1361; *National Rejectors Indus. v. United Steelworkers*, 562 F.2d 1069 (8th Cir.), cert. denied, 435 U.S. 923 (1978); *Dow I*, 530 F.2d at 274-75; *Southwestern Bell Tel. Co. v. CWA, Local 6222*, 454 F.2d 1333, 1335-37 (5th Cir. 1972).

134. *Educational & Recreational Servs., Inc. v. United Steelworkers, Local 8751*, 90 Lab. Cas. (CCH) ¶ 12,623 (D. Mass. 1980); *Southwestern Bell Tel. Co. v. CWA, Local 6222*, 343 F. Supp. 1165 (S.D. Tex. 1972). The extent to which unions defend *Boys Markets* injunctions on *Mastro* grounds is uncertain, since most *Boys Markets* cases are unreported. See Gould, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge*, 30 STAN. L. REV. 533, 542 (1978). As an example, the district court in *National Rejectors*, in one unreported decision, had enjoined a strike despite a claim that the employer had committed unfair practices. 562 F.2d at 1073.

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

sumption that all, even "frivolous," disputes were arbitrable under the contract.¹³⁶ Thus, any disputes involving unfair labor practice strikes, if at all cognizable under the contract, would be presumptively arbitrable.

While it is unclear whether a standard of presumptive arbitrability is proper when determining if a labor dispute is enjoined,¹³⁷ courts have enjoined alleged unfair labor practice strikes on this basis. In *Southwestern Bell Telephone Co. v. Communications Workers of America, Local 6222*,¹³⁸ for instance, the court applied a presumption of arbitrability in an unfair labor practice strike situation. The company had opened a new facility with a separate seniority schedule for part-time employees. The collective bargaining agreement contained no-strike and arbitration clauses, a management-functions clause, and a seniority provision. When the company announced its new plan, the

136. *United Steelworkers v. American Mfg. Co.*, 363 U.S. at 568.

137. Although the Court in *Boys Markets* faced a dispute that was in fact arbitrable, the Court seemed to give a stamp of approval to the presumption of arbitrability for injunctions in *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974). The Court found that a contract provision requiring arbitration of "any local trouble," *id.* at 376, covered safety disputes and, as such, justified the issuance of an injunction against a safety walkout. One author has read *Gateway Coal* as creating "a presumption of enjoinability for all labor disputes." Strizever, *Injunctions May Issue Against Labor Unions to End Strike Over Safety Disputes Despite Absence of a No-Strike Clause in Collective Bargaining Agreement*, 63 GEO. L.J. 275 (1974).

Whether, in fact, the Court has given approval to a presumption in all *Boys Markets* situations is uncertain, especially in light of the more recent decision in *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). Compare Strizever, at 275-77, and Simon, *Injunctive Relief to Maintain the Status Quo Pending Arbitration: A Practitioner's View*, 29TH ANN. N.Y. CONF. ON LAB. 317, 325 n.24 (1976) with Cantor, *Buffalo Forge and Injunctions Against Employer Breaches of Collective Bargaining Agreements*, 80 WIS. L. REV. 247, 258 n.56, 259 (1980), and Comment, *Boys Markets Injunctions Against Employers*, *Lever Bros. v. Chemical Workers, Local 217*, 91 HARV. L. REV. 715, 723 n.46 (1978) [hereinafter cited as *Boys Markets Injunctions*]. The Court in *Buffalo Forge* stated that an injunction could not issue over a sympathy strike since the strike was not "over an arbitrable issue." 428 U.S. at 407. The Supreme Court then added to the confusion over the presumption of arbitrability in *Boys Markets* cases when it later noted that the strike in *Gateway Coal* was "enjoined only because it was over an arbitrable dispute." *Id.* at 408 n.10 (emphasis added). The same precondition to a strike injunction also existed in *Boys Markets*.

After reviewing the Supreme Court's pronouncements in *Gateway Coal* and *Buffalo Forge*, one court recently stated that "it is unclear from these decisions what degree of scrutiny a court should give to the arbitration clause and its application to the particular dispute in determining arbitrability for the purpose of issuing a *Boys Markets* injunction." *Local Lodge No. 1266, IAM v. Panoramic Corp.*, 668 F.2d 276, 283 n.9 (7th Cir. 1982).

Notwithstanding the confusion about the applicability of a presumption in *Boys Markets* cases, courts before and after *Buffalo Forge* have enjoined strikes on the basis of a presumption of arbitrability. See, e.g., *Monongahela Power Co. v. Local 2332, IBEW*, 484 F.2d 1209 (4th Cir. 1973); *Avco Corp. v. Local No. 787, UAW*, 459 F.2d 968 (3d Cir. 1972); *Educational & Recreational Servs., Inc. v. United Steelworkers, Local 8751*, 90 Lab. Cas. (CCH) ¶ 12,623 (D. Mass. 1980); *Koster Bakeries v. Teamsters, Local 802*, 96 L.R.R.M. (BNA) 3315 (E.D.N.Y. 1977); *CF & I Steel Corp. v. UMW*, 372 F. Supp. 846 (D. Colo. 1973); *Southwestern Bell Tel. Co. v. CWA, Local 6222*, 343 F. Supp. 1165 (S.D. Tex. 1972). Cf. *NLRB v. Keller-Crescent Co.*, 538 F.2d 1291, 1297-98 (7th Cir. 1976) (sympathy strike presumptively arbitrable).

138. 343 F. Supp. 1165 (S.D. Tex. 1972).

union filed section 8(a)(5) charges with the Board, filed a grievance, and walked off the job at the new facility. In response the company sought to enjoin the strike pending arbitration. Applying the Fifth Circuit's "arguable arbitrability" standard,¹³⁹ the court found the dispute arbitrable under the seniority provision and enjoined the strike. Claiming that it was not pre-empted by the union's claim to protection under the Act,¹⁴⁰ the court stated: "[W]hile assent to no strike-arbitration clauses is not necessarily a waiver of access to the Board over an unfair labor practice . . . it can be . . . , and the inclusion of such clauses raises a presumption that unfair labor practice disputes, like any other disputes, are arbitrable unless otherwise specified."¹⁴¹ While recognizing that a presumption of arbitrability could easily lead to injunctions against lawful strike activity, the court justified its holding by the resulting protection that the arbitration process affords.¹⁴²

More recently, the court in *Educational and Recreational Services v. United Steelworkers, Local 8751*,¹⁴³ citing *Southwestern Bell*, also presumed arbitrability and enjoined an alleged unfair labor practice strike. In that case, the union struck over a series of unresolved grievances. When the employer discharged the local union leaders for striking, the union argued that the employer's action prolonged the strike and transformed it into an unfair labor practice strike.¹⁴⁴ Although the court agreed that the employer's actions may have been an unfair labor practice, it enjoined the strike since the discharges themselves were "arguably arbitrable" under the agreement.¹⁴⁵

There are many problems with applying a presumption of arbitrability to alleged unfair labor practice strikes. To begin with, as the *Southwestern Bell* court realized,¹⁴⁶ issuing preliminary injunctions against strikes which the union claims are in response to unfair labor practices runs the real risk that lawful employee activity will be enjoined in contravention of the policy behind the Norris-LaGuardia

139. See *Southwestern Bell Tel. Co. v. CWA, Local 6222*, 454 F.2d 1333 (5th Cir. 1972). The court in that case stressed that the standards for arbitrability and enjoinability should be identical. *Id.* at 1336.

140. Courts in § 301 actions may decide the issues in the case even if they involve alleged unfair labor practices. See *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16 (1974); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

141. 343 F. Supp. at 1172 (citations omitted).

142. *Id.* at 1172 n.9.

143. 90 Lab. Cas. (CCH) ¶ 12,623 (D. Mass. 1980).

144. The Board and courts are often at loggerheads over whether discharging only the leadership of a local following a wildcat strike is a violation of § 8(a)(3) of the Act. See generally Rummage, *Union Officers and Wildcat Strikes: Freedom From Discriminatory Disciplines*, 4 INDUS. REL. L.J. 258 (1981).

145. 90 Lab. Cas. (CCH) ¶ 12,623, at 26,977-78.

146. See *supra* text accompanying note 142.

Act.¹⁴⁷ Since the National Labor Relations Act affirmatively protects the right to engage in primary strikes,¹⁴⁸ and Norris-LaGuardia asserts that employers lacking "clean hands" should be denied equitable relief, the courts should not lightly adopt a policy which could lead to indiscriminate injunctions against activity which may in fact be lawful. To do so would lead to inequitable and anomalous results.

For example, because section 7 of the Norris-LaGuardia Act¹⁴⁹ requires specific findings to enjoin *unlawful* strikes, a presumption of arbitrability in *Boys Markets* situations generally would make it "easier to obtain an injunction against previously protected employee activity than against unprotected, 'unlawful' employee activity."¹⁵⁰ Furthermore, if the strike activity was protected, a court could enjoin a strike over a dispute which, under *Arlan's*, the union was not required to arbitrate. The court would then have prevented the employees from exercising their "most effective weapon against employer interference with their rights. . . ."¹⁵¹ Moreover, a preliminary injunction may break a strike,¹⁵² rendering only of academic interest a later arbitral or Board decision that the strike was not prohibited.¹⁵³ The union may be unable to resume the strike after dissolution of the injunction,¹⁵⁴ permitting the wrongdoing employer to profit unreasonably and unjustly from the relief granted.

Furthermore, it is not clear that an arbitral decision on the merits would resolve the statutory issues at stake. In the case of unilateral

147. In fact, as the court noted, an NLRB Trial Examiner had found the employer's unilateral action to be an unfair labor practice. 343 F. Supp. at 1171. No mention was made as to whether the unfair labor practice had been found serious.

148. Section 13 of the Act, 29 U.S.C. § 163 (1976) states: "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 of that right." Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1976), which provides that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing," indicates the congressional intent to protect as much as possible the right to strike.

149. 29 U.S.C. § 107 (1976).

150. Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 85 HARV. L. REV. 636, 642 (1972) [hereinafter cited as *Labor Injunctions*]. The author also argues that the presumption would make it easier to obtain a *Boys Markets* injunction than an injunction "under ordinary equitable principles under Rule 65 of the Federal Rules." *Id.* at 642. See also *Boys Markets Injunctions*, *supra* note 137, at 721-23 & n.42.

151. Stenger, *Labor Law: Unfair Practice Strikes During Taft-Hartley Act "Cooling-off" Period*, 6 BUFF. L. REV. 329, 329 (1957).

152. See *Buffalo Forge*, 428 U.S. at 412; S. Rep. No. 163, 72d Cong., 1st Sess. 21 (1932), reprinted in NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1280-85 (1949) (remarks of Senator Norris on use of anti-strike injunctions); F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 201 (1930).

153. Note, *The Supreme Court—1975 Term*, 90 HARV. L. REV. 1, 253 (1976) [hereinafter cited as *1975 Term*]. The statement in the text assumes, of course, that the arbitrator could decide the issues. See *infra* text accompanying notes 155-59.

154. *Labor Injunctions*, *supra* note 150, at 641.

employer action, arbitration would definitively settle the dispute only if the arbitrator found that the contract permitted the employer's action.¹⁵⁵ But if the arbitrator found that the employer had violated the contract, he would have no authority to determine whether the employer had refused to bargain and thus committed an unfair labor practice, or to decide whether the conduct was "serious" under *Arlan's*. In other words, a finding of contract violation would not automatically result in a finding of a statutory violation. Thus, had the employer discharged the striking employees, the arbitrator's decision would not necessarily result in their reinstatement, for the arbitrator might still find that the strike was just cause for discharge, despite the employer's breach.

Similarly, in a case like *Educational and Recreational Services*,¹⁵⁶ the arbitrator could find that striking over grievances in breach of the no-strike clause was "just cause" for discharge. But the arbitrator could *not* decide whether the subsequent discharge of union leaders was discriminatory under the Act or whether those discharges converted the strike into an unfair labor practice strike.¹⁵⁷ Thus, in many such cases,¹⁵⁸ the Board might be required to review the arbitrator's decision under its deferral policy.¹⁵⁹ In the meantime, the employer would have been granted an injunction while the lawfulness of the strike was still being determined.

Perhaps for the reasons just noted, the Board in recent years has apparently been reluctant to defer unfair labor practice strike cases to arbitration.¹⁶⁰ A court in a section 301 suit, therefore, might be in the awkward position of ordering to arbitration a case in which the Board itself would not defer. Ironically, courts have based injunctions against alleged unfair labor practice strikes partly on the assumption that the

155. See *NLRB v. Northeast Oklahoma City Mfg. Co.*, 631 F.2d at 675; *Atlantic Richfield Co.*, 199 N.L.R.B. at 1226 (Members Fanning and Jenkins, concurring and dissenting).

156. See *supra* text accompanying notes 143-44.

157. See *General Am. Transp. Corp.*, 228 N.L.R.B. 808, 94 L.R.R.M. (BNA) 1483 (1977); *cf.* *National Radio Co.*, 198 N.L.R.B. 527, 80 L.R.R.M. (BNA) 1718 (1972) (Members Fanning and Jenkins, dissenting) (arbitrator cannot decide if "union animus" motivated discharge). See also *The NLRB's Arbitration Deferral Policy Under Collyer: The Impact of National Radio Co.*, 53 B.U.L. REV. 711, 722-23 (1973).

158. Another example of the problems raised here between arbitral and Board jurisdiction could be supplied by the facts in *Magnavox*. See *supra* text accompanying note 116. In a case such as that, an arbitrator would have to hold that employees violating the contractual rule against distribution of literature could be disciplined. The law, though, imposes its *own* obligations under which the same conduct is absolutely protected.

159. See *supra* note 132 and accompanying text.

160. See, e.g., *Caterpillar Tractor Co.*, 250 N.L.R.B. 527, 104 L.R.R.M. (BNA) 1421 (1980), *enforcement denied on other grounds*, 108 L.R.R.M. (BNA) 2460 (7th Cir. 1981); *Northeast Oklahoma City Mfg. Co.*, 230 N.L.R.B. 135, 95 L.R.R.M. (BNA) 1276 (1977), *enforced* 631 F.2d 669 (10th Cir. 1980); *but see* *Atlantic Richfield Co.*, 199 N.L.R.B. 1224, 81 L.R.R.M. (BNA) 1412 (1972).

Board would defer.¹⁶¹

A further point should be made in light of the Supreme Court's decision in *Buffalo Forge*.¹⁶² Both the *Southwestern Bell* and *Educational and Recreational Services* courts justified enjoining the strikes in those cases by also enjoining the alleged unfair labor practices, halting the unilateral action,¹⁶³ and reinstating the employees.¹⁶⁴ Assuming for the moment that an unfair labor practice strike could be enjoined, preserving the *status quo ante* by enjoining the employer is a reasonable method to prevent giving undue advantage to the employer pending arbitration. The Court in *Buffalo Forge*, however, criticized at some length the "status quo" injunction issued by the lower court in that case.¹⁶⁵ While courts and commentators disagree about the vitality of status-quo orders,¹⁶⁶ a court after *Buffalo Forge* could conceivably enjoin a strike over a presumptively arbitrable dispute which is also an unfair labor practice, and yet refuse to enjoin the employer's conduct pending arbitration. While the lawfulness of both parties' conduct was being determined, only the union would be prevented from acting.

For all the foregoing reasons it should be clear that applying a presumption of arbitrability as the basis for enjoining an alleged unfair practice strike could seriously threaten protected employee rights. Commentators who have criticized a presumptive arbitrability standard in other injunction cases generally argue that to effectuate the policies of *Boys Markets*, while protecting employee rights, stricter judicial scrutiny of the dispute is necessary to insure that it is in fact arbitrable.¹⁶⁷ In the present context, however, a finding of arbitrability *in fact*

161. *Dow I*, 530 F.2d at 273 n.12; *Southwestern Bell Tel. Co.*, 343 F. Supp. at 1171.

162. 428 U.S. 397 (1976).

163. 343 F. Supp. at 1173-74.

164. 90 Lab. Cas. (CCH) ¶ 12,623, at 26,978.

165. 428 U.S. at 410. The Court wrote:

If an injunction could issue against the [sympathy] strike in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express prohibitions of § 4 [of the Norris-LaGuardia Act]. The court in such cases would be permitted, if the dispute was arbitrable, to hold hearings, make findings of fact, interpret the applicable provisions of the contract and issue injunctions so as to restore the status quo, or to otherwise regulate the relationship of the parties pending exhaustion of the arbitration process.

166. Some courts have denied status quo orders in light of *Buffalo Forge*. See, e.g., *United Steelworkers v. Fort Pitt Steel Casting*, 598 F.2d 1273 (3d Cir. 1979); *Transit Union Div. 1384 v. Greyhound Lines, Inc.*, 550 F.2d 1237 (9th Cir.), cert. denied, 434 U.S. 837 (1977), reversing 529 F.2d 1073 (9th Cir. 1974); *UMW Dist. 2 v. Rochester & Pittsburgh Coal Co.*, 416 F. Supp. 74 (W.D. Pa. 1976). *Contra* *Local Lodge No. 1266, IAM v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1982); *Lever Bros. Co. v. International Chem. Workers, Local 217*, 554 F.2d 115 (4th Cir. 1976). See generally Cantor, *supra* note 137; Payne, *Enjoining Employers Pending Arbitration—From M-K-T to Greyhound and Beyond*, 3 INDUS. REL. L.J. 169 (1979); *Boys Markets Injunctions*, *supra* note 137.

167. See Gouid, *supra* note 134, at 541; *Boys Markets Injunctions*, *supra* note 137, at 724-25. See also 1975 Term, *supra* note 153, at 251.

would *still* threaten protected activity. Since many serious, as well as nonserious, unfair labor practices will also be contract violations, most of these disputes could conceivably be arbitrated.¹⁶⁸ Thus the Supreme Court's pronouncement in *Buffalo Forge*¹⁶⁹ that *Boys Markets* injunctions are limited to strike over disputes that are in fact arbitrable will not necessarily prevent courts from enjoining strikes over serious unfair practices.

Reasonable minds can differ over the point at which a "contract" issue becomes a "statutory" issue no longer subject to the grievance machinery. Both the Board's deferral doctrine¹⁷⁰ and its *Arlan's* rule are predicated on the notion that the grievance and arbitration machinery can adequately dispose of many unfair labor practices. Since virtually any unfair labor practice during the life of an agreement will have some contractual basis,¹⁷¹ and therefore be arbitrable, in fact, a court, given the vagueness of the *Arlan's* waiver rule and the policies favoring industrial peace, might be encouraged to enjoin the strike pending arbitration. It thus might make sense for "the federal courts, when faced with a *Mastro Plastics* defense in *Boys Markets* situations to grant the injunction and direct arbitration of the underlying dispute, whether that dispute involves pure contract interpretation or company unfair labor practices."¹⁷²

To avoid the risk of injunctions against protected activity, it was incumbent on the Board in *Dow* to establish clearer guidelines as to when the right to strike over unfair labor practices may not be waived. A court in a section 301 suit in which a *Mastro* defense has been raised will be called on not only to construe the contract but also to consider the seriousness of the employer's conduct before deciding whether the suit was arbitrable and enjoinable. The court should be supplied with clear Board policy expressed in workable standards.

Under current law the scope of a no-strike clause will remain open for interpretation in a section 301 suit.¹⁷³ For, as currently understood,

168. In fact, unions might, for practical and tactical reasons, prefer to arbitrate a serious unfair labor practice rather than strike.

169. 428 U.S. 397 (1976).

170. See *supra* note 132 and accompanying text.

171. See, e.g., *Dow II*, 244 N.L.R.B. at 1069 (Member Penello, dissenting); *Atlantic Richfield*, 199 N.L.R.B. at 1226-27.

172. Spelfogel, *Wildcat Strikes and Minority Concerted Activity: Discipline, Damage Suits, and Injunctions*, 24 LAB. L.J. 592, 602 (1973); see also Axelrod, *supra* note 129, at 932.

173. For example, in a recent case, *Caterpillar Tractor Co. v. NLRB*, 658 F.2d 1242 (7th Cir. 1981), the no-strike clause provided that "there will be no strike or stoppage of work until all peaceable means, as enumerated in the grievance procedure of this agreement, of reaching a mutually satisfactory decision on any and all problems have been tried." *Id.* at 1247. Although the Board had found the unilateral change in that case serious enough to protect the strike, the court, in reversal, stated:

[The no-strike clause] is more specific than the clause at issue in *Mastro Plastics*, and we

Arlan's and *Mastro* establish that no-strike clauses and unfair labor practices co-exist on a sliding scale. Under the non-waivability standard suggested in this article, however, the scope of the no-strike clause would initially be irrelevant. A court in a 301 action would first consider just the seriousness of the employer's conduct. Only when the court determined that the conduct was clearly not serious could it consider whether the no-strike and arbitration clauses dictated arbitration and permitted an injunction. This result would maximize the protection for potentially protected lawful strikes, comport with the Board's reluctance to defer in such situations, and retain for the Board its statutory role of deciding unfair labor practice issues.

The preceding discussion suggests that the ready analogy for non-waivability to prevent injunctions in this area is the doctrine of preemption. In brief, preemption is grounded on two notions. First, not only is protected activity insulated from employer interference, but activity which is actually or arguably protected by section 7 is not subject to state regulation.¹⁷⁴ Second, federal labor policy should be carried out through an expert agency.¹⁷⁵ The corollary to the second branch of the doctrine is that, while the Board does not have exclusive jurisdiction over unfair labor practices vis-a-vis the *federal* courts, it nevertheless has primary jurisdiction.¹⁷⁶ The policies behind both branches of the preemption doctrine aim at enhancing the ability of employees to exercise their organizational rights free of interference, while vesting uniform regulation of that activity in an expert agency.

A Board determination that strikes against serious unfair labor practices are entirely protected under all circumstances would not only further the federal interest in organizational rights but would also reflect the Board's expert determination that the law demands such a result. To respect this determination, a federal court should be ousted from jurisdiction to enjoin such a strike upon a showing of arguable

believe that difference is significant in determining the extent to which the employees waived their right to strike. We construe [the clause] to mean that the employees waive their right to strike as long as the union and the company are attempting to resolve the underlying dispute through the grievance procedure. . . .

Id. at 1247. See also *Dow II*, 636 F.2d at 1355. Since the court also disagreed with the finding of seriousness, 658 F.2d at 1248, discussion of the no-strike clause is technically dicta. But even though the case was not a section 301 suit, there seems to be no reason why the court's willingness to independently interpret the no-strike clause would not equally apply to an action for an injunction.

174. See R. GORMAN, *supra* note 100, at 767. See also *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

175. R. GORMAN, *supra* note 100, at 767-68.

176. *Cf. id.* at 770. See also *Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1962) ("The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301.").

protection.¹⁷⁷ If a court enjoined the strike simply because the dispute *could* be arbitrated, the right to strike in such situations would have little meaning. An employer would be encouraged to always seek an injunction, since the court could make an independent judgment whether the strike was within the no-strike clause and the dispute subject to arbitration.

Preempting a court will therefore insure that protected activity will not be interfered with unnecessarily, while leaving to the Board the ultimate determinations as to protected status. Moreover, preempting the court in such a case could be done consistently with *Boys Markets*. The Court there warned that it does not "follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance."¹⁷⁸ Conceivably the Court recognized that in situations such as the unfair labor practice strike other interests might intrude upon the policies favoring peaceful resolution of disputes, and thus prevent a court from enjoining a strike even though the dispute might in fact be arbitrated.

Just as state courts must determine whether they are preempted by arguably protected activity,¹⁷⁹ a court in a section 301 suit should refuse to issue an injunction if the union makes a "colorable claim" to protection under the non-waivability standard.¹⁸⁰ Besides insuring that lawful strikes would not be interfered with, ousting the court from jurisdiction would also fulfill the "clean hands" policies underlying section 8 of the Norris-LaGuardia Act.

A "colorable claim" to protection standard might be criticized in the *Boys Markets* context as too easily frustrating the policies favoring arbitration by giving the union an easy method to continue a strike even though it was in violation of the no-strike clause.¹⁸¹ But unlike the "typical" *Boys Markets* situation, extremely important employee

177. The *Southwestern Bell* court recognized that the logic of the preemption doctrine might prevent a federal court from issuing an injunction where a union has raised a *Mastro-Arlan's* defense. 343 F. Supp. at 1171-72. Even so, the court felt that if it were to divest itself of jurisdiction in such a case, and the Board deferred to arbitration, a potentially unlawful strike might continue. Thus, there seemed no alternative but to follow through with the policy encouraging arbitration by enjoining the strike. *Id.* at 1172. But, as has been pointed out, it is doubtful that the Board would defer in such a situation. See *supra* text accompanying note 151. If it does not defer, there is no reason why the Board alone, which has primary jurisdiction of these issues, should not then be allowed to decide the case.

178. 398 U.S. at 253-54.

179. See R. GORMAN, *supra* note 100, at 771.

180. See *Standard Food Prods. v. Brandenburg*, 436 F.2d 964, 966 (2d Cir. 1970). It has been argued that *Gateway Coal* overruled *Standard Food's* "colorable claim" requirement *sub silentio*. Strizever, *supra* note 137, at 278 n.31. Perhaps given the present doubts about the vitality of the presumptive arbitrability standard in *Boys Markets* cases, see *supra* note 137, a "colorable claim" standard should be reconsidered, at least for unfair labor practice strikes where important employee interests are at stake.

181. See, e.g., *Labor Injunctions*, *supra* note 150, at 644.

interests are implicated in the unfair practice strike. The ability to take a dramatic stand in defense of section 7 rights should be respected by the courts as fulfilling the policies expressed in *Mastro Plastics*.

Nor does a colorable claim standard in this context have to mean that the policy favoring industrial peace will always give way merely because the union can frame a contract violation as an unfair labor practice. As the court in *Dow II* recognized, a union could always divest courts from jurisdiction in a section 301 suit if the union need only raise the *Mastro Plastics* defense.¹⁸² The *Arlan's* standards should prevent such a result. If a union makes a "colorable claim" to protection under *Arlan's*, it has amply demonstrated that the employer conduct was an unfair labor practice. In short, a union in a section 301 suit will have to defend against an injunction by demonstrating that the employer's conduct arguably was serious. The proper accommodation between *Mastro-Arlan's* and *Boys Markets*, then, would require the "seriousness" test as the first hurdle for the union.¹⁸³ If the union suc-

182. 636 F.2d at 1361.

183. Once that hurdle has been overcome, the burden would shift to the employer to show the probability of success on the merits. See, e.g., *Local Lodge No. 1266, IAM v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981); *Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438, 443 (2d Cir. 1977). Some cases have required a showing of a likelihood of success on the merits. See, e.g., *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974); *Columbia Typographical Union, No. 101 v. Evening Star Newspaper Co.*, 100 L.R.R.M. (BNA) 2394, 2396 (D.D.C. 1978); *Bakery Drivers Local 802 v. S.B. Thomas, Inc.*, 99 L.R.R.M. (BNA) 2253, 2256 (E.D.N.Y. 1978); *CWA v. Western Elec. Co.*, 430 F. Supp. 969, 978 (S.D.N.Y. 1977).

Since "likelihood of success on the merits" in this sort of case means a showing of "non-seriousness" under the Act, as well as protection by the contract, a "likelihood" standard would involve the court too deeply in the dispute, contrary to the mandate in *Buffalo Forge*, 428 U.S. at 410. The approach suggested here—"colorable claim" for the union and "probable success" for the employer—should sufficiently apprise the court of the issues and at the same time protect federal policies under § 301.

The employer will, of course, be required to show irreparable injury, and the court will still "balance the equities" under the Court's decision in *Boys Markets*, 398 U.S. at 254.

The *Dow I* court argued for a quite different approach to *Mastro Plastics* defenses in *Boys Markets* cases. Apparently recognizing the problems inherent in having to read both the contract and Board law in these situations, the court suggested that in the typical unfair labor practice strike case a court could issue the preliminary injunction and then "solicit the expertise of the Board in the form of an amicus brief." 530 F.2d at 279. As a corollary, the court believed that the Board should not lightly sanction actions by employers who, faced with an allegedly unlawful strike, had not first sought injunctive relief under § 301. See *supra* text accompanying note 29. The court felt that these approaches would simultaneously further the union's interest in organizational rights, protect the arbitral process, and encourage industrial peace. In fact, however, the court's concern with advancing federal labor policy seriously threatens employee rights and the proper relationship between the Board and the courts. First, as indicated earlier, see *supra* text accompanying notes 152-54, preliminary injunctions as a practical matter may effectively settle the controversy in the employer's favor, regardless of the ultimate determination of the lawfulness of the conduct. Second, the Supreme Court stressed in *Buffalo Forge* that courts should not become deeply involved in labor disputes. 428 U.S. at 410. Here, not only would the court become involved in the merits of a potentially arbitrable dispute, it would be called upon to decide issues arising under the Act as well. Third, and related to this last point, the Board, which is vested with primary jurisdiction over unfair labor practices, could, under the court's approach, conceivably

cessfully clears that hurdle, any determination of the lawfulness of the strike would have to be made by the Board—the agency invested with the expertise to properly make such a determination.

It is, of course, possible that some unlawful strike activity will not be enjoined under the approach advocated here. Even so, this is a legitimate price to pay to fully protect lawful employee activity. No perfect accommodation between the various policies of the law is possible. But if, as *Mastro Plastics* emphasized, a first principle of industrial peace is freedom of association, then the long-run protection of the latter may require some short-run sacrifice of the former. And, in any event, employers are not entirely without remedy if a request for injunctive relief fails. Damages may still be awarded against the union or the discharge of strikers may be upheld if it is later determined that the strike was in violation of the agreement.¹⁸⁴ In this way, unions will still be discouraged from participating in hasty strikes. At the same time, though, if employers recognize that injunctive relief will not automatically flow against strikes which involve arguable unfair practices, they will be discouraged from engaging in conduct which unduly antagonizes or threatens employees.

IV

“THE ANACHRONISM OF *MARATHON*”

The doctrine of material breach¹⁸⁵ theoretically applies to all

become merely an advisory arm to the federal courts. If courts issued injunctions and *then* sought the Board's expertise with an eye toward settling the unfair labor practice issues, the Board would retain effective jurisdiction only over those cases in which either *Boys Markets* relief was unavailable or the employer had failed to seek an injunction. Even so, the court strongly suggested that relief under the Act should be denied in the latter case. 530 F.2d at 276, 281. In short, for employers seeking protection from unlawful strikes, unfair labor practice proceedings would be forced to take a subordinate position to § 301 actions and the bulk of unfair practice litigation in these cases would have been transferred from the Board to the courts. Certainly, whatever reconciliation is necessary between *Arlan's* and *Boys Markets* should not be accomplished by so drastic an alteration in the relative roles of the Board and courts in effectuating federal labor policy.

184. The Court in *Boys Markets* extended injunctive relief to strikes in breach of contract partly because damages might not adequately compensate employers for the harm caused by a strike. 428 U.S. at 428. Furthermore, it has been argued that to protect employee rights while still protecting the employer, the court should order expedited arbitration when enjoining sympathy strikes. See *Buffalo Forge, id.* at 431 (Stevens, J., dissenting); see also Gould *supra* note 134, at 541-42.

Perhaps a similar argument could be made in the unfair labor practice strike situation. Since employers legitimately wish to be insulated from the injury caused by illegal strikes, but employees should be able to strike against serious unfair practices, the Board should expedite its processes where a preliminary injunction has been denied, as it is statutorily bound to expedite secondary boycott cases. See 29 U.S.C. §§ 161(k), (l) (1976).

185. *Marathon Elec. Mfg. Co.*, 106 N.L.R.B. 1171, 1176, 32 L.R.R.M. (BNA) 1645, 1647 (1953), *enforced sub nom.*, IUE, Local 113 v. NLRB, 223 F.2d 338 (D.C. Cir.), *cert. denied*, 350 U.S. 981 (1956). See also *Boeing Airplane Co. v. Aeronautical Lodge, No. 751*, 188 F.2d 356 (9th Cir. 1951); *Adroit Mfg. Co.*, 236 N.L.R.B. 1358, 1362, 98 L.R.R.M. (BNA) 1578 (1978) (history

strikes in breach of contract, not simply those over alleged unfair labor practices. Nevertheless, the doctrine deserves discussion with *Mastro Plastics* and *Boys Markets*. If a union strikes against employer unfair labor practices which it incorrectly analyzes as serious, the employer, as in *Dow*,¹⁸⁶ may exercise its contract law remedies rather than seek to enjoin the strike. In this situation, the material breach doctrine frustrates the twin policies of contemporary labor law represented by *Mastro* and *Boys Markets*. On one hand is the abiding concern for protecting the integrity of employee organizational rights. On the other is the interest in industrial stability and peaceful resolution of labor disputes. *Marathon Electric* advances neither policy; in fact, it serves to undermine both, and is wholly unnecessary given the availability of other relief under sections 8 of the NLRA and 301 of the LMRA.

The importation of traditional contract law into modern labor law followed closely on the heels of passage of the Wagner Act itself.¹⁸⁷

omitted); *Dow Chemical Co.*, 212 NLRB 333, 340-41, 87 L.R.R.M. (BNA) 1279 (1974); *Kellstone, Inc.*, 206 N.L.R.B. 156, 84 L.R.R.M. (BNA) 1193 (1973) (history omitted); *San Juan Lumber Co.*, 154 N.L.R.B. 1153, 60 L.R.R.M. (BNA) 1102 (1965).

186. See *supra* text accompanying note 15.

187. See Klare, *Judicial Deradicalization of the Wagner Act and The Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265:

Contract is alive and well in the law of labor relations. To be sure, the collective bargaining agreement is a special kind of contract, with peculiar legal incidents, but despite the strongly anti-contractualist tone of the Act, the Supreme Court ensured from the start that contractualism would be the jurisprudential framework of the law of labor relations.

Id. at 294-95. Thus, in *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939), the Supreme Court faced a case in which the union demanded changes in the operation of the collective bargaining agreement which seemed prima facie prohibited by the agreement. But the contract also gave the employer only 48 hours to settle a dispute before the employees could strike. The employer refused the demands, the parties reached an impasse, and the union threatened to strike. Upholding the subsequent discharges of the employees, the Court stated that the employer

rightly understood that the men were irrevocably committed not to work in accordance with their contract. It was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ by hiring others to take their place. The Act does not prohibit an effective discharge for repudiation by the employee of his agreement. . . .

. . . If, as we have held, the respondent was confronted with a concerted refusal to work on the part of [the union] to permit its members to perform their contract there was nothing unlawful in the company's attempt to procure others to fill their places.

Id. at 344-45.

Once the Supreme Court had laid the contractual foundation for interpretation of the collective bargaining relationship, the Board and courts constructed their own edifices on that foundation. One early court would have held *Sands* applicable even where it was admitted that the union had struck over the employer's unfair labor practices. *United Biscuit Co. v. NLRB*, 128 F.2d 771, 775 (7th Cir. 1942) (alternative holding).

The Board has held that a union's strike in breach of contract worked such a repudiation of the agreement as to justify the employer's subsequent conditioning of bargaining on ending the strike. *Arundel Corp.*, 210 N.L.R.B. 525, 86 L.R.R.M. (BNA) 1180 (1974); *United Elastic Corp.*, 84 N.L.R.B. 768, 24 L.R.R.M. (BNA) 1294 (1949). Normally, of course, such a precondition for bargaining would clearly violate the Act. See, e.g., *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 245 F.2d 594 (5th Cir. 1957).

[T]he mere fact that a Union has without justification precipitated a strike does not make

While that story is beyond the scope of this article, *Marathon Electric* can be seen as part of a larger judicial effort to impart traditional contract notions into the primarily statutory labor law. Although the facts of *Marathon* were complicated, for present purposes they can be stated very simply. The collective bargaining agreement contained a wage re-opener clause and a no-strike commitment. Following a dispute over wages, the union struck without having given statutory notice under section 8(d).¹⁸⁸ The employer then discharged the striking employees, terminated the agreement, and refused to bargain with the union. The Board found that because the union breached the contract, the employer's conduct did not violate the Act.¹⁸⁹ In affirming, the court of appeals stated:

It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so. And that rule applies to labor contracts. Moreover, in cases where the breach is a strike in violation of a collective bargaining agreement, as in the instant case, application of the rule is supported by the rationale underlying such agreements. The prevention of strikes is one of the principal purposes of labor contracts and of the Act. A no-strike provision is "the chief advantage which an employer can reasonably expect from a collective bargaining agreement." The walkout was a material breach which justified the subsequent rescission of the contract by the company.¹⁹⁰

The *Marathon Electric* rule has been applied against both un-

the union or the employees for whom it is the bargaining representative outlaws so that they forfeit all of the benefits of the Act. The calling of such a strike does not infect all that thereafter occurs with the virus of that action. A strike does not in and of itself suspend the bargaining obligation. . . .

Id. at 596.

The Board has further held that as long as the union is in breach, the employer can ignore its statutory obligation to bargain. *Arundel Corp.*, 210 N.L.R.B. at 527, 76 L.R.R.M. (BNA) at 1183; *United Elastic Corp.*, 84 N.L.R.B. at 774, 24 L.R.R.M. (BNA) at 1291. This is so even though industrial stability would be disrupted, not furthered, by that result.

[U]nless the duty to bargain is continued after a collective agreement has been broken, the purpose of the Act to prevent industrial conflict will be served only in small measure. . . .

. . . Collective bargaining is not, under the Act, a reward given to unions or employers for meritorious conduct. The system of collective bargaining is not a system of rewards and punishments but a device prescribed by Congress expressly for the purpose of avoiding industrial strife and unrest. . . .

. . . In determining whether an employer should be relieved of his duty to bargain collectively, therefore, the question is not whether a union should be punished for participating in a breach of contract. . . . The question is whether it serves the purpose of the Act to terminate the employer's duty to bargain while the unlawful stoppage is still in progress and thus to set the parties on the road, not to solution of their difficulties, but to prolonged conflict."

Brief for the Congress of Industrial Organizations as *amicus curiae* at 23-24, *IUE, Local 113 v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955).

188. 29 U.S.C. § 158(d) (1976).

189. 106 N.L.R.B. at 1180-81, 32 L.R.R.M. (BNA) at 1649.

190. *IUE, Local 113 v. NLRB*, 223 F.2d 338, 341 (D.C. Cir. 1955).

ions¹⁹¹ and employers.¹⁹² Although it survives, the doctrine has received almost universal condemnation by commentators and courts¹⁹³—and deservedly so. The rule threatens employees in the basic exercise of their statutory rights.

A signal flaw in the reasoning underlying the *Marathon* rule is the assumption that the no-strike commitment is the chief consideration an employer derives from the collective bargaining agreement.¹⁹⁴ If the no-strike clause in fact fulfills this role, an employer's rescission on contract law grounds might be justified. But the no-strike agreement is only one of numerous advantages an employer receives, not least of which is the employees' willingness to comply with the "industrial government" constructed by the collective agreement.¹⁹⁵ Since the no-strike clause is only part of the consideration, a strike is not a material breach of the contract.¹⁹⁶ Yet under *Marathon*, the employees are "punished" with the most drastic form of contract-law remedy.

When viewed in light of the *Arlan's* rule, the material breach doctrine appears even more unreasonable and inequitable. An employer, for example, could indulge in a series of "non-serious" unfair practices, hoping the employees would finally strike and trigger the right to rescind.¹⁹⁷ In other words, an employer could engage in *illegal* activity

191. *Dow I*, 212 N.L.R.B. at 341-42; *Arundel Corp.*, 210 N.L.R.B. at 527, 36 L.R.R.M. (BNA) 1183.

192. *Adroit Mfg Co.*, 236 N.L.R.B. at 1362; *Kellstone, Inc.*, 206 N.L.R.B. at 157-58, 84 L.R.R.M. (BNA) at 1195; *San Juan Lumber Co.*, 154 N.L.R.B. at 1155, 60 L.R.R.M. (BNA) at 1103.

193. See *Cox*, *supra* note 76, at 18-19; Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 797-99 (1973); Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 542-44 (1969); see also *Dow I*, 530 F.2d at 280; *Children's Rehabilitation Center, Inc., v. Service Employees Int'l Union, Local 277*, 503 F.2d 1077, 1079-81 (3d Cir.), *cert. denied*, 419 U.S. 1090 (1974) (Seitz, C.J., dissenting); *NLRB v. State Electric Service, Inc.*, 477 F.2d 749, 751-52 (5th Cir. 1973). But see *Dow II*, 636 F.2d at 1362.

194. *IUE v. NLRB*, 223 F.2d at 341.

195. See Feller, *supra* note 193, at 764-66, 798; cf. *Warrior & Gulf Navigation*, 363 U.S. at 578-80 ("[T]he collective agreement . . . calls into being a new common law—the common law of a particular industry or of a particular plant. . . . A collective bargaining agreement is an effort to erect a system of industrial self-government.").

An incisive critique of this model of collective bargaining may be found in Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981).

196. Feller, *supra* note 193, at 798-99 n.522 argues further that, "[s]imilarly, it is not true that an employer refusal to arbitrate should be regarded as a material breach relieving the union of its promise not to strike. The consideration for the no-strike promise is the agreement itself, not just the promise to arbitrate." But as I have argued, see *supra* text accompanying notes 104-06, the employer's refusal to arbitrate *should* be a relevant consideration in whether strike action is protected as an unfair labor practice strike.

197. It may have been this possibility that led Member Truesdale in *Dow II* to suggest that the *Marathon Electric* rule be modified, such that an employer would relinquish the right of rescission if its own unfair labor practices precipitated the strike. 244 N.L.R.B. at 1078, 102 L.R.R.M. (BNA) at 1214.

safe in the knowledge that, under the circumstances, the employees have no better remedy than that given by the contract. And yet, if the employees choose to strike and thus breach the contract, they lose all rights under the Act.

Moreover, although the *Marathon* rule theoretically applies to unions as well as employers, the doctrine in fact operates asymmetrically to the advantage of employers. This is because any employer breach that is material enough to render a resulting strike protected will usually amount to a serious unfair labor practice.¹⁹⁸ In short, a finding of material breach as a basis for protecting the strike is redundant. In *Adroit Manufacturing Co.*,¹⁹⁹ for example, the employer was obliged to pay production bonuses to employees, but failed to do so in five of the eight months in which they were owed. The ALJ stated that the violations of the agreement "constituted serious unfair labor practices and materially breached [the] collective bargain-agreement."²⁰⁰ Presumably, an employer's material breach would also allow the union to rescind rather than strike. No union, of course, would commit such contractual suicide. In practice, the union would call a strike, a remedy already justified by the unfair labor practice.

Finally, under the currently vague *Arlan's* standards, the *Marathon* doctrine severely punishes a union that incorrectly assesses circumstances and strikes over a non-serious unfair labor practice. Viewed from this perspective *Marathon* clearly tends to chill the exercise of protected rights. Even where a strike would most likely be protected, the union might refrain from striking if, in addition to the usual risk of damages or an injunction, it also faced possible rescission of the collective bargaining agreement.

If the material breach doctrine threatens employee rights, it is even more inconsistent with the national policy favoring the peaceful resolution of existing disputes. The "contract theory" of collective bargaining exemplified in *Marathon* was introduced into American labor law prior to enactment of section 301 of the LMRA, which provided remedies for

198. It is worth mentioning in this regard that the *Arlan's* board used "modified" material breach language as a basis for its holding. 133 N.L.R.B. at 808, 48 L.R.R.M. (BNA) at 1735.

199. 236 N.L.R.B. 1358, 98 L.R.R.M. (BNA) 1578 (1978).

200. *Id.* at 1362, 98 L.R.R.M. (BNA) at 1579. The ALJ found that San Juan Lumber Co., 154 N.L.R.B. 1153, 60 L.R.R.M. (BNA) 1102 (1965), was controlling. *San Juan* held in part that the employer, by failing to pay the agreed-upon wages, materially breached the agreement and released the employees from their obligation not to strike. Although no § 8(a)(5) allegation was raised in *San Juan*, the Board's language suggests that even this case can be seen as involving unilateral action resembling an unfair labor practice. In finding the strike protected, the Board stated that the employer had breached its "basic and fundamental obligation to pay agreed-upon wages when due." 154 N.L.R.B. at 1155, 60 L.R.R.M. (BNA) at 1103. To the extent that *San Juan* does not fit into an unfair practice mold, it is probably the unusual case. In almost every other circumstance the material breach and the unfair labor practice will be co-extensive. See, e.g., *Kellstone, Inc.*, 206 N.L.R.B. at 157-58, 84 L.R.R.M. (BNA) at 1195.

breaches of collective bargaining agreements. It became firm law before the development of the federal law of arbitration, and long before strikes over arbitrable grievances could be enjoined. Whatever justification contract-law remedies may have had in an earlier day, the present availability of alternative statutory remedies implementing industrial peace calls the wisdom of the doctrine into serious question.²⁰¹

Collective bargaining agreements are made with the expectation that breaches will occur. Partly for this reason, the parties establish grievance and arbitration machinery.²⁰² The *Steelworkers Trilogy*,²⁰³ *Boys Markets*, *Arlan's*, and the deferral doctrine encourage the use of that machinery to the fullest extent possible within the confines of countervailing considerations, such as the right to strike. On this ground, it makes little sense to allow either party to renege on its promise because the other has chosen to breach the contract. The collective bargaining relationship is not like a one-time commercial encounter after which the parties may sever their relations, never to deal with one another again. Instead, the parties have an ongoing, continual relationship which the agreement is designed to regulate. The grievance machinery is a principal means, therefore, of resolving most small and some large disputes. Only the most egregious employer conduct threatening organizational rights will lift the dispute from the realm of contract so that responsive employee strike action will be protected.²⁰⁴

Since federal policy encourages peaceful resolution of labor disputes, allowing parties to rescind, even upon a material breach, runs counter to that policy. In *Marathon*, for instance, "[t]he result was a total disruption of the collective bargaining relation, destruction of employees' job security and seniority rights, and such serious aggravation of the dispute that labor peace became impossible."²⁰⁵ In *Dow*, the employees were discharged, those remaining were without an agreement, and the exclusive representative was ousted. It is hard to imagine conduct more likely to exacerbate a dispute while threatening fundamental section 7 rights. Nor does there seem to be any doubt that, absent the strike, rescission would be a *per se* refusal to bargain.²⁰⁶ The *Dow I* court correctly concluded, therefore, that the *Marathon* rule had no place in the panoply of remedies available to the wronged party

201. See, e.g., *Arundel Corp.*, 210 N.L.R.B. at 529, 86 L.R.R.M. (BNA) at 1184 (Member Jenkins, dissenting).

202. See Cox, *supra* note 76, at 18-19.

203. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

204. See *supra* text accompanying notes 79-81, 102-06.

205. Summers, *supra* note 193, at 543.

206. See, e.g., *Kellstone, Inc.*, 206 N.L.R.B. at 157-58, 184 L.R.R.M. (BNA) at 1195.

in a labor dispute.²⁰⁷

Moreover, *Arlan's* expresses the judgment that unions should be required to arbitrate some disputes, even though they may technically be unfair labor practices, because relatively minor disputes are better resolved through the grievance machinery.²⁰⁸ *Boys Markets* adds further teeth to the requirement that unions should arbitrate essentially contractual disputes.²⁰⁹ Suppose, however, that a union nevertheless strikes over a non-serious unfair labor practice. To the extent that rescission under *Marathon* would release the employer from its contractual obligation to arbitrate any aspect of the dispute, an employer could punish the union by refusing to arbitrate the very dispute which the union itself was required to arbitrate. This sort of result defies rationality and confirms that *Marathon Electric* is a square peg struggling to fit within the round hole of contemporary labor law.

While the foregoing reasons may be sufficient for explicitly overruling *Marathon Electric*, an argument can be made that the case has already been overruled *sub silentio* by *Local Union No. 721, Packinghouse Workers v. Needham Packing Co.*²¹⁰ In that case, after the employer discharged an employee, 190 other workers walked off the job. On several occasions, the employer threatened the striking employees with discharge if they did not return, and finally did discharge them. Some time later, the union sought to arbitrate the discharges and the employer refused, contending that the union had "repudiated and terminated" the agreement, releasing the employer from any duty to arbitrate. In the union's section 301 suit to compel arbitration, the Supreme Court, noting that there was no rigid rule linking no-strike and arbitration clauses, held that the duty to arbitrate survived the union's breach.²¹¹ The court nevertheless cautioned: "Whether a fundamental and long-lasting change in the relationship of the parties prior to the demand for arbitration would be a circumstance which, alone or among others, would release an employer from his promise to arbitrate we need not decide . . ." ²¹²

That the duty to arbitrate survived the union's "repudiation" implies that the contract itself survived. Without a contract there could be

207. 530 F.2d at 280.

208. 133 N.L.R.B. at 808, 48 L.R.R.M. (BNA) at 1735.

209. 398 U.S. 235 (1970).

210. 376 U.S. 247 (1964). See also *Drake Bakeries v. Bakery Workers*, 370 U.S. 254, 262-63 (1962).

211. 376 U.S. at 253. On this point, *Needham* has been cited innumerable times. See, e.g., *Trailways of New England, Inc. v. Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees*, 343 F.2d 815, 817 (1st Cir. 1965); *Minnesota Joint Bd., Amalgamated Clothing Workers v. United Garment Mfg. Co.*, 338 F.2d 195, 199-200 (8th Cir. 1964); *Ice Cream Drivers & Employees v. Borden, Inc.*, 312 F. Supp. 549, 552-53 (S.D.N.Y. 1970).

212. 376 U.S. at 253.

no grievance and arbitration procedure, nor would there be contractual grounds to test the employer's actions.

The material breach doctrine has at least two important consequences. First, while the union is in fact on strike in breach of contract, an employer may refuse to bargain.²¹³ Once the strike is terminated, however, the duty to bargain resumes.²¹⁴ Second, the employer faced with a strike may rescind the contract. Since rescission is effective beyond the end of the strike, this second consequence has potentially more impact. Even though the employer is no longer bound by the rescinded agreement, the terms and conditions of employment would presumably be insulated from unilateral change without notice and bargaining, which are independent obligations imposed by law.²¹⁵ Thus, insofar as rescission releases the employer from any duties under the agreement, freedom from the obligation to arbitrate would appear to be the most significant. But *Needham* establishes that the duty to arbitrate *does* survive the union's breach. Thus, *Needham* is entirely inconsistent with *Marathon* as applied.

Unlike *Marathon Electric*, *Needham* reached the proper result. Not only does federal policy encourage peaceful settlement of disputes, but the parties intend the grievance procedure to be the mechanism to resolve their contractual differences. If an employer—or a union for that matter—were completely free to relinquish its contractual obligation with every arguably material breach, industrial relations would dissolve into chaos.²¹⁶ Short of the point where the employer's actions become serious unfair labor practices, thereby implicating the Act, the parties should be bound by their established grievance and arbitration machinery.

It is somewhat puzzling that *Marathon Electric* survives relatively untarnished after *Needham*. Perhaps this is a function of the independent development of Board law and the law under section 301. The cases can be reconciled, since the Supreme Court has never explicitly ruled that the duty to arbitrate survives after the employer has clearly notified the union that the agreement has been rescinded and has acted consistently with that notice.²¹⁷ To harmonize the cases in this way, however, is highly formalistic, and places the survival of the collective bargaining relationship on the careful or not-so-careful words of the

213. See *supra* note 187.

214. See, e.g., *Arundel Corp.*, 210 N.L.R.B. at 527, 86 L.R.R.M. (BNA) at 1183.

215. *NLRB v. Katz*, 369 U.S. 736 (1962).

216. Cf. *Summers*, *supra* note 193, at 543-44.

217. See *Smith & Jones, The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 V.A. L. REV. 831, 845-46 (1966); see also *Children's Rehabilitation Center*, 503 F.2d at 1079; *Minnesota Joint Bd., Amalgamated Clothing Workers v. United Garment Mfg. Co.*, 338 F.2d at 199 n.1.

employer. Certainly the employer in *Needham* believed that the strike released it from further obligation under the contract, and enabled it to discharge its employees. Viewed from this perspective, *Marathon Electric* should have controlled the disposition of the case. Yet the Court did not cite *Marathon* in its analysis.²¹⁸

So long as *Marathon* and *Needham* exist independently of one another, whether an employer can legitimately be released from its obligations under the agreement by a strike in breach of contract will depend on the forum in which the parties bring their dispute. If suit is brought under section 301, the court would be required to compel arbitration of the dispute. But if the union instead filed unfair labor practice charges on the same set of facts, it would run the risk that the Board might find a material breach and hold any discharges or rescission valid.

Despite the many difficulties with the material breach doctrine, it has continued to find adherents. Most recently, Member Penello, dissenting in *Dow II*,²¹⁹ argued that dispensing with *Marathon Electric* would undermine the national policy allowing self-help in labor disputes,²²⁰ and that the availability of rescission and discharge add force to the *Arlan's* rule.²²¹

Penello's argument is not persuasive. As already noted, *Arlan's* and *Marathon* together could destabilize collective bargaining.²²² Moreover, since employers can *always* discharge employees striking in breach, only rescission is really at issue. According to Penello, even though the union may be liable in damages under section 301, the potential for irreparable injury to the employer justifies the deterrent of rescission.²²³ What he deliberately ignores, though, is that injunctive relief may also be available if the employer's conduct was clearly not serious, even under the non-waivability standard proposed in this article.²²⁴ This relief, if granted, would prevent irreparable injury to the employer pending arbitration without exacting such a high price from the union. If a court refuses to grant injunctive relief, the employer can rely on its other potential remedies—all of which are substantial deterrents to hasty or ill-considered strike action.

Preserving economic self-help is also an inadequate reason to maintain *Marathon*. While national labor policy does legitimately

218. *Needham*, 376 U.S. 247 (1964).

219. 244 N.L.R.B. at 1065, 102 L.R.R.M. (BNA) at 1203.

220. *See, e.g.*, *Lodge 76, IAM v. Wisconsin Employee Relations Comm'n*, 427 U.S. 132 (1976); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

221. 244 N.L.R.B. at 1070 n.59, 1071, 102 L.R.R.M. (BNA) at 1207.

222. *See supra* text accompanying note 197, 201-09.

223. 244 N.L.R.B. at 1071, 102 L.R.R.M. (BNA) at 1208.

224. *See supra* text accompanying notes 101-18, 173-84.

leave some matters to the "free play of economic forces," the very purpose of the Act is to constrain the complete freedom of the parties in the conduct of their affairs. By leaving some areas of collective bargaining unregulated and open to self-help, Congress sought to protect the integrity of collective bargaining as a free system. Thus, for example, during negotiations, each side may "bargain" by strike or lock-out,²²⁵ employees who strike in breach of a no-strike clause may be discharged, and a union which has not waived the right to strike may walk out over a mid-term dispute. At the point where economic power becomes coercive or inequitable, however, the Act intervenes. Rescission of a contract and withdrawal of union recognition is an area which has *not* been left unregulated. The unfair labor practice provisions of the Act would normally proscribe such conduct. Only through the intrusion of strict contract principles can the employer's action be insulated from the remedial reach of the law. As a rule of self-help, then, the *Marathon* doctrine tends to undermine the foundations of collective bargaining.

The court in *Dow II* also found continued merit in *Marathon*. Like Member Penello, it stressed that the employer should be free to terminate the employees.²²⁶ But, as noted above, overturning *Marathon* would not achieve this result. A better argument advanced by the court stressed that where, as in *Dow*, *Boys Markets* relief is unavailable, termination of the agreement frees the employer to bargain collectively with its new employees. "Thus," the court concluded, "the *Marathon Electric* doctrine . . . continues to fill an important need in the law of labor contracts."²²⁷ There is some question, however, whether and to what extent an employer who elects to rescind is interested in collective bargaining at all. And, the *Marathon* rule allows rescission whether or not the union retains majority status. Where the employer rescinds and the union retains its majority status, "there is no contract to which to return after resolution of the often limited issue over which the strike or lockout occurred."²²⁸ New negotiations would be required, but in an atmosphere of suspicion, distrust, and anger because of the recent disruption of the collective bargaining relationship. It is not clear that productive collective bargaining could resume in such a situation.

Only in those circumstances in which the new hires comprise a majority of the bargaining unit would *Marathon* encourage bargaining. But as the Third Circuit in *Dow II* recognized, in the absence of rescis-

225. See, e.g., *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

226. 636 F.2d at 1362.

227. *Id.* at 1362.

228. *Children's Rehabilitation Center*, 503 F.2d at 1080 (Seitz, C.J., dissenting).

sion, no decertification election²²⁹ or selection of a new representative could be held until the end of the contract period.²³⁰ The policy behind these contract bar rules is stability in collective bargaining. Thus, an employer who chooses the destabilizing remedy of wholesale discharges should be required to await expiration of the agreement, just as employees dissatisfied with their union must await expiration. If an employer was prevented altogether from cancelling the agreement, it would be further encouraged to seek peaceful solutions to its disputes with the union.²³¹ Had Dow Chemical, for example, agreed to negotiate with the union over the work scheduling or, at the very least, had not threatened to implement the plan before the grievance procedure was completed, the strike might have been avoided. In any event, the *Dow* situation—no injunctive relief possible *and* a majority of new hires—is likely to be sufficiently rare that it should not justify retaining *Marathon* as a rule of general application.

Under the material breach doctrine a union's breach of contract—conduct unprotected under, but not violative of the Act—may provide the justification for actions by the employer which otherwise would be extreme violations of the Act.²³² To the extent that rescission followed by discharge and withdrawal of recognition mirror otherwise objectionable behavior under the Act, the Board, in approving *Marathon*, sanctions activity which operates directly contrary to the law's express policies. And when it is recalled that in the unfair labor practice strike situation it was the *employer's* conduct—even if not serious—which gave rise to the strike in the first instance, the results of the *Marathon* doctrine seem all the more inequitable.

In sum, in the context of unfair labor practice strikes, reaching "proper" results under apparently neutral contract law produces absurd and nonsensical results under the remedial policies of the Act. It allows an employer to violate the spirit, if not presently the letter, of the law. In fact, it would appear that given that alternate remedies are available to an employer faced with a strike in breach, the *Marathon* rule really aids only the anti-union employer who wishes to be free of its obligation to bargain collectively.

229. See 29 U.S.C. 159(c)(1)(A)(ii) (1976).

230. See General Cable Corp., 139 N.L.R.B. 1123, 51 L.R.R.M. (BNA) 1444 (1962).

231. The Board has developed a number of exceptions to the contract bar rule. See R. GORMAN, *supra* note 100, at 54-59. One such exception holds that where a signatory union has become "defunct," an election petition during an agreement will be considered timely. *Id.* at 57. See also Hershey Chocolate Corp., 121 N.L.R.B. 901, 42 L.R.R.M. (BNA) 1460 (1958). Perhaps a similar exception could be created for the situation which occurred in *Dow*, where no injunctive relief was possible and the new hires constituted a majority *and* demonstrated a willingness to decertify the union. The employer could be released from bargaining with the practically "defunct" union.

232. See also *supra* note 187.

The Board could eliminate these discrepancies by overruling *Marathon*. In doing so it would bring the law into conformity with its own preference for arbitration as well as the preference for industrial peace expressed in section 301. The Board had the opportunity to overrule *Marathon* in *Dow II*, but it unfortunately declined.²³³ At its first chance, the Board should reconsider and then dispense with the doctrine altogether. Overruling the case, to paraphrase Member Truesdale, will eliminate "the anachronism of *Marathon*, that pure contract principles are allowed to dominate important policies of the Act."²³⁴ Employers will still be able to discharge or discipline strikers in breach. Employers will still have available damages and injunctive relief. But employers and unions will be apprised that the Board will no longer countenance traditional legal doctrines which are "destructive of the foundation on which collective bargaining must rest."²³⁵

V

CONCLUSION

The foregoing analysis highlights several conflicts in federal labor law. All the central tenets of contemporary labor policy converge upon strikes protesting alleged unfair labor practices during the life of a collective bargaining agreement. The protection of section 7 rights, the insistence on industrial peace and freedom of contract all vie for prominence in this area. This article has argued that the principle outlined

233. In two footnotes, though, the suggestion was made that *Marathon* might be reconsidered in the future. The Board first noted, 244 N.L.R.B. at 1062 n.13, 102 L.R.R.M. (BNA) at 1202 n.13, that the *Dow* case seemed to come within the rule of *NLRB v. State Elec. Serv., Inc.*, 477 F.2d 749 (5th Cir. 1973), to the effect that a strike does not confer an automatic right to rescind and that the employer's refusal to fully comply with the grievance procedure should be seen as having aggravated the dispute. More significantly, the Board went on to say:

The citation of *Kellstone* [see *supra* note 178] by the Administrative Law Judge [in *Dow*] as affirming the rule in *Marathon* . . . is an *overstatement*; the Board's reference there to *Marathon* was limited to the general or hornbook law proposition that "as a general rule of law, one party to a contract need not perform if the other party refuses in a material respect to do so."

244 N.L.R.B. at 1062 n.14, 102 L.R.R.M. (BNA) at 1202 n.14 (emphasis added). See also *id.* at 1078, 102 L.R.R.M. (BNA) at 1214 (Member Truesdale, concurring).

234. 244 N.L.R.B. at 1078, 102 L.R.R.M. (BNA) at 1214.

235. Having concluded that *Marathon Electric* should be dispensed with as a rule of law, there is no reason why the parties should not be allowed to *bargain* for rescission as one remedy under the contract. For an employer this bargained-for remedy would roughly correspond to a union reserving the right to strike following completion of the grievance procedure. Since the law *does* allow unions and employers great latitude to structure the substance of their bargain, and *does* allow them to resort to self-help in appropriate circumstances, the parties could provide for such a remedy consistent with national policy. In fact, some collective bargaining agreements do provide for an employer's rescission upon a union's strike during the life of an agreement. See Feller, *supra* note 193, at 799 & n.524. But because of the countervailing labor policies encouraging stability in collective bargaining relationships, a rescissionary remedy should never be implied in contract. Instead, it should be expressly stated before given effect. See *Children's Rehabilitation Center*, 503 F.2d at 1080 (Seitz, C.J., dissenting).

in *Mastro Plastics*, that free association is the precondition for industrial peace, should be the premise upon which a reconciliation of these policies commences. The right to strike against serious unfair labor practices should be non-waivable; otherwise the potential availability of injunctive relief may sap the strength from free association in the interest of industrial stability. Those disputes which involve non-serious unfair labor practices should continue to be resolved through the grievance procedure, and injunctive relief should be available to the employer. Finally, the continued vitality of the material-breach doctrine menaces both collective rights and industrial peace.

In its own way, the Board recognized that the principle of *Mastro* should, in fact must, retain its force when it reached its *Dow II* decision.²³⁶ Nevertheless, the Board missed the opportunity to shape the contours of a coherent doctrine which would provide guidance to unions, employers, and courts. Had it affirmatively ruled that unions striking against serious employer unfair labor practices would be absolutely protected, had it clarified what a serious unfair labor practice might be, and had it overruled the material breach doctrine, the Board would have, at once, given maximum protection to section 7 rights while affirming the integrity of the arbitral process. Indeed, the Board should have taken the Third Circuit's remand more seriously than it did. Should similar issues arise in the future—as they must—the Board should seize the opportunity to reduce the tensions in the law which the *Dow I* court addressed.

236. 244 N.L.R.B. at 1062 n.11, 1065, 1077, 102 L.R.R.M. (BNA) at 1201-02 n.11, 1203, 1213.