Technical Note #3: Employee Duties

In the leading case of Atlantic & *Gulf Stevedores, Inc. v. OSHRC,*[1] the employer was cited for a violation of § 5(a)(2) because employees were working without hard hats. The employer contended that the employees refused to wear hard hats, despite its strenuous efforts to obtain compliance. Specifically, the employer had furnished the hard hats and encouraged their use at regular safety meetings, posted hard hat signs at the worksite, used payroll envelope stuffers advocating wearing hard hats, and placed hard hat safety messages on employee hiring tapes. Furthermore, there was evidence that the employer believed that employees would engage in wildcat strikes or walkouts if the employer attempted to enforce the standard by discharging employees who refused to comply.

In affirming the Commission's finding of a violation, the Third Circuit held that the Secretary could insist that during collective bargaining the employer retain the right to discipline disobedient employees. The court, however, rejected the position that employees were subject to direct sanctioning under the Act by the Secretary or by cease and desist orders of the Commission.

To lessen the harsh results of its holding, the court suggested several remedies available to employers faced with employee refusals to comply. First, because safety and health is a mandatory subject of bargaining, the employer can insist to the point of impasse upon the right to discipline disobedient employees. Once established, this contract right may be enforced by a suit under § 301 of the Labor-Management Relations Act. Second, should employee discipline or discharge produce a work stoppage, injunctive relief would be available if the parties have a no-strike and arbitration clause.[2] Third, where an injunction cannot be obtained or arbitration fails to vindicate an employer's action, the employer can still apply f r a variance. Fourth, the employer could file a petition for modification of abatement.[3] In 1. T.O. Corp. v. OSHRC,[4] the First Circuit specifically endorsed the Third Circuit's rationale in Atlantic & *Gulf.*

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1. 534 F.2d 541 (3d Cir. 1976).
2. Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235 (1970). There are five prerequisites to a Boys Markets injunction: (1) the strike must be over an issue the parties are obligated to arbitrate; (2) the injuction must be conditioned on arbitration of the underlying dispute; (3) a strike in breach of contract must be occurring or imminent; (4) the strike has caused or will cause irreparable injury to the employer; and (5) ordinary principles of equity favor the issuance of an injunction.
   It has been held that a no strike clause will be implied when there is an arbitration clause. Local 174, Teamsters, Chauffeurs, Warehouse men & Helpers of America v. Lucas Flour Co., 369 U.S. 95 (1962).
3. Fora criticism of the court's approach, see M. Rothstein, Occupational Safety and Health Law 148-49 (2d ed. 1983).
4. 540 F.2d 543 (1st Cir. 1976).