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Limiting Parent Union Liability for Local Union Wildcat Strikes, Carbon Fuel Company v. United Mine Works of America, 444 U.S. 212 (1979)

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CASE COMMENTS

LIMITING PARENT UNION LIABILITY FOR LOCAL UNION WILDCAT STRIKES *Carbon Fuel Company v. United Mine Workers of America*, 444 U.S. 212 (1979)

*"Up here on the creek, nobody tells me when to work and when not to work."*¹ *Mike Adkins, UMWA member.*

The Supreme Court, in *Carbon Fuel Company v. United Mine Workers of America*,² resolved a disagreement among the circuits³ by insulating an international union and its regional subdivision from liability for their local unions'⁴ unauthorized wildcat strikes.⁵

Three local unions of the United Mine Workers of America (UMWA)⁶ engaged in forty-eight wildcat strikes at the Carbon Fuel

1. *The Coal Miners Walk Out*, TIME, Dec. 12, 1977, at 72, 74.

2. 444 U.S. 212 (1979).

3. See notes 20-23 *infra* and accompanying text.

4. For a description of the structure of UMWA, see *Hodgson v. UMWA*, 344 F. Supp. 990 (D.D.C. 1972) (mem. op.); M. FORKOSCH, TREATISE ON LABOR LAW 300, 300-03 (1953).

5. A "wildcat strike" is defined as a work stoppage, generally spontaneous in character, by a group of union employees without authorization or approval. It may exist when a local union has supported a strike but has not received the approval of the national or international union. Such action generally is in violation of the applicable collective bargaining agreement. H. ROBERTS, ROBERTS' DICTIONARY OF INDUSTRIAL RELATIONS 582 (1971). If an international union authorizes a strike in violation of any term of the agreement, whether express or implied, it will be held responsible. See, e.g., *Gateway Coal Co. v. UMWA*, 414 U.S. 368 (1974); *Boys Markets, Inc. v. Clerks Union*, 398 U.S. 235 (1970).

A wildcat strike should be distinguished from a concerted work stoppage protected by § 7 of the Taft-Hartley Act. See Labor-Management Relations Act, 29 U.S.C. § 157 (1976). The rights of protected strikers depend on the cause of the strike. A work stoppage protesting employer conduct found by the National Labor Relations Board to be in violation of the Labor Act is termed an unfair labor practice strike. A strike for another reason, typically in support of bargaining demands regarding wages and working conditions, or requests that the employer recognize a union, is termed an economic strike. See R. GORMAN, LABOR LAW 339-41 (1977). Discharge of either an economic or unfair labor practice striker violates §§ 8(a)(1) and (3) of the Taft-Hartley Act. *NLRB v. International Van Lines*, 409 U.S. 48 (1972). An unfair labor practice striker must, upon an unconditional request for reinstatement, be reinstated to his original position. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). An economic striker can be permanently replaced and is not entitled to oust his or her replacement upon the termination of the strike. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). A wildcat striker loses statutory protection unless the strike is directed toward a specific, previously articulated union objective. *NLRB v. Shop Rite Foods, Inc.*, 430 F.2d 786 (5th Cir. 1970), noted in 49 TEX. L. REV. 943 (1971).

6. The UMWA rank and file is renowned for its militancy. See generally J. FINLEY, THE CORRUPT KINGDOM: THE RISE AND FALL OF THE UNITED MINE WORKERS (1972); B. HUME,

Company mines from 1969 to 1973. District 17,⁷ a regional subdivision of UMWA, unsuccessfully attempted to persuade the miners to return to work.⁸ The company petitioned the trial court for injunctive relief⁹ and damages from UMWA, District 17, and the local unions. The Fourth Circuit Court of Appeals vacated the trial court's judgments¹⁰ against UMWA and District 17, holding that neither could be liable for damages unless they adopted, encouraged, or prolonged the strikes. A unanimous Supreme Court affirmed the Fourth Circuit's decision and *held*: A parent union is liable for a local union's unauthorized strike only (1) if the parent union would be liable under the common-law rule of agency or (2) if the parent union explicitly promises in the collective bargaining agreement to attempt to prevent unauthorized strikes.¹¹

DEATH AND THE MINES; REBELLION AND MURDER IN THE UNITED MINE WORKERS (1971). In recent years, the UMWA has plagued the the bituminous coal industry with wildcat strikes. 80 W. VA. L. REV. 492 (1978). In 1976, the UMWA engaged in 1,132 wildcat strikes, one fourth of all industrial disputes in the United States. Hoerr, *The UMWA Is Bargaining From Weakness*, BUS. WEEK, No. 2514, Dec. 19, 1971, at 30. In 1977, the coal industry lost a record 2.28 million tons of coal production during wildcat strikes. *Fading Power of Mine Workers Union*, 87 U.S. NEWS AND WORLD REP. July 23, 1979, at 64-65.

Wildcat strikes are said to be symptomatic of the growing restiveness of rank and file workers, Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act*, 52 CORNELL L.Q. 672 (1967). Professor Gould attributes rank and file restlessness to inflationary economic conditions, the Landrum-Griffin Act's preoccupation with the individual's rights against his or her union and the rise of industry-wide and multi-enterprise bargaining in the United States. *Id.* at 674. See also S. SLICHTER, J. HEALY & E. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 633-91, 926 (1960).

7. District 17, comprised of 25,000 miners in southern West Virginia, is termed "the biggest, brashest, most uncontrollable and most defiant of the union's twenty-one districts." TIME, Dec. 12, 1977, at 72.

8. Wildcat strikes threaten an incumbent union's interests through deterioration of internal discipline and erosion of employer confidence, with consequent undermining of the union's stability and strength. Cantor, *Dissident Worker Action, After "The Emporium"*, 29 RUTGERS L. REV. 35 (1975); Comment, *Parent Union Liability for Strikes in Breach of Contract*, 67 CALIF. L. REV. 1028, 1044 (1979). However, Professor Archibald Cox suggests that while wildcat strikes may disrupt plant relationships and interfere with the normal processes of collective bargaining, "much can be said in favor of aggressive unions whose leaders are consistently pricked to action by militant minorities." Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 332 (1951).

9. Because the contracts had expired at the time the case reached the Supreme Court, there was no question of injunctive relief. 444 U.S. at 214, n.2.

10. The Fourth Circuit vacated in part judgments against the three local unions. Carbon Fuel Co. v. UMWA, 582 F.2d 1346 (4th Cir. 1978). Review of judgments against the three locals was not sought in the Supreme Court. 444 U.S. at 215, n.3.

11. *Id.* at 218-19. The 1968 and 1971 collective bargaining agreement contained a provision promising to maintain the contract. The following provision was held inadequate to hold the parent union liable:

Section 301(a) of the Labor-Management Relations Act¹² provides that suits for breach of a collective bargaining agreement, negotiated by a union representing employees in an industry affecting commerce, may be maintained against the union as an entity in federal courts.¹³ Mandatory grievance and arbitration provisions¹⁴ provide a basis for the judicial imposition of an implied no strike clause.¹⁵ An employer may recover damages for breach of contract, such as the violation of a no strike clause,¹⁶ in a § 301(a) proceeding.

The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the Settlement of Local and District Disputes' section of the Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts.

Id. at 221. (quoting the National Bituminous Coal Wage Agreement).

12. 29 U.S.C. § 185(a) (1976).

13. At common law, labor organizations, being unincorporated associations, could not be sued as separate entities. *E.g.*, Pullman Standard Car Mfg. Co. v. Local 2928, United Steelworkers, 152 F.2d 493 (7th Cir. 1945). See Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation*, 51 YALE L.J. 40 (1941); 32 VA. L. REV. 394 (1946). Before the enactment of § 301, only state courts, in the absence of diversity of citizenship, had jurisdiction over suits for a breach of a collective bargaining agreement. Accordingly, all rights and remedies related thereto were determined by state law. See A. COX & D. BOK, LABOR LAW 597 (7th ed. 1969). As Congress noted, the various procedural expedients which existed in many states were, as a practical matter, too fortuitous to be adequate. See *Hearings Before the Senate Committee on Labor and Public Welfare on S. 1126 and S. 55*, 80th Cong., 1st Sess. 1914 (1947).

Section 301 was enacted primarily to make collective bargaining agreements binding and enforceable on both the employer and the union, as well as eliminating procedural defects by treating unions as entities for the purpose of actions to recover damages for breach of contract. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 485 app. (1957); 93 CONG. REC. 3839 (1947) (remarks of Sen. Taft); *Id.* at 6283 (remarks of Rep. Case); *Id.* at 5014 (remarks of Sen. Ball). Section 301 is more than jurisdictional; it authorizes the federal courts to fashion a body of federal substantive law from the policy of our national labor laws for the enforcement of collective bargaining agreements. The substantive judicial doctrines formulated under § 301 are paramount and preempt all state law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

14. See note 11 *supra*.

15. The implied no strike clause would cover the same topics as the grievance-arbitration provision. Each promise is the quid pro quo for the other because the employer relinquishes some managerial autonomy in exchange for a period of industrial peace. See *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 248 (1970); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 449, 455 (1957).

16. The measure of damages is the actual losses sustained as a natural result of the breach of the provisions of the collective bargaining agreement. *E.g.*, *United Electrical, Radio & Mach. Workers v. Oliver Corp.*, 205 F.2d 376 (8th Cir. 1953); *Wilson & Co. v. United Packinghouse Workers*, 181 F. Supp. 809 (N.D. Iowa 1960). The usual type of damages, called "standby ex-

The Taft-Hartley Act provides in § 301(b), to effectuate the intent of § 301(a),¹⁷ that a union "shall be bound by the acts of its agents"¹⁸ and in § 301(e) that the common law of agency shall govern "in determining whether one person is acting as an 'agent' for another person."¹⁹ Federal courts developed discordant standards for determining the extent of a parent union's responsibility for a local union's unauthorized strike under sections 301(b) and (e). Some courts adopted the "all reasonable means" doctrine and imposed a duty on a union to use all reasonable means to end a wildcat strike staged by its members.²⁰ Other courts held a union responsible for the mass action of its members, despite the union's contention that it had not authorized a strike.²¹ The Sixth Circuit imposed liability on a union for authorized or ratified actions of its agents and absolved a union from liability in the absence of union initiation, authorization, or encouragement of a wildcat

penses," consist of: overhead, fixed charges, salaries of paid supervisory personnel, property insurance, property tax, compensation and group insurance premiums, social security tax and employee pension payments that were paid despite lack of production. *See, e.g.,* *United Steelworkers v. CCI Corp.*, 395 F.2d 529 (10th Cir. 1968); *United Electrical, Radio & Mach. Workers v. Oliver Corp.*, 205 F.2d 376 (8th Cir. 1953); *International Union of Operating Eng'rs v. Dahlem Constr. Co.*, 193 F.2d 470, 472 (6th Cir. 1951); *Union Tank Car Co. v. General Truck Drivers Local 5*, 309 F. Supp. 1162 (E.D. La. 1970); *Structural Steel Ass'n v. Shopmen's Local 545*, 172 F. Supp. 354, 360-62 (D.N.J. 1959). Overhead may consist of idle equipment, lost profits and anticipated lost profits. *See, e.g.,* *Roadway Express, Inc. v. Highway Truck Drivers Local 107*, 299 F. Supp. 1058 (E.D. Pa. 1969) (loss of use, lost and anticipated profits); *Denver & Rio Grande R.R. v. Brotherhood of Ry. Trainmen*, 58 L.R.R.M. 2568 (D. Colo. 1965) (lost profits); *Denver Bldg. & Constr. Trades Council v. Shore*, 132 Colo. 187, 287 P.2d 267 (1955) (fair rental value of idle machinery considered loss of use). For an extensive survey of damages elements see Spelfogel, *Enforcement of No-Strike Clause by Injunction, Damage Action and Discipline*, 17 LAB. L.J. 67, 78-79 (1966).

Because the statute does not expressly provide for punitive damages, it is unlikely they will be awarded in § 301 actions. The statute's function is remedial, rather than punitive. *See* *United Shoe Workers v. Brooks Shoe Mfg. Co.*, 187 F. Supp. 509, 512-13 (E.D. Pa. 1960).

17. *See* note 13 *supra*.

18. 29 U.S.C. § 185(b) (1976).

19. *Id.* § 185(e).

20. *See* *Bituminous Coal Operators v. UMWA*, 585 F.2d 586 (3d Cir. 1978); *Republic Steel Corp. v. UMWA*, 570 F.2d 467 (3d Cir. 1978), *noted in* 24 VILL. L. REV. 369 (1978-79); 31 VAND. L. REV. 706 (1978); *United States Steel v. UMWA*, 534 F.2d 1063 (3d Cir. 1976); *Eazor Express, Inc. v. Teamsters*, 520 F.2d 951 (3d Cir. 1975), *noted in* 89 HARV. L. REV. 601 (1976), 26 VAND. L. REV. 1331 (1975) and 19 VILL. L. REV. 665 (1974); *Wagner Elec. Corp. v. Local 1104*, 496 F.2d 954 (8th Cir. 1974).

21. *See, e.g.,* *Wagner Elec. Corp. v. Local 1104*, 496 F.2d 954 (8th Cir. 1974); *Vulcan Materials Co. v. United Steelworkers*, 430 F.2d 446, 455 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971); *United States v. UMWA*, 77 F. Supp. 563 (D.D.C. 1948), *aff'd on other grounds*, 177 F.2d 29 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949).

strike.²² The Fourth Circuit applied a similar standard and exculpated the international union from liability unless it adopted, encouraged, or prolonged the unauthorized strike.²³

Justice Brennan, writing for the Court in *Carbon Fuel Co. v. UMWA*, found that the legislative history of the Taft-Hartley Act revealed a clear congressional intention to impose liability on unions for strikes in breach of their contract only when the union would be responsible under the common-law rule of agency.²⁴ To hold the international union liable for failure to fulfill an affirmative duty in response to its

22. See *North Am. Coal Corp. v. Local 2262, UMWA*, 497 F.2d 459 (6th Cir. 1974); *Blue Diamond Coal Co. v. UMWA*, 436 F.2d 551 (6th Cir. 1970), cert. denied, 402 U.S. 930 (1971); *Lewis v. Benedict Coal Corp.*, 259 F.2d 346 (6th Cir. 1958), aff'd by an equally divided court, 361 U.S. 454 (1960); *Garmeada Coal Co. v. UMWA*, 230 F.2d 945 (6th Cir. 1956). But see *Teamsters Local 984 v. Humko Co.*, 287 F.2d 231, 241-42 (6th Cir. 1961) (international becomes liable when local officials are instigators because local is mere administrative subdivision of the international); *UMWA v. Osborne Mining Co.*, 279 F.2d 716 (6th Cir.), cert. denied, 364 U.S. 881 (1960) (international received benefits in the form of dues and as a real party in interest to the breached contract, held liable although no international union officials were present when strike occurred).

23. See *United Constr. Workers v. Haislip Baking Co.*, 223 F.2d 872 (4th Cir.), cert. denied, 350 U.S. 847 (1955). Accord, e.g., *Lewis v. Benedict Coal Corp.*, 259 F.2d 346 (6th Cir. 1958), modified, 361 U.S. 459 (1959); *Garmeada Coal Co. v. UMWA*, 230 F.2d 945 (6th Cir. 1956); *Local 25, Teamsters v. W.L. Mead Inc.*, 230 F.2d 576 (1st Cir.), cert. denied, 352 U.S. 802 (1956); *UMWA v. Patton*, 211 F.2d 742 (4th Cir. 1954); *United Elec. Workers v. Oliver*, 205 F.2d 376 (8th Cir. 1953); *Textile Workers Union v. Aleo Mfg. Co.*, 94 F. Supp. 626 (M.D.N.C. 1950).

24. The Court quoted Senator Taft's explanation of § 301(e):

If the wife of a man who is working at a plant receives a lot of telephone messages, very likely it cannot be proved that they came from the union. There is no case then, there must be legal proof of agency in the case of Unions as in the case of corporations. 93 CONG. REC. 4022 (1947), quoted in 444 U.S. at 217.

Prior to 1947, application of the common-law agency doctrine as a means of finding union liability was complicated by union disclaimers and exculpatory provisions in labor contracts and union constitutions disavowing responsibility for the unauthorized acts of union functionaries and declaring such functionaries without authority to initiate or maintain strikes. Congress responded in the Labor Management Relations Act (LMRA) in 1947. Sections 301(b) and (e) were designed to apply the doctrine of agency law, including the doctrine of apparent authority, to unions, notwithstanding resolutions and exculpatory provisions disclaiming responsibility for union functionaries. See *United Steelworkers v. CCI Corp.*, 395 F.2d 529, 532 (10th Cir. 1968), cert. denied, 393 U.S. 1019 (1969); *United Constr. Workers v. Haislip Baking Co.*, 223 F.2d 872 (4th Cir.), cert. denied, 350 U.S. 847 (1955). Section 301(e) specifically overrules the Supreme Court's decision in *United Bhd. of Carpenters v. United States*, 330 U.S. 395 (1947), that unions are liable only for conduct actually authorized or subsequently ratified, and not for all acts taken by agents in the course of their employment. See 93 CONG. REC. 6608 (1947) (remarks of Sen. Taft).

Section 6 of the Norris-LaGuardia Act requires "clear proof" of union instigation, participation or ratification to establish union responsibility for a smaller entity's actions. 29 U.S.C. § 4106 (1976). See *United Bhd. of Carpenters v. United States*, 330 U.S. 395, 403 (1947). Although § 6 has not been repealed, Congress restricted its application to cases arising outside the LMRA. Union responsibility under § 301 was not to be governed by the more stringent "clear proof"

locals' actions would be anomalous in the face of the shield Congress constructed.²⁵ Carbon Fuel Company failed to present evidence that the district or international union instigated, supported, ratified, or encouraged any of the work stoppages.²⁶ The company thus failed to prove agency as required by sections 301(b) and (e).²⁷

The Court rejected the company's argument that the union's promise to maintain the contract²⁸ was meaningless because UMWA and District 17 had no obligation to employ their best efforts to force miners to abide by their contracts.²⁹ The UMWA had negotiated the deletion of language from the collective bargaining agreement that would have required each side to "exercise their best efforts through available measures to prevent stoppages of work by strike."³⁰ The union and company thus specifically resolved the issue of the union's obligation to persuade unauthorized strikers to return to work. Federal labor policy favoring free collective bargaining³¹ does not allow the courts to substi-

standard of the Norris-LaGuardia Act. *See* *United Mine Workers v. Gibbs*, 383 U.S. 715, 736 (1966); *Mason-Rust v. Laborers' Local 42*, 435 F.2d 939, 943 (8th Cir. 1970).

25. 444 U.S. at 216.

26. The Supreme Court noted that the UMWA had repeatedly expressed its opposition to wildcat strikes. The Court cited Art. XVI § 1 of the UMWA constitution, which provides that local unions lack authority to strike without authorization from the UMWA. *Id.* at 218.

27. *Id.*

28. *See* note 11 *supra*.

29. 444 U.S. at 219.

30. The union did not want to surrender its freedom to decide what measure to take or not to take in dealing with an unauthorized strike. *Id.* at 220; *International Union, UMWA v. NLRB*, 257 F.2d 211, 216-17 (1958); *International Union, UMWA*, 117 N.L.R.B. 1095, 1118 (1957) (Intermediate Report of Trial Examiner, reprinted as an appendix to NLRB opinion).

31. This policy was one of the numerous policies of particular importance that Congress sought to promote in the Taft-Hartley Act. *See* *Carbon Fuel Co. v. UMWA*, 444 U.S. 212, 218-19 (1979); *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962); *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 488 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453-54 (1957). In *Teamsters Local v. Lucas Flour Co.*, the Court stated that "[t]he ordering and adjusting of competing interests through a process of free and collective bargaining is the keystone of the federal scheme to promote industrial peace."

In § 8(d) of the Taft-Hartley Act, Congress made "crystal clear the intention to leave the parties entirely free of any government compulsion to agree to a proposal, or even reach an agreement" 444 U.S. at 217. *See* *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 254-55 (1976). Section 8(d) defines "to bargain collectively" as not to compel either party to agree to a proposal or require the making of a concession. 29 U.S.C. § 158(d) (1976). Congress thereby "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 488 (1960). *Accord*, *Howard Johnson Co. v. Detroit Local Joint*

tute a different resolution.³²

The Supreme Court, in *Carbon Fuel Company v. UMWA*,³³ declared a policy regarding an international union's liability for wildcat strikes that recognizes the realities of union structure,³⁴ collective bargaining agreements, and damage actions. The deterrent effect of imposing liability on a parent union for a local union's conduct is valuable only if the international union has actual control over the conduct of its subordinate organization and if imposition of liability might encourage the development of responsible union conduct.³⁵ A parent union's ability to control a local union³⁶ is impeded, however, by the number and size of local unions,³⁷ and the quality and frequency of a local's contact with its parent.³⁸ The power of the international union to control a local union's conduct is subject to the ultimate political limitation of assent to the international union's authority.³⁹

The "all reasonable means" doctrine⁴⁰ creates a dilemma for union officials by creating a conflict between their duty to respond to the

Executive Bd., *Hotel & Restaurant Employees*, 417 U.S. 249, 254-55 (1974); *NLRB v. Burns Security Services*, 406 U.S. 272, 287 (1972); *Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

The parties' collective bargaining agreement primarily determines their relationship. 444 U.S. at 219; *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring). Professor Cox suggests that the LMRA, "while it appears to reject the policy of encouraging the spread of collective bargaining, accepts the institution where it already exists as a method by which a large proportion of industrial life is ruled, and attempts to share its operation so as to increase its effectiveness and reduce its cost." Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 274 (1948).

32. 444 U.S. at 219.

33. *Id.* at 410.

34. Judicial notice can be taken of the framework of industrial and craft unions and the extent of the international and local unions. *Farnsworth & Chambers, Co. v. Sheet Metal Workers*, Local 99, 125 F. Supp. 830 (D.N.M. 1954).

35. See Evans, *The Law of Agency and the National Union*, 49 KY. L.J. 295 (1961).

36. The overwhelming weight of judicial authority is that a local union is a legal entity apart from its international. See cases cited in *International Bhd. of Electrical Workers*, 121 N.L.R.B. 143, 146 n.3, 42 L.R.R.M. 1301, 1303 n.3 (1958).

37. Many parent unions oversee thousands of local unions. See, e.g., M. HOROWITZ, *THE STRUCTURE AND GOVERNMENT OF THE CARPENTER'S UNION* 9 (1962). Local unions vary greatly in size and sovereignty. In 1961, one article counted 60-70,000 locals, some of which had as many as 40,000 members. See Evans, *supra* note 35, at 312.

38. A parent union seldom deals closely with one local. See generally D. BOK & J. DUNLOP, *LABOR & THE AMERICAN COMMUNITY* (1970). Some locals have only a loose affiliation with the national union, paying only a per capita tax and can withdraw from the national union at will. Evans, *supra* note 35, at 312.

39. See Evans, *supra* note 35, at 322.

40. See note 20 *supra* and accompanying text.

membership's wishes⁴¹ and to avoid unfair labor practice charges.⁴² Administration of harsh disciplinary measures may exacerbate factionalism within the union, thus undercutting support for union leadership.⁴³ Furthermore, a union compelled to take drastic steps may lose its credibility with wildcat strikers and jeopardize its own ability to end the walkout.⁴⁴ A strict "all reasonable means" standard deprives union leadership of the flexibility to adjust to the political dynamics of a wildcat strike by selecting a productive method to inspire responsible conduct.⁴⁵ The underlying reasons for a wildcat strike may lie with the management, the community, the economy, or other forces beyond the union's control.⁴⁶ The "all reasonable means" standard is, thus, impractical and unworkable.

Substantive freedom in collective bargaining agreements⁴⁷ thwarts the implication of a duty, such as that urged by Carbon Fuel Company, that is not expressly provided in the agreement.⁴⁸ A collective bargaining agreement is neither an ordinary contract⁴⁹ nor a commitment of specific performance by either party.⁵⁰ Unions make a commitment in a collective bargaining agreement to encourage compliance, not to guarantee performance, because the power to perform rests beyond the control of union leaders.⁵¹

41. Section 501 of the Landrum-Griffin Act imposes fiduciary duties on all union officials, and § 501(b) gives union members a right or private derivative action against union officials for breach of that duty. 29 U.S.C. § 501 (1976). The Eighth Circuit held that § 501 requires union officers to obey the orders of the membership. *Johnson v. Nelson*, 325 F.2d 646 (8th Cir. 1963).

42. It is an unfair labor practice for a union to enforce its membership obligations so as to prejudice an employee's rights. 29 U.S.C. § 158(b)(2) (1976). See *Radio Officer's Union v. NLRB*, 347 U.S. 17, 40-41 (1954); Whitman, *Wildcat Strikes: The Unions' Narrowing Path to Rectitude*, 50 IND. L.J. 472, 480-81 (1975).

43. See Whitman, *supra* note 42, at 481-82; Gould, *supra* note 6 at 674; 89 HARV. L. REV. 601, 608 (1976); 26 VAND. L. REV. 1331, 1335 (1973).

44. See Whitman, *supra* note 42, at 481; Gould, *supra* note 6 at 701; 89 HARV. L. REV. 601, *supra* note 43 at 608.

45. See Whitman, *supra* note 42, at 481-82; Gould, *supra* note 6 at 701-02; 89 HARV. L. REV. 601, *supra* note 43 at 607.

46. See Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 COLUM. L. REV. 829, 841-42 (1948).

47. See note 31 *supra*.

48. See *Kellogg Co. v. NLRB*, 457 F.2d 519, 524-25 (6th Cir.), *cert. denied*, 409 U.S. 850 (1972); 89 HARV. L. REV. 601, *supra* note 43, at 607.

49. *Kellogg Co. v. NLRB*, 457 F.2d 519, 524-25 (6th Cir.), *cert. denied*, 409 U.S. 850 (1972).

50. See Chamberlain, *supra* note 46.

51. *Id.*

Damage actions against the union generate friction⁵² and induce financial ruin.⁵³ The imposition of liability on the union shifts an employer's losses to workers who may have not been involved with the wildcat strike and may have been powerless to end it.⁵⁴ A potential damage action might unduly restrain employee freedom to engage in concerted activity for their mutual aid and protection.⁵⁵

The parent union nevertheless can exercise some control over the local union. It may impose internal union discipline on recalcitrant unauthorized strikes.⁵⁶ An international union can effectively control the local union by placing the local in trusteeship.⁵⁷ In practical effect, however, a union is not likely to take such disciplinary measures to end the strike unless the union is directly named by the wildcat strikers.⁵⁸ An employer also can exercise certain powers to end a wildcat strike.⁵⁹

52. See Shearer, *Legal Remedies and Practical Considerations in Dealing with a Wildcat Strike*, 22 DRAKE L. REV. 46 (1972); Comment, *Parent Union Liability for Strikes in Breach of Contract*, 67 CALIF. L. REV. 1028, 1033 (1979).

53. This policy was a major impetus to the enactment of § 301(b). See *Sinclair Ref. Co. v. Oil Workers Int'l*, 452 F.2d 49, 52 (7th Cir. 1971), noted in 6 GA. L. REV. 797 (1972); 93 CONG. REC. 4893-40 (1947); 92 CONG. REC. 5705 (1946). This policy is as compelling in an unauthorized strike situation as in an authorized strike. See 86 HARV. L. REV. 447, 452 (1972).

54. See 86 HARV. L. REV. 447, 456 (1976). Such a shift would give a minority of the workers undue power to financially impair a satisfied majority. *Id.*

55. See 29 U.S.C. § 157 (1976). For example, if a minority of union members believe that their employer has committed an unfair labor practice and their union is not adequately representing the employees' interest, an employee strike would be a protected activity under § 7 of the LMRA. The possibility of extensive damage liability if the strikers are wrong in their evaluation of the employer's conduct may promote excessive caution in the exercise of statutorily protected rights. See 86 HARV. L. REV. at 451-52.

56. See Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1065-66 (1951).

Union constitutions frequently permit a parent union to discipline its members for acts violating the constitution including contractual obligations. See, e.g., *Pearl v. Tarantola*, 361 F. Supp. 288 (S.D.N.Y. 1973).

Prof. Cantor argues that since a wildcat strike chiefly harms the union's interests, internal union discipline, rather than employer retaliation, should be the only permissible response to wildcat activity. See Cantor, note 8 *supra* at 61.

57. See S. REP. NO. 187, 86th Cong., 1st Sess. 17, reprinted in [1959] U.S. CODE CONG. & AD. NEWS 2318, 2333. Section 302 of the Labor Management Reporting & Disclosure Act, 29 U.S.C. § 462 (1976), permits trusteeships over locals to ensure, *inter alia* "the performance of collective bargaining agreements," i.e., no strike clauses. Trusteeships were sustained in illegal strike situations in *Jolly v. Gorman*, 428 F.2d 960 (5th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971); *National Ass'n of Letter Carriers v. Sombrotto*, 449 F.2d 915 (2d Cir. 1971); *Local 238, Laborer's Int'l Union v. FOSCO*, 80 L.R.R.M. 2087 (E.D. Wash. 1972).

58. See *United States v. Railroad Trainmen*, 27 L.R.R.M. 2308 (N.D. Ill. 1951); 6 GA. L. REV. 797, 803 (1972).

59. The Supreme Court has stated that if the grievance-arbitration procedure is opened to

The employer may have a damage action against the local union.⁶⁰ An employer can discharge⁶¹ or discipline⁶² unauthorized strikers, although this remedy is subject to a prohibition against disparate treat-

company grievances, the company loses its right to obtain money damages in court for a strike in violation of a no strike pledge. *Drake Bakeries v. Bakery Workers*, 370 U.S. 254 (1962). See Fairweather, *Use of Presumptions to Establish the Tort of Instigation of Strikers in Breach of Contract*, 17 HASTINGS L.J. 301 (1965). The remedy of contract rescission has been disclaimed by the Court. *Local 721 v. Needham Packing Co.*, 376 U.S. 247 (1964). Since rescission would only terminate the agreement temporarily, the employer would be forced to renegotiate the collective bargaining agreement because the representation rights of the union would usually remain after rescission. See Fairweather, *supra*.

60. The Supreme Court, in *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962), held that an action under § 301 of the NLRA would lie for an alleged breach of a union's no strike promise. The Court also held that § 301(b) had made it clear that no cause of action for damages can be stated against union officials or members personally for participating in an unlawful strike authorized by the union. Section 301(b), embodying congressional distaste for money judgments enforceable directly against individual workers, also bars an action against employees who engage in a work stoppage in violation of a no strike clause when that stoppage is a wildcat strike authorized by and against the orders of the union. *Sinclair Oil Corp. v. Oil Workers*, 452 F.2d 49 (7th Cir. 1971), noted in 6 GA. L. REV. 797 (1972); 38 MO. L. REV. 128 (1972). See Note, 18 WAYNE L. REV. 1657 (1972) (advocating individual liability). See generally Givens, *Responsibility of Individual Employees for Breaches of No Strike Clauses*, 14 IND. & LABOR REL. REV. 595 (1961).

One court has held that an employer may recover damages from individual strikers who participate in a wildcat strike on a tort theory of interference with business. See *Louisville & Nashville Ry. v. Brown*, 252 F.2d 149 (5th Cir.), cert. denied, 356 U.S. 949 (1958). See generally Fairweather, *supra* note 59. This holding has been severely criticized and may not represent a correct statement of the law. See Givens, *supra*, Note, *Employer Remedies for Breach of No Strike Clauses*, 39 IND. L.J. 387 (1964); Comment, 59 COLUM. L. REV. 177 (1959). It is likely that an individual union member would be unable to satisfy a judgment against him/her. Note, *Employer Remedies for Breach of No Strike Clauses*, 39 IND. L.J. 387 (1964).

61. Unless strikes in breach of contract are prompted by an unfair labor practice, they are not protected activity and discharge is an available remedy. *E.g.*, *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939).

A potential problem exists when appointed and elected officials are removed. They may argue that their discharge is a reprisal for exercise of their Title I, Landrum-Griffin membership rights, *e.g.*, their opposition to the leadership's position on the substantive bargaining matters which led to the strike. See 29 U.S.C. §§ 411-15 (1976); Erelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 HARV. L. REV. 727, 737 (1969); Whitman, *supra* note 42 at 482, 484; 89 HARV. L. REV. 601 (1976). Reprisal for the exercise of Title I membership rights is actionable under § 609 of the Landrum-Griffin Act. 29 U.S.C. § 529 (1976). See, *e.g.*, *Schonfeld v. Penza*, 477 F.2d 899 (2d Cir. 1973).

While most arbitrators consider employee participation in an unauthorized strike sufficient cause for discharge, arbitrators have specifically examined the following circumstances as bearing on the propriety of discharge:

- 1) the familiarity of the employee with his/her obligation, *Armour Creamers*, 31 Lab. Arb. 291 (1958) (Kelliher, Arb.);
- 2) the past practice of the employer, *e.g.*, *United States Steel Corp.*, 65 Lab. Arb. 15 (1975)

ment when employees exhibit varying degrees of guilt.⁶³ Section 301 confers on the federal courts the authority to use their equitable powers to issue an injunction prohibiting an unauthorized strike,⁶⁴ thus enabling an employer to quickly restore production. Some employers have made effective use of grievance arbitration procedures to obtain

(Garrett, Arb.); Granite City Steel Co., 53 Lab. Arb. 909 (1969) (McKenna, Arb.); National Gypsum Co., 34 Lab. Arb. 114 (1960) (Abernathy, Arb.);

3) the extent of participation, *e.g.*, Union Carbide Corp., 55 Lab. Arb. 1159 (1970) (Williams, Arb.); Border Chem. Co., 34 Lab. Arb. 114 (1959) (Wallen, Arb.);

4) the status of the employee in the union organization, *e.g.*, George S. Carrington Co., 57 Lab. Arb. 1109 (1971) (Volz, Arb.); American Smelting & Ref. Co., 34 Lab. Arb. 575 (1959) (Kotin, Arb.);

5) the employee's history of wildcat strikes, *e.g.*, Butler Mfg. Co., 55 Lab. Arb. 1214 (1970) (Purdum, Arb.);

6) the employee's length of service, *e.g.*, Leewall Sportswear, Inc., 53 Lab. Arb. 1165 (1969) (Dworkin, Arb.); and

7) the cause of the strike, *e.g.*, Allen Indus., Inc., 52 Lab. Arb. 1131 (1969) (Altrock, Arb.); Donegal Steel Foundry, 37 Lab. Arb. 1001 (1961) (Brandschain, Arb.).

62. See cases cited in Note, 18 WAYNE L. REV. 1657, 1668 n.62 (1972). One commentator states that effective discipline penalizing strike participants in wildcat strikes is one of the most effective ways of avoiding wildcats. See Mangum, *Taming Wildcat Strikes*, 1960 HARV. BUS. REV. 88, 96.

63. Selective discharge under such circumstances is regarded as discriminatory, arbitrary, and capricious. See cases cited in Note, *Reaction to the Wildcat Strike—The Employer's Dilemma*, 20 CASE W.L. REV. 423, 432 n.46 (1969). An employer will be allowed to administer unequal penalties on individuals who have instigated or taken a particularly active role in the wildcat. *Id.* at 430 and cases cited therein. Arbitrators have approved harsher treatment for union officials considering them presumptive leaders who have greater responsibility to refrain from strike action and better knowledge of obligations created by a no strike pledge. See, *e.g.*, Union Tank Car Co., 38 Lab. Arb. 1144, 1149 (1962) (Davey, Arb.); Philco Corp., 38 Lab. Arb. 889 (1962) (Marshall, Arb.); Union Tank Car Co., 38 Lab. Arb. 928, 938 (1962) (Klamon, Arb.); Publisher's Ass'n, 36 Lab. Arb. 706, 708-09 (1961) (Seitz, Arb.); Borden Chem. Co., 34 Lab. Arb. 325, 328 (1959) (Wallen, Arb.).

The National Labor Relations Board policy is not to permit questions of the equality of discipline to cloud the fact that each participant in the strike individually breached the agreement, and his/her individual breach is not cured because the employer selected certain strikers for reinstatement and not others. See, *e.g.*, Lenscraft Optical Corp., 128 N.L.R.B. 807, 46 L.R.R.M. 1412 (1960); American Gillette Co., 121 N.L.R.B. 1514 (1958); California Cotton Co-Op Ass'n, 110 N.L.R.B. 1494, 35 L.R.R.M. 1390 (1954); Kaiser Aluminum & Chem. Corp., 104 N.L.R.B. 873, 32 L.R.R.M. 1182, *rev'd* 217 F.2d 366 (1953); United Elec. Corp., 84 N.L.R.B. 768, 777 (1949).

64. *Boys Mkts., Inc. v. Retail Clerks, Local 770*, 398 U.S. 235 (1970), noted in Shearer, *supra* note 52 at 52-59; 35 ALB. L. REV. 410 (1971); 37 BROOKLYN L. REV. 214 (1970); 9 DUQ. L. REV. 328 (1970-71); 39 FORDHAM L. REV. 143 (1970); 84 HARV. L. REV. 30, 192 (1970); 46 NOTRE DAME LAW. 526 (1971). For criticism of labor injunctions in general see, *e.g.*, *Truax v. Corrigan*, 257 U.S. 312 (1921) (Brandeis, J., dissenting); F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 201 (1930); Anderson, *Disadvantages of Injunctions in Industrial Disputes*, 1975 NEW ZEALAND L.J. 179, 182.

injunctive relief.⁶⁵ Perhaps the most economical remedy is for management to avoid the wildcat strike by developing a sound labor relationship with local union members.⁶⁶ The Supreme Court, in *Carbon Fuel Co. v. UMWA*, has removed the inappropriate remedy of a damage suit against the parent union from the arsenal of potential remedies available to an employer for a local's unauthorized strike.

65. See *New Orleans S.S. Ass'n v. Local 1418*, 49 L.R.R.M. 2941 (E.D. La. 1962); *Ruppert v. Egelhofer*, 3 N.Y.2d 576, 148 N.E.2d 129 (1958); *In re Wholesale Laundry Bd. of Trade*, 15 Lab. Arb. 867 (N.Y. Sup. Ct. 1951); *Cloak, Suit & Shift Mfgs. Inc.*, 5 Lab. Arb. 372 (1946) (Poletti, Arb.).

66. See *Shearer*, *supra* note 52, at 69. A management which fails to observe sound personnel policies and seeks to solve a wildcat strike problem by discipline alone increases the chances of more subtle employee retaliation. See *Mangum*, *supra* note 62, at 96.