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Wildcat Strikers: Individual Liability Under Section 301?

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Employers economically injured by strike activity instituted in violation of a collective bargaining agreement often seek to pursue claims for money damages against the parties involved. It has been frequently ruled that under section 301 of the Taft-Hartley Act damages may not be awarded against individual strikers, even where it is the individuals themselves, not their union, who have conducted the strike. The author examines the statutory, case law, and policy bases for granting such immunity for wildcat strikers, arguing that Congressional purpose, equity, and the collective bargaining process itself would be better served if suits for damages were allowed in this context.

I

INTRODUCTION

Most labor contracts contain a no-strike clause. When effective, this clause serves to eliminate the costly consequences of strikes, such as loss of employer production and profits and diminution of consumer choice. But sometimes the no-strike commitment is breached by employees who go out on a wildcat strike.[1] Profits and production are not the only interests affected; in the absence of an effective legal remedy, the collective bargaining process is itself undermined. The employer who is deprived of the benefit of his contract will be less willing to make concessions. The union which is unable to control its members will lose bargaining power.[2] The union membership will be encouraged to believe that members have rights but no obligations under

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1. As used in this article the term "wildcat strike" refers to a strike by employees without union authorization in violation of a collective bargaining agreement. The term has been used elsewhere to describe a union-authorized strike in violation of a contract. The wildcat strikes being considered here are only those undertaken to achieve economic objectives, rather than to protest serious unfair labor practices or to protect employees from immediate danger. In Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956), the Court held that a general no-strike clause did not operate to deprive employees of their right to strike in protest of employer unfair labor practices; subsequently, in Gateway Nat'l Coal Co. v. United Mineworkers of America, 414 U.S. 368 (1974), the Court added that a strike called solely to protect employees from immediate danger is authorized by § 502 of the Labor Management Relations Act and cannot be the basis for either a damages award or an injunction.

2. Duquoin Park Co. v. Meat Cutters Local P-156, 321 F. Supp. 1230, 1233 (E.D. Ill. 1971).

the collective bargaining agreement. In sum, the outcome will be in direct contravention of the national labor policy of encouraging peaceful settlement of labor disputes.[3]

Section 301 of the Taft-Hartley Act[4] provides the means for avoiding this undesirable outcome. That section provides an employer with the right to enforce a collective bargaining agreement through a suit in federal court. The Supreme Court has held that this includes the right to sue a union for breach of a no-strike clause,[5] but it recently ruled in *Carbon Fuel v. United Mine Workers*[6] that absent a contract clause defining a higher duty, a union cannot be held liable in damages for such breach unless it "instigated, supported, ratified, or encouraged the action."[7] This effectively precludes union liability for wildcat strikes. In these circumstances the employer may wish to hold employees liable. The Supreme Court reserved judgment on the availability of this remedy in *Atkinson v. Sinclair Refining Co.*,[8] and the lower federal courts are divided.[9] The legislative history behind section 301 suggests that

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3. S. Rep. No. 105, 80th Cong., 1st Sess. 17 (1947).

4. 29 U.S.C. 185 (1976), which states in part:

> (a) Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.
>
> . . . .
>
> (e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, *the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.*

(Emphasis added.)

5. Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962).

6. 100 S. Ct. 410 (1979).

7. *Id.* at 414. *See also* United Steelworkers of America v. Lorain, 103 L.R.R.M. 2627 (6th Cir. 1980), where the court held the union not liable even though the contract required the union actively to "discourage and endeavor to prevent or terminate" any work stoppage or slowdown. The court pointed out that the quoted passage did not appear in the damages section of the contract, which stated that the union would be liable only if it authorized, supported, encouraged, or ratified such action by the employees. *Id.* at 2629.

8. 370 U.S. 238 (1962).

9. Holding against employee liability are Complete Auto Transit v. Reis, 103 L.R.R.M. 2722 (6th Cir. 1980); United Steelworkers of America v. Lorain, 103 L.R.R.M. 2627 (6th Cir. 1980); Sinclair Oil Corp. v. Oil, Chem. & Atomic Workers Int'l Union, 452 F.2d 49 (7th Cir. 1971); Westinghouse Elec. Corp. v. IUE, 101 L.R.R.M. 2899 (W.D. Pa. 1979). Finding liability are Certain-Teed Corp. v. United Steelworkers, No. 790937 (M.D. Pa. 1980); Alloy Cast Steel Co. v. United Steelworkers, 429 F. Supp. 445 (N.D. Ohio 1977); Duquoin Park Co. v. Meat Cutters Local P-156, 321 F. Supp. 677 (E.D. Ill. 1971).

suits against individual employees are authorized; this article will contend that to allow suits for damages against wildcat strikers is both good policy and good law.

II

LEGISLATIVE HISTORY

The Taft-Hartley Act[10] was passed to carry out the Congressional objectives of reducing the large number of strikes in the United States, strengthening the collective bargaining process, and redressing a bargaining-power imbalance in favor of unions which was seen to have been created by the National Labor Relations Act.[11] Among the provisions designed to meet these concerns is section 301, which authorizes treatment of unions "as if they were corporations" for purposes of suit in federal courts.[12] This provision replaced the common law rule, under which unions were not legal entities for litigation purposes.[13] It thereby made suits against unions easier by removing the common law requirement of service of process on every union member.

Consistent with allowing unions to be sued as entities, subsection 301(b) abolished the common law rule making all union members liable for a money judgment against their union. By virtue of that section, only the union as an entity could be liable for wrongs committed as an organization. The major impetus behind the inclusion of this provision was Congressional reaction against the notorious *Danbury Hatters* case,[14] where union members were held personally liable for an illegal union-directed boycott. The resulting money judgment against the workers caused severe economic hardship.

In insulating union members from money judgments against their unions, Congress did not overlook the situations in which members violate the no-strike provisions of a collective bargaining agreement in defiance of their union's position favoring adherence.[15] Legislative history shows that Congress felt union members acting unofficially ought not be allowed to engage with impunity in behavior which violates a valid contract. It is not clear, however, what they conceived as permissible countermeasures.

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10. Pub. L. No. 101, 61 Stat. 136 (1947).

11. 29 U.S.C. §§ 151-187 (1976).

12. 93 CONG. REC. 3839 (1947).

13. *See* Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 303-04 (1948).

14. Loewe v. Lawlor, 208 U.S. 274 (1908), *subsequent trial verdict appealed*, 209 F. 721 (2nd Cir. 1913), *aff'd*, 235 U.S. 522 (1915) [hereinafter referred to as the *Danbury Hatters* case].

15. 92 Cong. Rec. 5706 (1946). If two unions having jurisdiction are in dispute—for example, where a local union resists a national union strike order—and employees strike illegally, the union directing the strike, not the employees who failed to follow the local union's directions, would be liable under § 301.

There is some support in the legislative record for the proposition that section 301 contemplates suits against individual employees. Senator Taft stated during the Congressional debate: "If the union wants to carry [the collective bargaining agreement] out and some of the men say 'We will not do it' they ought to be liable."[16] This statement was a reply to a statement made by Senator Capehart regarding liability for fines levied upon the wildcat strikers,[17] and one court has held that the statement applies only to such situations.[18]

Still, there is reason to believe that the reference to the imposition of fines was not intended to indicate the extent of the remedies allowable against wildcat strikers under section 301. The reference arose in the context of a discussion between Senators Taft and Revercomb of whether subsection (d) of the amendment to the bill, concerning illegal stoppages, authorized punishment of an employee for quitting his job or stopping work for a legitimate reason. Senator Taft questioned whether any collective bargaining agreement actually prohibited quitting or legitimate stoppages. As an illustration to the contrary, Senator Capehart offered the example of miners' collective bargaining contracts under which fines could be imposed for any stoppage. Senator Taft did not comment on that example; when he made the quoted remark, he had already moved on to the more general discussion of punishment under subsection (d).[19]

Although legislative history provides no definite indication that section 301 was meant to authorize suits against employees, two legislative concerns appear. The first is a desire on the part of Congress that union and employees be held accountable for irresponsible behavior; the second is a mandate that individual employees are to be held harmless for wrongs committed by their unions. Neither of these considerations is compromised when employees are held accountable under section 301 for their individual wrongful actions.

III

JUDICIAL APPLICATIONS OF SECTION 301

A. Supreme Court

The Supreme Court has adopted an expansive interpretation of section 301 based on its reading of Congressional policy. In particular, it has favored a broad construction over a narrow one in deciding ques-

16. *Id.*
17. *Id.*
18. Sinclair Oil Corp. v. Oil, Chem. & Atomic Workers Int'l Union, 452 F.2d 49, 53 (7th Cir. 1971).
19. 92 CONG. REC. 5706-07 (1946).

tions of the availability of injunctive relief and the right of employees to enforce collective bargaining agreements.

In *Textile Workers Union v. Lincoln Mills*,[20] the Court decided that section 301 contemplates union suits to compel employer compliance with a contractual commitment to arbitrate, and that a section 301 injunction compelling arbitration need not comply with the procedural requirements of the Norris-LaGuardia Act.[21]

Thirteen years later in *Boys Markets, Inc. v. Retail Clerks Local 770*,[22] the Court recognized the corresponding right of employers to sue to enjoin union strike action in violation of the no-strike provision in a collective bargaining agreement, again finding that the provisions of the Norris-LaGuardia Act did not bar the relief sought. In both *Lincoln Mills* and *Boys Markets* the Court recognized the Congressional policy favoring arbitration and no-strike provisions and the Congressional objective of devising a procedure enabling enforcement of a collective bargaining agreement by each of the parties to the contract.[23]

In *Boys Markets* the Court also noted the shift in Congressional emphasis from protection of the infant labor movement to the encouragement of collective bargaining. It reasoned that older statutes such as the Norris-LaGuardia Act had to be accommodated to newer ones like the Taft-Hartley Act in order to effectuate this change. It recognized that the denial of injunctions against strikes undermined arbitration provisions by preventing employer enforcement, thereby discouraging employers from agreeing to these provisions.

Smith v. Evening News Ass'n[24] established the parallel right of employees to enforce collective bargaining agreements against employers through section 301 suits. In subsequent decisions the Court has recognized the justiciability of employee claims against their own union as well as against their employer; suits by employees have been allowed in recognition of circumstances in which a union breaches its duty of representation or in which grievance procedures fail to resolve the dispute.[25]

While the Court has recognized enforceability of individual employee rights under section 301, it has not taken a clear position on the corresponding right of employers to sue individual employees under a collective bargaining agreement. It reserved decision on the question

20. 353 U.S. 448 (1957).
21. *Id.* at 457-59.
22. 398 U.S. 235 (1970).
23. 353 U.S. at 453; 398 U.S. at 252.
24. 371 U.S. 195 (1962).
25. Humphrey v. Moore, 375 U.S. 335 (1964); Hines v. Anchor Motor Freight Co., 424 U.S. 554 (1976).

in the first case put before it, *Atkinson v. Sinclair Refining Co.*[26] In its subsequent holding in *Boys Markets* the Court expressed some general disapproval for the damages remedy in the labor context,[27] but the significance of this is difficult to assess, since the damages remedy is allowed in at least some cases. Moreover, the disapproval of damages in *Boys Markets* must be weighed against the Court's later remark in *Hines v. Anchor Motor Freight*[28] that section 301 "contemplates suits by and against individual employees as well as between unions and employer." It is unlikely that the Court intended with that one sentence to decide the question of employer suits against employees, but the language may indicate its inclination in the matter.

B. Lower Court Decisions

The federal courts are divided on the question of whether individual employees can be sued for damages under section 301. The Seventh Circuit and a number of district courts have held against such suits, but several district courts have allowed the suits to proceed.

In *Sinclair Corp. v. Oil, Chemical & Atomic Workers International Union*,[29] the Seventh Circuit considered whether an employer could bring suit for damages against six individual employees, who had refused to cross a picket line at their place of work in violation of a no-strike provision in their collective bargaining agreement and in defiance of their union's order. In dismissing the suit, the court of appeals first noted that section 301 neither authorizes nor prohibits suits against individual employees, although it does provide that an employer's judgment against a union may not be satisfied against the assets of individual employees. Finding no sure guidance in statutory language or in case law, the *Sinclair* court based its decision on an interpretation of legislative history and federal labor policy.

The court found that Congress' practical objectives in enacting section 301 were limited to making unions answerable in federal courts for breaches of collective bargaining agreements and insulating individual members from liability for union wrongs; Congress did not in-

26. 370 U.S. 238, 249 n.7 (1962). Count I of the Complaint in *Atkinson* brought charges against the union for violation of contract. On count II, the individual members and officers were sued for their actions on behalf of the union. The Court found that the conduct charged in count II was within the scope of a suit for violation of a collective bargaining agreement, but held that count II impliedly alleged union liability and that the union alone could therefore be liable. *Id.*

27. 398 U.S. at 248. Justice Brennan there observed that "an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union." The comment was made in support of the idea that injunctive relief halting a strike is more advantageous to an employer than an award of damages against a union after a dispute.

28. 424 U.S. 554, 562 (1976).

29. 452 F.2d 49 (7th Cir. 1971).

tend to authorize an employer's suit against individual employees. The court noted that the problems of wildcat strikes and possible remedies were explicitly considered by Congress, and that the remedies envisioned were discipline and discharge, not damages. Finally, the court reasoned that recovery of damages against individuals would not serve the national policy of encouraging peaceful settlements of labor disputes, citing Justice Brennan's majority opinion in *Boys Markets*.[30]

A different line of reasoning was adopted earlier by a district court within the Seventh Circuit in *Duquoin Park Co. v. Meat Cutters Local P-156*,[31] as the court held that individual employees could be sued by their employer for violation of a no-strike clause in their collective bargaining contract. Viewing section 301 as covering only the *Danbury Hatters* situation where the union directed the illegal actions but individual employees were held liable, the court ruled that section 301 does not prohibit suits alleging that individual employees alone are at fault. The *Duquoin Park Co.* court also reasoned that individual liability is consistent with the Supreme Court's announced policy of giving strength to no-strike clauses, since such liability makes it possible for unions to exercise some control over their members. In the absence of such control the no-strike clause becomes a nullity.[32]

Another district court decision holding employees liable to their employer is *New York State United Teachers v. Thompson*,[33] which concerned violation of the educational leave provisions of a collective bargaining agreement. The agreement required employees who took leaves of absence to return to the employ of the New York State United Teachers afterwards for at least the same length of time as their leave period. Two employees resigned without fulfilling this requirement.

The court held that the employees were individually bound by their collective bargaining contract and found them liable in light of the strong Congressional policy of enforcement of such contracts by or against the parties who are bound by them. Noting that the usual remedies of discharge and discipline were unavailable because of the resignation of the employees, the court referred to the *Lincoln Mills* mandate to the federal courts to fashion a remedy commensurate with the nature of the problem. It reasoned that to permit the employees' conduct to fall outside the scope of section 301 would leave a gap which

30. 452 F.2d at 54, *citing* 398 U.S. at 248. *Accord*, see the cases cited at note 9 *supra*.

31. 321 F. Supp. 1230 (E.D. Ill. 1971).

32. *Id.* at 1233. With considerably less analysis the district court in Alloy Cast Steel Co. v. United Steelworkers, 429 F. Supp. 445 (N.D. Ohio 1977), found union members could be held liable in damages when they struck illegally without union authorization or encouragement. The court quoted the Supreme Court's language in *Hines* that "[s]ection 301 contemplates suits by and against individual employees," and reasoned that each of the strikers must take the consequences of his own actions. *Id.* at 451.

33. 459 F. Supp. 677 (N.D.N.Y. 1978).

the court was mandated to bridge.[34]

The unavailability of the remedies of discharge and discipline distinguish this case from those involving violation of no-strike clauses. Another distinguishing feature is that the collective bargaining contract in *Thompson* contained provisions requiring that individual employees pay into the educational leave fund a *pro rata* portion of the expenses of their leave if they resigned following their leave before the agreed time. These differences do not, however, render the holding in *Thompson* inapplicable to cases involving breach of a no-strike clause. The reasoning that collective bargaining agreements are binding on employees and that federal courts are free to fashion remedies for breach of these agreements by those who are bound by them has equal application in no-strike clause cases. In *Certain-Teed Corp. v. United Steelworkers of America*,[35] the court relied heavily on the reasoning in *Thompson* and permitted a suit against employees for violation of a no-strike clause. One subsequent court of appeals panel has expressly refused to apply the *Thompson* analysis in such a situation, dismissing suits against individual employees.[36]

IV

THE POLICY OF INDIVIDUAL LIABILITY

A series of policy arguments has been offered by the courts and in the academic literature against allowing employers to sue individual employees under section 301. Upon examination, none of these arguments seems sufficiently convincing to outweigh the need for a damage remedy against individual employees.

One argument advanced against employee liability is that it is unnecessary, since the remedies of discipline, discharge, and injunctive relief are available.[37] It is sometimes argued further that the damages remedy is inconsistent with the national labor policy of the National Labor Relations Act, under which the severest penalty is discharge.[38] It is also suggested that the harsh results the remedy may yield are contrary to the admitted Congressonal desire to avoid results like the *Danbury Hatters* case.[39]

The remedies advanced as a safeguard against individual employee disobedience may not always be available or particularly effec-

34. *Id.* at 683.

35. No. 790937 (M.D. Pa. 1980).

36. Complete Auto Transit v. Reis, 103 L.R.R.M. 2722 (6th Cir. 1980).

37. *See* Givens, *Liability of Individual Employees for Wildcat Strikes?*, 4 EMPL. REL. L.J. 552, 553 (1979); *Boys Markets*, 398 U.S. at 248 n.17.

38. *See* Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act*, 52 CORNELL L.Q. 672, 703 (1967).

39. Givens, *supra* note 36, at 557.

tive from the employer's perspective. Mass discharges of wildcat strikers may not be a realistic option where the employees are so numerous or so skilled that replacements would be difficult to obtain or their training would involve considerable delay. Disciplinary action by the employer may also be limited by the existence of contractual arbitration provisions granting review of such action.[40] Arbitrators typically require that penalties be assigned equally to employees of equal guilt;[41] it may be impossible for an employer to meet this requirement, given the confusion which occurs in strike situations obscuring the identities of the leaders. In addition, the union itself is unlikely to discipline members who violate union rules to the discomfiture of the employer.[42]

There are also difficulties with the injunctive remedy, which is not always effective in securing the return of workers.[43] While damages may be available for violation of an injunction, these will be paid into the court rather than to the employer, who will be left without compensation for the damage inflicted on him. Further, if a strike is not over an arbitral issue, an injunction cannot lie.[44]

None of the existing remedies have been effective in deterring the intermittent wildcat strikes which tend to occur in certain industries such as mining. A damages remedy against the individuals responsible would provide a solution in such cases. Such a remedy is not inconsistent with the policy of the National Labor Relations Act. There is nothing in the Act which specifies that discharge shall be the severest penalty for a wildcat strike. Moreover, the Taft-Hartley Act was en-

40. "Arbitrators have specifically examined the following circumstances as bearing on the propriety of the discharge of employees who have breached their agreement by striking: 1) the familiarity of the employee with his obligation; 2) the past practice of the employer; 3) the extent of participation; 4) the status of the employee in the union organization; and 5) the cause of the strike." Fairweather, *Employer Actions and Options in Response to Strikes in Breach of Contract*, 18 N.Y.U. ANN. CONF. LAB. 129, 174 (1966). *See also* Morrison & Handsaker, *Remedies and Penalties for Wildcat Strikes: How Arbitrators and Federal Courts Have Ruled*, 22 CATH. U. L. REV. 279, 284-85 (1973), reprinting tables showing results of arbitrators' decisions regarding employers' actions.

41. Edwards & Bergman, *The Legal and Practical Remedies Available to Employers to Enforce a Contractual No-Strike Commitment*, 21 LAB. L.J. 3, 7 (1970); Morrison & Handsaker, *supra* note 39, at 304; Unkovic, *Enforcing the No-Strike Clause*, 21 LAB. L.J. 387, 395 (1970). *But see* Ingersoll-Rand Co., 50 Lab. Arb. 487 (1968).

42. Union disciplinary action was alluded to by Senators Taft and Capehart in the debates. 92 CONG. REC. 5706 (1946). However much a union might want to get its members back to work, it is unrealistic to expect them to punish men with whom the union officers work side by side. United States v. Railroad Trainmen, 27 L.R.R.M. 2308, 2311 (N.D. Ill. 1951). In addition, the union might be tacitly sympathetic to the action of its members, and under the recent Supreme Court decision of *Carbon Fuel Co. v. Mine Workers*, 100 S. Ct. 410 (1979), a union would have no incentive to take measures against the striking employees. See note 48 *infra*.

43. Consider the facts of Alloy Cast Steel Co. v. United Steelworkers, 429 F. Supp. 445 (N.D. Ohio 1977).

44. Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976).

acted years after the NLRA, and represented a marked reassessment of the remedies required to ensure an even balance of power between employers, unions, and employees. There is no reason why it should be limited by the policy of the NLRA in this instance.

Neither is the damages remedy inconsistent with the Congressional displeasure with the *Danbury Hatters* case. In *Danbury Hatters*, financial liability was imposed upon union members for union wrongs; it is logically and legally distinct to hold union members accountable for breaches of collective bargaining contracts which they have committed willfully and independent of union influence.

Opponents of the damages remedy against employees also argue that such liability will exacerbate industrial strife and escalate the intensity of disputes instead of ending strikes.[45] To allow damages would allegedly summon up the bitterness of historical labor disputes by requiring that employees turn over money and assets directly to their employer, and create movement martyrs by wiping out the savings of the employees sued. This analysis seems specious; there is nothing peculiar to the damages remedy that renders it more inflammatory than the remedies of discharge, discipline, or injunction. Employees must be prepared to accept the consequences of their chosen actions.

A further argument made against employee liability is that it would be punitive in nature, since the amount an employer is likely to recover from employees will not compensate him for his losses.[46] It is argued that the damages remedy should not be allowed since the normal motive for section 301 suits is compensation, and deterrence is covered elsewhere in the NLRA.[47] Some authors also argue that damages should not be allowed in the employee context in any event as a deterrent, because they would be ineffective for that purpose.[48] It is suggested that the remedy would occur too far in the future to affect present behavior; it might also lead to resignations rather than strikes—a distinct handicap for employers, since any attempts to enjoin or penalize resignations would be barred by the thirteenth amendment.

Although an employer's recovery will often be inadequate, the fact that an employer may not be able to recover for all his losses does not imply that recovery for some losses is punitive. Moreover, there will be cases where the employer is able to recover fully, and these should not be ruled out by the insufficiency of recovery in some cases. As to the

45. Givens, *Responsibility of Individual Employees for Breaches of No-Strike Clauses*, 14 INDUS. & LAB. REL. REV. 595, 596 (1961); Shipman, *The Scope of the National Emergency Injunction Law*, 9 SETON HALL L. REV. 709, 715 (1978).

46. Givens, *supra* note 44, at 595-96.

47. Gould, *supra* note 37, at 703.

48. Holtmann, *Labor Law—Wildcat Strikes and Section 301 of the Taft-Hartley Act*, 38 MISSOURI L. REV. 128 (1973).

deterrent value, it is fair to say that although the damages award will not be made immediately, the threat of it should be sufficient to make wildcat strikes less attractive; certainly it should be as effective a deterrent as a discipline measure which may or may not be upheld by an arbitrator. The thirteenth amendment problem is unlikely to arise; no one would seriously question an employee's right to resign. Given the choice between resignation from a secure position, risking personal liability in an illegal strike, or observing a no-strike clause, most employees would be inclined to play it safe and let the union control their strike activity.

Finally, it is argued that the damages remedy would be inequitable because employees might not know that their conduct is illegal. In such a situation only an injunctive remedy seems fair, since individuals would be penalized only if they fail to obey a court order issued after a hearing on the matter. It seems extremely unlikely, however, that employees would not know or have good reason to know that their conduct is illegal. As union members, they vote to ratify any agreement; while members may not have knowledge of all details of that agreement, there is ample reason to believe that they know of the main provisions, including those authorizing strikes. Further, employees will most likely be told by their union upon commencement of independent strike action that such conduct is illegal because it violates the terms of the collective bargaining agreement and, at the very least, that their action cannot receive its support.[49]

V

LEGAL ARGUMENTS AGAINST INDIVIDUAL LIABILITY

The central legal argument made against holding individual employees liable is that employees are not contractually bound by collective bargaining agreements. This point of view is based on an inaccurate characterization of the collective bargaining contract. Labor-management agreements are not ordinary contracts and should not be limited by rules governing them.

The traditional approach of American courts was to deny any en-

49. Until the Supreme Court's decision in Carbon Fuel Co. v. Mine Workers, 100 S. Ct. 410 (1979), lower courts divided over whether a no-strike clause obligated the union to use best efforts to end unauthorized strikes. *See, e.g.*, Eazor Exp. v. Teamsters, 520 F.2d 951 (3rd Cir. 1975) (no-strike clause requires union to use best efforts if the agreement is not to be rendered illusory); United Constr. Workers v. Haislip Baking Co., 223 F.2d 872 (1955) (union has no responsibility to take any actions encouraging its members to return to work). In *Carbon Fuel Co.*, however, the Supreme Court held that under the common law agency test adopted by Congress in subsections 301(b) and (e), unions are not liable for actions of their members if they do not instigate, support, ratify or encourage any of the work stoppages. Union failure to take action to halt a strike by individual employees is currently no ground for liability under an agency theory.

forcement of the collective bargaining agreement by either employer or individual employees.[50] Some of the grounds for denying such enforcement have been that the union cannot be sued as a corporate entity, the contract lacks mutuality, the contract is for personal service, the contract restrains trade, and the contract concerns an illusory promise.[51]

Some courts, however, permitted suits by the union and employer against each other, apparently proceeding on the assumption that a collective bargaining agreement can be analogized to a traditional bi-partite contract.[52] These courts developed several theories to identify the rights and obligations of employees created under the collective bargaining agreement. The contract was variously viewed as 1) the formulation of a usage or custom which could be incorporated by the individual into the employment contract; 2) a contract between the employer and the individual member/employee, negotiated by the union as the employee's agent; and 3) a contract between the union and the employer for the benefit of the employees. Occasionally, courts sought other terms of comparison, analogizing the agreement to a group insurance policy, a treaty, and a tariff. However, each of these theories had the drawback of raising theoretical problems or yielding unsatisfactory results.[53]

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50. St. Louis, Iron Mountain & S. Ry. Co. v. Matthews, 64 Ark. 398, 42 S.W. 902 (1897).

51. Warns, *The Nature of the Collective Bargaining Agreement*, 1948 MIAMI L.Q. 239.

52. *Id.* at 240.

53. The custom or usage theory proved unsatisfactory because common law permitted employees in their individual contracts to waive provisions of the collective agreement, while labor statutes did not. *Id.* at 236-37. Provisions of the collective agreement were incorporated whether the employee knew of them or not, again unlike the common law. *Id.* Also, it stretched language to dub something "usage" which was a deliberate agreement, arrived at only after a period of negotiations and subject to change by mutual consent. Witmer, *Collective Labor Agreements in the Courts*, 48 YALE L.J. 195 (1938).

Similarly, agency concepts were not always appropriate to the collective bargaining agreement. That dissident members, as well as a majority in certain instances, lose the power to change unions or to act for themselves (Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 12-13 (1958)) are facts that find no corollary in ordinary agency law; agency is always revocable and a principal does not lose power to act for himself. Agency also demands a continuing consensual relationship, a rule difficult to apply to a shifting body of plant employees. Warns, *supra* note 50 at 237. Further, no agency principle permits the termination of a contract because of a union schism or disintegration of the incumbent union. Cox, *supra* this note, at 14.

Neither does the third party beneficiary theory fit the demands of labor relations. It would permit no suit against the employee by the employer, yet under the contract not only does an employee incur obligations, he or she frequently instigates, ratifies, or rejects it at a union meeting. Warns, *supra* note 50, at 239.

Under another theory, developed later, the relations between the employer, employees, and union were governed by two contracts. One contract, between the employer and the union, is composed partly of promises running to the benefit of the union as an organization, and partly relates to wages, hours, and the like, the latter being incorporated by operation of law into the former, individual contract of hire. The union, however, had no right to enforce obligations running to the employee under his contract of hire. *See* Association of Westinghouse Salaried Em-

Whether because of these drawbacks or because of the enactment of section 301, or both, recent court decisions have abandoned adherence to common law doctrines. Instead, they have adopted an approach first advanced in the academic literature,[54] which combines use of common law theories as models but adapts them to the policy of labor statutes and the realities of the industrial arena.

Under this pragmatic approach, the imposition of liability on employees for their individual wrongs in a section 301 damages suit is not dependent on whether or not the common law would have allowed such an action.[55] The focus of the analysis is on the twin Congressional objectives of peaceful resolution of labor disputes and the enforcement of collective bargaining agreements. Thus, the Supreme Court, in ruling that employee suits against unions and employers are permissible under section 301, did not engage in a theoretical analysis of which common law principle permitted this result. On the contrary, it found those suits were included within section 301 because their exclusion would "stultify" the Congressional policy of having the administration of collective bargaining agreements enforced under a uniform body of federal law.[56] Similarly, in declaring that a suit against individual employees was within the jurisdiction of section 301, the Court did not question whether the common law would allow the imposition of liability.[57]

VI

A POSSIBLE ALTERNATIVE TO THE DAMAGES REMEDY

Should the Supreme Court ultimately rule against allowing damage suits by employers against employees, a possible avenue for obtaining the same result might lie in judicial enforcement of an arbitrator's award directing employees to pay damages. Such was the case before *Sinclair Refining Co.* was overruled by *Boys Markets*; during that period, employers attempted to secure judicial enforcement of

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ployees v. Westinghouse Elec. Corp., 210 F.2d 623 (3rd Cir. 1954), *aff'd*, 348 U.S. 437 (1955). In his opinion affirming the Third Circuit decision, however, Justice Frankfurter found the principles of the theory to conflict with federal labor policy for the following reasons: 1) subsection 9(a) of the NLRA did not destroy the right of the union to bring an action affirming certain rights; 2) the theory would exclude from court the party who is required at preliminary stages of the agreement; 3) it impairs a union's power to negotiate a satisfactory settlement; and 4) the inability of the union to act on a grievance would encourage wildcat strikes. 348 U.S. at 456-58.

54. Witmer, *supra* note 52, at 228-29; Cox, *supra* note 52, at 19-22; *See also* Warns, *supra* note 50, at 235, 250-51; Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 604 (1956).

55. *See, e.g.*, Lodge 1327 Int'l Ass'n of Machinists & Aerospace Workers v. Frazer & Johnston Co., 454 F.2d 88, 92 (9th Cir. 1971).

56. Smith v. Evening News Ass'n, 371 U.S. 195, 200 (1962). *See also* Humphrey v. Moore, 375 U.S. 335, 342-44 (1964); Republic Steel Corp. v. Maddox, 379 U.S. 650, 657 (1965).

57. Atkinson v. Sinclair Refining Co., 370 U.S. 238, 247 n.6 (1962); Smith v. Evening News Ass'n, 371 U.S. 195, 199-200 (1962).

arbitrators' awards directing employees to return to work. In reported decisions, two circuit courts sanctioned this approach to remedy;[58] two district courts did not.[59]

The court of appeals in *New Orleans Steamship Association v. General Longshore Workers*[60] let stand a district court order enforcing an arbitrator's award, even though it acknowledged that the court would itself have no power to issue the order:

> Norris-LaGuardia is limited to labor disputes and we consider the instant controversy to be outside the scope of a labor dispute as such. We have before us a contract wherein the parties have ceded their remedy of self-help in a labor dispute to arbitration even to the point of permitting the arbitrator to grant a desist order. Once the arbitration was completed, the matter became ripe for specific performance and fell outside the scope of Norris-LaGuardia.
>
> We think the logic of the arbitration policy compels this result; otherwise one of the parties to a collective bargaining agreement containing arbitration and no-strike or work stoppage clauses has a hollow right indeed. He is told: Our national policy is to encourage arbitration; you may contract to arbitrate and obtain a no-strike clause as the *quid pro quo* for your agreement to arbitrate; a recalcitrant party will be compelled to arbitrate any dispute arising therefrom; and the arbitrator may be empowered contractually to issue a desist order. We do not believe in light of the body of law which has grown from Section 301 that the law will now say to this party that, having done these things, there is no remedy in the event the opposite party decides to ignore the award of the arbitrator to desist the stoppage. No such result should be imputed to Congress . . . .[61]

The district court in *Marine Transport Lines v. Curran*[62] had rejected such a position, arguing that a distinction between injunctive relief and an order to enforce the arbitrator's award is unrealistic: "This is a labor dispute. Petitioner does not claim otherwise. The court is being asked to enjoin a work stoppage. This is the reality of the situation, whatever may be the form of the proceeding."[63]

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58. New Orleans Steamship Ass'n v. General Longshore Workers, 389 F.2d 369 (5th Cir. 1968); Philadelphia Marine Trade Ass'n v. Int'l Longshoremen's Ass'n, Local 1291, 368 F.2d 932 (3rd Cir. 1966), *rev'd on other grounds*, 389 U.S. 64 (1967). In the latter case, the Supreme Court refused to reach the issue of whether the order was an injunction against work stoppages precluded by the ruling in *Sinclair Refining Co.* or an order to enforce arbitration pursuant to *Lincoln Mills*, holding only that the district court order failed to satisfy the requirement of Rule 65 of the Federal Rules of Civil Procedure on the grounds of vagueness. 389 U.S. at 76.

59. Tanker Service Comm. v. Masters, Mates & Pilots, 269 F. Supp. 551 (E.D. Pa. 1967) (order to enforce award precluded by § 4 of the Norris-LaGuardia Act, but it was the court's responsibility to fashion a remedy so court assessed damages); Marine Transport Lines v. Curran, 65 L.R.R.M. 2095 (S.D.N.Y. 1967) (§ 4 of Norris-LaGuardia Act prohibited relief sought).

60. 389 F.2d 369 (5th Cir. 1968).

61. *Id.* at 372.

62. 65 L.R.R.M. 2095 (S.D.N.Y. 1967).

63. *Id.* at 2097.

Nonetheless, the approach was accepted by higher courts, as a means of addressing a seemingly crucial gap in the coverage of the labor laws. Therefore, in the case at hand, an employer might request at arbitration an award of damages against striking employees in the absence of union liability. While no case has been found in which an arbitrator has awarded damages against individual employees, arbitrators have, in instances involving union culpability, held they do have authority to award monetary damages even where the contract is silent on the issue.[64]

Since not all arbitrators have so construed their powers,[65] it is more desirable, from the employer's point of view, to have a provision in the collective bargaining agreement specifying that damages may be awarded where individual employees engage in a wildcat strike, especially in circumstances where damages are obvious and the amount readily ascertainable.[66] Enforcement of such an award would be necessary to effect what would be a freely bargained-for provision; an employer seeking judicial enforcement of the award would then be seeking only to uphold the collective bargaining agreement, rather than to pursue an independent action in court for a money judgment.

VII

CONCLUSION

Statutory language is ambiguous on whether section 301 grants employers a cause of action against individual employees for damages incurred as a result of a wildcat strike in violation of the collective bargaining agreement. Legislative history similarly offers no clear guidance, clarifying only that unions are to be made accountable as entities for union wrongs. The issue, therefore, involves a preliminary question of whether the remedy would be inconsistent with prior case law as enunciated by the Supreme Court, with statutory provisions, or with legislative history; this analysis has shown no such inconsistency.

The resolution must then be based on whether federal labor policies of peaceful collective bargaining by employers and authorized union representatives, and enforcement of the agreements negotiated by those parties, would be furthered by the remedy. In the collective bargaining process, a party is most likely to make a concession if he perceives that he is receiving something in return; the assurances of

64. *See, e.g.*, PPG Industries, Inc., 51 Lab. Arb. 500 (1968).

65. *See, e.g.*, Waycross Sportswear, Inc., 53 Lab. Arb. 1061 (1969).

66. For example, in *Thompson*, discussed above at note 32, the contract specified that if an employee left employment before matching the time spent on paid leave of absence, he would be required to repay an appropriate portion of the amount paid to him during his leave; the court allowed damages based on that measure.

unions that no strikes will occur if management observes the contract are worth nothing if individual workers cannot be made to stay on the job. Discharge, discipline, and injunction are not, as has been argued, always available or effective; to the extent that a suit for damages provides an additional enforcement mechanism, a means of restitution, and a deterrent to the wildcat strike, the employer is more likely to agree to a grievance and arbitration procedure, which is the foundation of labor/management peace. Such a result is surely a weighty argument for the allowance of damages awards against individual wildcat strikers.