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Reaction to the Wildcat Strike--The Employer's Dilemma

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NOTE

Reaction to the Wildcat Strike — The Employer's Dilemma

AS A RESULT of intensive and often heated negotiations, most labor contracts currently contain provisions prohibiting employees from resorting to a strike or work stoppage as a means of applying leverage during the life of the contract.[1] A necessary companion clause generally gives to the employer the power to discipline any employee who violates the "no-strike" pledge.[2] Both union and company alike have recognized that these confederate clauses are mutually advantageous and vital to the maintenance of industrial peace and stability. By prohibiting the use of the wildcat strike, both parties are making a concerted effort to create an atmosphere where an ongoing harmonious relationship between management and labor can be maintained, and where future good-faith bargaining can occur in a climate free from mutual hostility. Owing to the vital role which the no-strike clause plays in preserving industrial stability, it is imperative that the employer have sufficient power to implement the authority for which he has bargained — the power to react incisively to a wildcat strike and deal firmly with those who participate.

In response to an illegal strike, the employer has two goals: ending the work stoppage as soon as possible in order to resume efficient production and fulfill obligations to customers; and (perhaps more important) preventing the occurrence of any similar incidents in the future. In achieving these two ultimate aims, there are two courses of action which are most effective: (1) securing an injunction to quickly bring to an end the unauthorized walkout; and (2) selectively discharging participants in the strike, thus setting an example of company intolerance of contract violations which will tend to deter future walkouts.

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[1] A typical contract provision might read: There shall be no strikes, lockouts, stoppages of work, or picketing during the life of this agreement.

[2] For example: Any employee participating in an unauthorized strike, slowdown, walkout or any other interference of work shall be subject to disciplinary action. Or: The company shall have the right to discharge or otherwise discipline any employee who does engage in a strike, organized slowdown, or work stoppage.

By so empowering the employer to take direct action to redress an illegal walkout, employees are encouraged to resort to the grievance procedures, including arbitration, rather than to an illegal strike.

In order to gauge the success of employer efforts to preserve the vitality of the no-strike clause as a meaningful device for promoting industrial stability, this Note will examine the response of the courts to employer demands for injunctive relief to end wildcat strikes and the response of arbitrators toward selective discharge as a means of discouraging repeated disregard for contract terms.

I. INJUNCTIONS IN FEDERAL AND STATE COURTS

A. Availability of Injunctive Relief in Federal Courts

The obvious purpose of the no-strike pledge is to insure industrial peace by carrying out the conciliatory measures dictated in the contract.[3] Indeed, the no-strike clause is the "quid pro quo" granted by the union to the employer for the employer's agreement to arbitrate disputes arising under the contract.[4] In the landmark *Textile Workers v. Lincoln Mills*[5] decision, the Supreme Court announced that the paramount federal interest in maintaining stability in labor relations would be best served by strict enforcement of collective bargaining agreements.[6] Certainly it would seem that a national policy concerned with vouchsafing "the fruits of a bargain which the parties have finally arrived at through the exercise of collective bargaining rights"[7] would favor the issuance of an injunction where the fundamental no-strike pledge of a collective bargaining agreement has been breached. Yet, a review of the court decisions discloses that the employer has been effectly foreclosed from the much needed injunction remedy.

The federal rule respecting the issuance of an injunction to end a strike in violation of a no-strike clause was enunciated in *Sinclair Refining Co. v. Atkinson.*[8] In *Sinclair* the employer sought an injunction in a federal court after nine illegal slowdowns and work stoppages within a 19-month period had severly damaged business operations. Despite an explicit no-strike provision in the collective bargaining agreement, the Court held that no injunction could issue

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[3] *See* Teamsters v. McMaken Transp. Co., 282 F.2d 345 (10th Cir. 1960).

[4] *See* Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). The Court added that section 301(a) of the Labor-Management Relations Act, 28 U.S.C. § 185 (1964), allowing suit for the breach of a collective bargaining agreement in the federal courts "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements . . . ." *Id.* at 451.

[5] 353 U.S. 448 (1957).

[6] *Id.*

[7] Teamsters v. McMaken Transp. Co., 282 F.2d 345, 350 (10th Cir. 1960).

[8] 370 U.S. 195 (1962).

because the situation fell within section 4 of the Norris-LaGuardia Act[9] which deprives the federal courts of jurisdiction to issue injunctions in peaceful labor disputes. Reasoning that the grant of jurisdiction in section 301 of the Taft-Hartley Act[10] had not repealed the injunction prohibition contained in the Norris-LaGuardia Act, the Court concluded that any alteration of the fundamental policy against injunctions in peaceful labor disputes was wholly within the domain of Congress and not the courts.[11] Although the Court indicated that the right to sue under section 301 would be worth far more if companies could get federal court injunctions to bar a breach of their collective bargaining agreements,[12] it reached the decision that it was bound by the legislative history and the language of section 301[13] to conclude that that provision had not disturbed the Norris-LaGuardia Act's ban on injunctions against strikes arising out of a "labor dispute."

In a cogent dissent,[14] Mr. Justice Brennan pointed out that the decision of the majority conflicted with their avowed policy of ad-

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[9] 29 U.S.C. § 104 (1964). The pertinent language states:

> No court of the United States shall have any jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person . . . from doing, whether singly or in concert, any of the following acts:
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> a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .
>
> e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; . . .
>
> i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . .

[10] 29 U.S.C. § 185(a) (1964), which reads:

> (a) Suits for violation 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.

Subsection (b) of section 301 provides that judgments for money damages against a union are enforceable against the union's assets and not the individual members.

[11] Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 212 (1962). Although the Court had issued an injunction under section 301 in the *Lincoln Mills* decision, it was only a mandatory injunction specifically enforcing an agreement to arbitrate, and not an injunction restraining a strike so as to invoke the policies of Norris-LaGuardia.

[12] *Id.* at 214.

[13] *Id.* at 205-10. The Court used as their indicia the fact that a provision expressly repealing the anti-injunction provision was dropped before passage, and the statement of one of the Act's authors, Senator Taft, that, "[t]he conferees . . . rejected the repeal of the Norris-LaGuardia Act." *Id.* at 208.

[14] *Id.* at 215.

herence to arbitration commitments,[15] and that the strict application of Norris-LaGuardia threatened the very vitality of these arbitration provisions. In deference to the national policy favoring strict enforcement of arbitration agreements announced in *Lincoln Mills*, Mr. Justice Brennan would read section 301 as giving the district courts "their regular arsenal of remedies [appropriate] to the situation,"[16] including the injunction.

In light of the clear language of Norris-LaGuardia Act section 4 and the failure of Congress to explicitly repeal the anti-injunction proviso in enacting section 301, it cannot be claimed that *Sinclair* decision was clearly erroneous. However, it is obvious that the exceedingly literal reading given the relevant statutes by the *Sinclair* Court departs markedly from the broad policy analysis of *Lincoln Mills*. The enjoining of a strike over a grievance that can be settled by arbitration may well be "indispensable to the effective enforcement of an arbitration scheme in a collective bargaining agreement."[17] Indeed, enjoining a strike over a grievance which is subject to arbitration would not offend the underlying policy of Norris-LaGuardia — "the avoidance of judicial evaluation of the social and economic justification for strikes."[18] By refusing to allow federal courts to enjoin wildcat strikes, the Court has gone a long way towards rendering the no-strike pledge nugatory; without the injunction as a sanction, the employee subject to the contract remains free to violate its terms with impunity.[19] *Sinclair* effected a sharp limitation on the federal policy promoting industrial stability through the strict enforcement of arbitration clauses contained in collective

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[15] *Id.* at 225. The federal policy favoring arbitration was clearly established in Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), which was followed by Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[16] Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 220 (1962) (dissenting opinion).

[17] Marshall, *Section 301-Problems and Prospects*, in LABOR ARBITRATION AND INDUSTRIAL CHANGE 146, 153 (1963) (Proceedings of the Sixteenth Annual Meeting of the National Academy of Arbitrators).

[18] 111 U. PA. L. REV. 247, 252 (1962).

[19] *See* Comment, *Quid Pro Quo in Federal Labor Law: Enforcement of the No-Strike Clause*, 1963 WIS. L. REV. 626, 631 (1963). An excellent argument in favor of the view that the Norris-LaGuardia injunction prohibition should not apply to section 301 suits is presented in 111 U. PA. L. REV. 247, 251-52 (1962):

> In enacting section 301, Congress meant to give employers some means of enforcing union contract promises; the union right to sue was regarded as purely secondary . . . . A better approach . . . is to weigh the desirability of an injunction to effectuate arbitration against the harm done to the anti-injunction policy of Norris LaGuardia . . . .

bargaining agreements. This constraint has proved quite damaging to employers.[20]

B. *Availability of Injunctive Relief in State Courts*

As Mr. Justice Brennan anticipated,[21] *Sinclair* caused employers to look to state courts for the remedy which they could not get in the federal courts.[22] A conflict arose concerning whether state courts were divested of jurisdiction over strike injunction suits. Some courts continued to grant injunctions, maintaining that the right to injunctive relief for breach of contract where damages were inadequate was a state-created right, not subject to federal preemption.[23] Other courts sought to avoid a situation where the choice of forum would determine the availability of injunctive relief[24] and denied the remedy in order to further the federal labor policy.[25]

This conflict was recently resolved by the Supreme Court in *Avco Corp. v. Aero Lodge 735, International Association of Machinists*.[26] Although not specifically deciding whether *Sinclair* extended

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[20] The grievance procedure is worth little if employees can walk out and still claim protection under the grievance procedure. In fact, it was for the very purpose of preventing such destructive self-action that the grievance procedure was established. *See* text accompanying notes 3-7 *supra*.

[21] Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 226 (1962) (dissenting opinion).

[22] *See* Comment, *The Availability of State Remedies in Section 301 Cases: Injunctive Relief*, 10 WAYNE L. REV. 580, 584-85 (1964), where it is stated that "to allow the state courts to freely use this [injunction] remedy would be tantamount to allowing substantive rights to exist in state courts which would not be available in the federal courts under the applicable federal laws."

[23] *See, e.g.*, American Dredging Co. v. Local 25, 338 F.2d 837 (3d Cir. 1964), *cert. denied*, 380 U.S. 935 (1965) (*Sinclair* only governs if action originally brought in federal district court under section 301); McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958) (simply because injunctive relief is unavailable in federal courts does not preclude granting such relief in state courts); Curtis v. Tozer, 374 S.W.2d 557 (Mo. Ct. App. 1964); C.D. Perry & Sons, Inc. v. Robilotto, 39 Misc. 2d 147, 240 N.Y.S.2d 331 (Sup. Ct. 1963), *aff'd*, 23 App. Div. 2d 949, 260 N.Y.S.2d 158 (1965) (the *Sinclair* decision did not hold that the prohibition against injunctions applied to state courts). *See also* Lesnick, *State-Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris LaGuardia*, 79 HARV. L. REV. 757 (1966).

[24] *See* Stern, *The Norris LaGuardia Act and State Court Injunctions against Strikes in Breach of a Collective Bargaining Agreement under Section 301: Accommodation v. Incompatibility*, 39 TEMP. L.Q. 65, 67 (1965).

[25] *See, e.g.*, Avco Corp. v. Aero Lodge 735, IAW, 376 F.2d 337 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968); Oman Constr. Co. v. Teamsters Local 327, 263 F. Supp. 181 (M.D. Tenn. 1966); Lott, Inc. v. Hoisting Eng'rs, 222 F. Supp. 993 (S.D. Texas 1963); Crestwood Dairy v. Kelly, 222 F. Supp. 614 (E.D.N.Y. 1963). The need for uniformity between federal and state courts was also recognized in Humphrey v. Moore, 375 U.S. 335 (1964); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Teamsters v. Lucas Flour Co., 375 U.S. 335 (1962).

[26] 390 U.S. 557 (1968). For a thorough discussion of the *Avco* decision and its

to state courts and eliminated the availability of injunctions in a state proceeding,[27] the *Avco* Court rendered that question effectively moot by its holding that a state court action by an employer seeking to enjoin a strike in violation of a no-strike clause falls within the jurisdictional grant of section 301 and hence is properly removable to a federal court under section 1441(b) of the *Judicial Code*.[28] Once the action has been removed, the federal court is compelled to apply the federal substantive law of labor relations which, under *Sinclair*, requires dismissal of the employer's claim for injunctive relief.[29] Since the employer's action in the state court will always be removable where the industry involved "affects interstate commerce,"[30] the employer is effectively foreclosed from the injunction remedy in both judicial systems.[31]

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federal jurisdiction ramifications in particular, see Recent Decision, 20 CASE W. RES. L. REV. 460 (1969).

[27] The court of appeals in *Avco* did direct itself to this question, however, and concluded that "the remedies available in state courts are limited to remedies available under federal law." Avco Corp. v. Aero Lodge 735, IAM, 376 F.2d 337, 343 (6th Cir. 1967).

[28] 28 U.S.C. § 1441(b) (1964) provides that:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

[29] *See* text accompanying notes 8 & 9 *supra.*

[30] 29 U.S.C. § 185(a) (1964) (Taft-Hartley Act § 301). Since the union itself often has a great deal to lose by a wildcat strike, it might be argued that unions could put an end to the strike by consciously failing to effect removal in a state court which is disposed not to follow the federal injunction policy. However, although such a ploy by the union is theoretically possible, the union's failure to exhaust the legal remedies of the rank and file would surely cause extensive political difficulties for the union. Hence, it is unlikely that employer actions seeking to enjoin a wildcat strike will not be removed.

The union might lose its rights to remove through inadvertence by failing to petition for removal within 30 days from the day the employer files his complaint. 28 U.S.C. § 1446(b) (1964). However, such failure is unlikely in an action seeking an injunction where time is always of the essence.

[31] Whether state courts still have the authority to issue injunctions when removal is not effected is still an unanswered question. Although the Court did not reach the question in *Sinclair* or *Avco*, section 4 of the Norris-LaGuardia Act denies "jurisdiction" to the "court[s] of the United States," and thus a literal reading of the statute would suggest that state courts are not deprived of their traditional equity jurisdiction. However, notwithstanding the fact that section 4 speaks in terms of withholding federal court jurisdiction, it is beyond dispute that the statute's operative effect is more substantive than procedural owing to the immense importance of the injunction remedy in determining the success or failure of a strike effort. *See* Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 COLUM. L. REV. 1027, 1035 (1963), Once the mandate of section 4 has been adopted as part of the federal substantive law of labor relations under section 301, state courts would be forced to yield to the dominant federal policy in the exercise of their concurrent jurisdiction. *See* Comment, *The Norris-LaGuardia Act and Section 301 of the Taft-Hartly Act — Problems of Jurisdiction and Removal in the Enforceability of Collectively Bargained No-Strike Agreements*,

In the absence of congressional action to the contrary, the company is, for all practical purposes, effectively barred from obtaining an injunction in either a federal or state court. Given the unavailability of injunctive relief to end a strike, the employer necessarily becomes solely dependent upon his contract right to discipline contract violators as a means of preventing the reoccurrence of illegal work stoppages. The next section of this Note examines the extent to which arbitrators have enforced the employer's theoretically unfettered power to discipline wildcat strikers, the contract right which was often the inducement for the employer's agreement to the contract terms.

II. Disciplining the Wildcat Striker — The Arbitrator's Response

A. Federal Policy Favoring the Binding Authority of Arbitration

It has long been the federal policy to severely limit court authority in matters of contract interpretation,[32] leaving the resolution of industrial disputes to the independent consideration of the arbitrator within the framework of the grievance procedure set forth in the collective bargaining agreement. Favoring the intent of the parties to erect a system of industrial self-government, the Supreme Court has decided that all doubts concerning the propriety of the settlement should be resolved in favor of arbitration.[33] Given the "hands off" policy of the federal courts with respect to the finality of arbitration decisions[34] and the overall policy favoring their strict enforcement, the arbitrator has a great responsibility to faithfully discharge his duties by a strict adherence to the contract and the no-strike clause contained therein.

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60 Nw. U.L. Rev. 489, 501 (1965). The policies fostering a uniform national labor policy announced in *Lincoln Mills*, reinforced in *Sinclair* and *Avco*, militate against the availability of injunctive relief in state courts when similar relief is unavailable in the federal courts. In any event, although the question of the direct applicability of section 4 to the states remains unresolved, the ease with which an injunction suit can in a state court be removed renders the question of direct applicability somewhat academic.

[32] This policy was set forth in one of the cases in the famous *Steelworkers Trilogy*: Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[33] *See* Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

[34] The policy of not substituting the court's discretion for that of the arbitrator is enunciated in the third case in the *Trilogy* — Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). *See also* Issacson, *The Grand Equation: Labor Arbitration and the No-Strike Clause*, 48 A.B.A.J. 914 (1962).

B. *Discharge of the Wildcat Strike Instigator*

It is well-settled arbitral authority that where the specific individual or individuals who actually instigated a wildcat strike can be identified, they are subject to summary discharge.[35] By assuming a leadership role in a proscribed activity, an employee voluntarily exposes himself to the risk that when the strike is over, he may have to pay for the consequences for his inflammatory conduct with the loss of his job. Unless the employer is afforded considerable latitude in disciplining the instigator, the no-strike provision would be rendered completely meaningless. Recognizing the gravity of fomenting a wildcat strike, the arbitrator has given the instigator little protection when identified by the employer to the arbitrator's satisfaction.[36]

C. *Discharge of Strike Participants When There is a Basis for Differentiation*

Although it is often impossible to identify the actual instigators of a wildcat strike, the employer will nonetheless be allowed to execute unequal penalties on those who have taken a more active role in the strike or have otherwise distinguished themselves as strong proponents of the illegal activity.[37] Thus arbitrators have relied on

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[35] *See* Ingersoll-Rand Co., 50 Lab. Arb. 487 (1968); Wells Mfg. Co., 49 Lab. Arb. 1189 (1968); Kaiser Steel Corp., 49 Lab. Arb. 507 (1967); Pullman-Standard, 47 Lab. Arb. 752 (1966); Hussmann Refrigerator Co., 45 Lab. Arb. 585 (1965); Deere & Co., 43 Lab. Arb. 182 (1964); General Am. Transp. Corp., 42 Lab. Arb. 142 (1964); Mack Truck Inc., 41 Lab. Arb. 1240 (1964); American Hard Rubber Co., 41 Lab. Arb. 155 (1963); Ford Motor Co., 41 Lab. Arb. 609 (1963); Pettibone Mullikin Corp., 41 Lab. Arb. 110 (1963); Pullman Inc., 41 Lab. Arb. 607 (1963); Homer Laughlin China Co., 41 Lab. Arb. 1216 (1963); Insulrock Co., 39 Lab. Arb. 169 (1962); Bethlehem Steel Co., 30 Lab. Arb. 72 (1958); Chrysler Corp., 30 Lab. Arb. 562 (1958); Wesson Oil & Snow Drift Co., 29 Lab. Arb. 622 (1957); Bower Roller Bearing Co., 22 Lab. Arb. 320 (1954); Borg-Warner Corp., 22 Lab. Arb. 589 (1954); Alan Wood Steel Co., 21 Lab. Arb. 843 (1954); International Harvester Co., 21 Lab. Arb. 239 (1953); Shenandoa Rayon Corp., 21 Lab. Arb. 421 (1953); Inland Steel Co., 19 Lab. Arb. 601 (1952); Gardner-Denver Co., 15 Lab. Arb. 829 (1951); International Harvester Co., 13 Lab. Arb. 610 (1949); Everett Dyers & Cleaners, 11 Lab. Arb. 462 (1948); Carnegie Illinois Steel Corp., 5 Lab. Arb. 363 (1946).

[36] It should be pointed out that many arbitrators allow the employer considerable latitude in ascertaining the identity of strike instigators. *See, e.g.*, United States Steel Corp., 50 Lab. Arb. 472 (1968) ("Employees who promote strike activity and so are disciplined cannot escape responsibility merely because it later appears that others may have been equally guilty . . . ." *Id.* at 476). Deere & Co., 43 Lab. Arb. 182 (1964) (discharge of instigators upheld on evidence that they did quantitatively more picketing than other strikers); Bower Roller Bearing Co., 22 Lab. Arb. 320 (1954) (role as instigator established on basis of past role of leadership and spokesman in shop).

[37] *See* cases cited notes 38-41 *infra.*

indices such as taking a more active role in picketing,[38] being the first employees to walk out,[39] holding of an official union capacity,[40] and other specific distinguishing acts to uphold an employer's selective discharge of strike participants, even where the actual instigators cannot be identified.[41]

The rationale behind the "reasonable distinction" doctrine, which allows the employer to impose more severe sanctions upon the most culpable strike participants, is grounded in the belief that the employer's self-destruction should not be the cost of taking reasonable steps to preserve the integrity of the no-strike clause. An employer whose business has been damaged by an illegal strike should not be relegated to discharge of his entire workforce as the only means of redressing an unauthorized walkout where he cannot specifically identify the instigators:

> An employer who is the victim of such a [wildcat] strike is not required to deprive himself of the services of all employees participating in the strike . . . . It would be unreasonable to require the company to terminate all guilty employees in order to sustain its action in terminating those employees it determined were most guilty. Any employee who participates in a strike in breach of contract must take the gamble that at the conclusion thereof he may not be reinstated even though those equally guilty may be.[42]

The imposition of heavier penalties on the more active participants in an illegal strike will discourage employees from taking a role in a strike that will contribute to its momentum, and thus help to curb reoccurrences. Where there is a rational basis for distinguishing those participants responsible for intensifying or prolonging a wildcat strike, selective discharge accomplishes the legitimate purpose of encouraging adherence to the grievance procedure agreed to by union and management, and therefore the practice should not be attacked as unjustifiably coercive or discriminatory.[43]

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[38] Phillips Indus. Inc., 45 Lab. Arb. 943 (1965); *Cf.* Bethlehem Steel Co., 29 Lab. Arb. 644 (1957).

[39] Insulrock Co., 39 Lab. Arb. 169 (1962).

[40] Philco Corp., 38 Lab. Arb. 889 (1962).

[41] It is stated in Jones & Laughlin Steel Corp., 29 Lab. Arb. 644 (1957) that:
> It is well settled that an employer may single out for penalties the *leaders* of a strike, or those who commit specific acts distinguishing them from others, but that unless there is a reasonable basis for distinction, all must be treated alike. *Id.* at 645.

[42] Phillips Indus. Inc., 45 Lab. Arb. 943, 953-54 (1965).

[43] It is true that in applying the "reasonable distinction" rule, people of equal guilt may often receive uneven penalties. However, if the company acted in good faith and, on the basis of all evidence at hand, felt it reacted towards the most guilty, there does not seem to be a reason why the executed penalty should be vitiated.

D. Selective Discharge of Wildcat Strike Participants

The most difficult problem arises where, after a wildcat strike, the employer is unable either to ascertain the identity of instigators, or provide a rational basis for distinguishing between the participating employees. In the spontaneous and emotional atmosphere that often erupts in a strike, it is often impossible for the employer to sift through the fragile indications of leadership to arrive at a definitive conclusion. However, the company is left with a damaging strike, and out of a desire for industrial self-preservation wishes to take firm action to prevent any reoccurrences. Therefore, the employer will resort to the random selection of strike participants for discharge as a means of preventing future strikes.

In support of this position the company will present the following argument: upon breach of the no-strike clause, it has the right to discharge its entire work force,[44] but to do so would be tantamount to self-destruction, so certain employees, whose participation in the strike is clearly established, are selected for discipline. This power is specifically granted by the contract, and each employee knew he was taking the risk of incurring disciplinary penalties, including discharge, when he participated in the unauthorized walkout.[45] To decide otherwise would be to allow employees to participate in walkouts in violation of the contract without fear of reprisal, thereby reducing the no-strike clause to meaningless verbiage.

Despite the apparent merit of the employer's argument, the overwhelming weight of arbitral authority stands behind the proposition that participants who are equally guilty must be accorded equal disciplinary penalties.[46] Premised on the theory that merely

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[44] *See, e.g.*, Pullman-Standard, 47 Lab. Arb. 752 (1966); American Air Filter Co., 47 Lab. Arb. 129 (1966) (although discharge is not too severe a penalty, where no degrees of guilt can be established, the employer must discharge either all or none of the participants.); Capital Airways, Inc., 40 Lab. Arb. 1048 (1963); Glass Container Mfrs. Institute, 27 Lab. Arb. 131 (1956).

[45] *See* Phillip Indus. Inc., 45 Lab. Arb. 943, 954 (1965).

[46] *See* American Air Filter Co., 47 Lab. Arb. 129 (1966); Pullman-Standard, 47 Lab. Arb. 752 (1966); Gartland-Haswell Foundry Co., 45 Lab. Arb. 108 (1965); Ford Motor Co., 41 Lab. Arb. 609 (1963) (selective discipline disallowed even in the face of a contract provision giving employer authority to discharge or discipline "any employee 'who instigates, participates in or gives leadership to an unauthorized strike in violation of this Agreement.'" *Id.* at 610.); Capital Airways Inc., 40 Lab. Arb. 1048 (1963) (will not sustain discharge of rule violators when others have done so and are not discharged); Metropolitan Transit Authority, 39 Lab. Arb. 849 (1962) (random discipline violates concept of fairness, equality of treatment, and justice when conduct of hundreds of others essentially the same); McGraw-Edison Co., 39 Lab. Arb. 76 (1962) (disparity of guilt will not allow the same penalty of discharge for all); American Smelting & Ref. Co., 34 Lab. Arb. 575 (1959); Jones & Laughlin Steel Corp.,

"[p]articipating in a work stoppage is not the same as instigating a work stoppage"[47] or actively supporting one, the weight of authority holds that although mere participation subjects all to summary discharge, where no degrees of guilt can be established, the employer must discharge all or none of the strikers.[48] Selective discharge under such circumstances is regarded as discriminatory, arbitrary, and capricious.[49]

It is frequently the case that the employer, plagued by a succession of damaging wildcat strikes, is yet unable to identify the instigators or single out the activists; and it is here that the employer's plight is most acute. Precluded from the injunction remedy in the courts,[50] the arbitrators have rendered the employer impotent to take any meaningful steps to vindicate the no-strike clause, for the only effective retaliation left to the employer — discharge of his entire work force — is patently unfeasible.

An apparently more enlightened approach would allow the employer to selectively discipline contract violators. It cannot be doubted that the end of recurrent wildcat strikes is an absolute necessity for peace in the shop. For the company to act to guarantee the cessation of unauthorized work stoppages is no more and no less than the right to which it bargained. Employees should realize, as have union and management, that the maintenance of an orderly system of industrial self-government in a climate conducive to harmonious relations between management and labor requires that disputes

29 Lab. Arb. 644 (1957) (the question of random discipline has "been answered in the negative so many times, and so unanimously . . . ." *Id.* at 645.); Underwood Glass Co., 27 Lab. Arb. 614 (1956); Glass Container Mfrs. Institute, 27 Lab. Arb. 131 (1956); McLouth Steel Corp., 24 Lab. Arb. 761 (1955) (regard for natural justice goes against picking and choosing certain employees for discharge); Aleo Mfg. Co., 15 Lab. Arb. 715 (1950) (cannot discharge some and strip others of seniority as all are equally at fault); Rheem Mfg. Co., 8 Lab. Arb. 85 (1947); Borg-Warner Corp., 4 Lab. Arb. 4 (1945).

In Pettibone Mulliken Corp., 41 Lab. Arb. 110 (1963), the contract contained, in addition to a no-strike clause, a provision stating that "participation . . . not authorized by the International . . . or by [the] Agreement shall be just cause for the immediate dismissal of any and all employees participating therein." After a work stoppage the company discharged one of the employees involved. Despite the contract provision, the arbitrator ordered reinstatement because the employee was a mere participant, and others who walked out were not disciplined.

[47] Lone Star Steel Co., 30 Lab. Arb. 519, 524 (1958).

[48] *See* cases cited not 46 *supra.*

[49] A negative implication inheres in this prevailing view that punishment must always be proportionate to guilt. If an instigator can be ascertained, no participant can be discharged since his guilt is of a lesser degree. Thus, the logic of this philosophy leads to the situation that participants can willingly, but silently, follow a strike instigator, and know that they can only receive a relatively minor disciplinary penalty.

[50] *See* text accompanying notes 26-29 *supra.*

be settled through the orderly grievance procedure and not by resort to the wildcat strike.[51] Selective discharge which will help establish a rational and durable collective bargaining relationship is neither arbitrary nor discriminatory, but sensible.

It might be argued, with some justification, that allowing the company such wide discretion could easily degenerate into a situation where the employer selects union activists for discharge. However, if an employee has reason to believe he was dismissed for his union activities rather than for strike participation, the safeguards provided by the National Labor Relations Act[52] are still available to him. To avoid unfair labor practice charges, the company would have to provide some basis other than union activity for imposing unequal sanctions on strike participants. For example, the selective discipline of employees with poor work records, or less seniority might be reasonable criteria where there is no way to ascertain degrees of participation in the work stoppage.

In truth, if the policy of the National Labor Relations Act were to protect any employee engaged in concerted action, even where the activity is proscribed in a collective bargaining agreement, then the Supreme Court decisions favoring arbitration and the implementation of the no-strike clause would be inconsistent with the Act.[53] A more realistic interpretation would easily reconcile Court decisions favoring the no-strike clause with the policy of the Act by concluding that the right to strike, indispensable to the function of collective bargaining, is a disruptive influence once a contract with a grievance procedure has been set up by the mutual consent of the parties. Thus, where the right to strike has served its function by producing a contract with favorable terms and has been temporarily waived in the interest of securing an orderly process of dispute resolution throughout the duration of the contract, selective discharge, where necessary to make the no-strike pledge meaningful, would not offend the policy thrust of the National Labor Relations Act.

Some arbitrators have adhered to the selective discipline doctrine,[54] although often because they determined that any discretion

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[51] It is, of course, not suggested that any employee be required to stay on the job and rely on the grievance procedure in a situation where unsafe and hazardous conditions are prevalent in the shop.

[52] 29 U.S.C. §§ 151-168 (1964).

[53] *See* text accompanying notes 4-6, 32-34 *supra.*

[54] *See* Ingersoll-Rand Co., 50 Lab. Arb. 487 (1968); Ross Gear Tennessee Plant, 45 Lab. Arb. 959 (1965) (provision for selective discipline upheld, although this does not preclude investigation into fairness of particular penalty); Okonite Co., 37 Lab. Arb. 977 (1961); L.B. Jones Co., 35 Lab. Arb. 590 (1960) (would not grant rein-

they had was removed by specific contractual language which gave the employer an absolute privilege to impose random discipline once participation with a wildcat strike was established.[55] Recently, however, at least one arbitrator has responded to the employer's plight by accepting selective discipline of strikers as a proper sanction. In a recent decision, *Ingersoll-Rand Co.*,[56] the arbitrator provided an incisive analysis, upholding selective descipline.[57] Recognizing the employer's need to insure compliance with the grievance procedure and the importance of preventing employees from flouting the established channels of dispute resolution by taking the law into their own hands, the arbitrator sustained the employer's selective discipline of strike participants,[58] condemning the wildcat strike as "one of the most serious acts of industrial misconduct."[59] In order to live up to its responsibilties to both customers and employees, firm and prompt discipline is needed since "[t]he removal of dangerous offenders from the industrial community not only discourages serious misconduct by others, thereby achieving prevention, but also is a simple act of self defense for the business as a whole."[60] The purpose of the labor agreement and the grievance procedure, culminating in arbitration, is to secure a period of uninterrupted pro-

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statement to 10 wildcat strike participants where there was no evidence of discrimination against them due to their union membership); Vickers, Inc., 33 Lab. Arb. 594 (1959) (discipline for participation upheld even though employee opposed strike and only went because others did — the arbitrator called his joining in an indication of "an attitude of disloyalty both to the Company and to the Union." *Id.* at 604.); Wolff Shoe Mfg. Co., 33 Lab. Arb. 568 (1959); National Lock Co., 12 Lab. Arb. 1194 (1949); Carnegie-Illinois Steel Corp., 5 Lab. Arb. 363 (1946) ("The mere fact that there may have been other employees who may have been equally guilty does not make the act of the company discriminatory." *Id.* at 368.).

[55] For example, in National Lock Co., 12 Lab. Arb. 1194 (1947), the contract empowered the employer to discharge *any* employee who participated in a strike in violation of the no-strike clause. After an illegal strike, the employer exercised his powers reserved in the contract and discharged several participants at random. Noting that the penalties imposed for mere participation were harsh, the arbitrator upheld the discharges stating that the sweeping contract provision had deprived him of authority to disturb the employer's action.

Also, in Okonite Co., 37 Lab. Arb. 977, 980 (1961), the arbitrator recognized the majority view that "[f]air play requires equality of treatment for all members of a group," but felt that under a contract giving the company the right to discipline "any and all" employees, the management was in a "technically unassailable position." *Id.*

[56] 50 Lab. Arb. 487 (1968).

[57] It should be noted that the doctrine of stare decisis is not applicable to arbitration decisions, and that therefore *Ingersoll-Rand* is effective only as an able argument for a minority view.

[58] The penalties imposed ran the gamut from discharge to lengthy suspension.

[59] 50 Lab. Arb. at 493.

[60] *Id.* at 493.

duction,[61] without which the business cannot prosper and the workers cannot expect fringe benefits or fair play on the part of management. Holding that the employees were adequately protected from employer abuse by the grievance procedure itself, the arbitrator noted that the only ones who gain by the wildcat strike are the employer's competitors, since a company with a reputation for chronic delays in making deliveries due to repeated work stoppages inevitably loses customers.[62] The rationale behind selective discipline seems neither discriminatory nor arbitrary where

> the Company often does not have sufficient proof or finds itself in the position where if it were to discipline all those involved, it might seriously interfere with production and punish itself as well as those of its employees who were innocent of having any part in the illegal work stoppage.[63]

Although on the surface the process of selective discipline may appear arbitrary since unequal penalties will often be exacted upon those of equal guilt, the procedure cannot be attacked as unjust for "under such circumstances, it is inevitable that some of the guilty 'get away with it' hopefully having learned a lesson from their 'lucky break' ".[64]

When the gravity of the employer's predicament is viewed in the perspective of the strong national policy endorsing mandatory arbitration and the companion no-strike clause as pillars of industrial stability, it can only be hoped that in the future more arbitrators will follow the lead of the *Ingersoll-Rand* decision and approve selective discharge as an appropriate solution to the wildcat strike.

III. Realities of Alternative Solutions

Some might argue that the company is adequately protected from an illegal strike by the right to bring an action for money damages under section 301 of the National Labor Relations Act.[65] In reality, damages seem an inadequate remedy since it is virtually impossible for the employer to accurately assess the damages caused by a wildcat strike. Furthermore, "the best interests of labor-management relations are not served by forcing an employer, after the strike, to

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[61] *Id.*

[62] *Id.* at 494.

[63] *Id.*

[64] *Id.*

[65] 29 U.S.C. § 185(a) (1964).

sue a union consisting of his employees."[66] Also, damages are a hollow reward to the company whose business is ruined due to customers lost as a result of debilitating work stoppages. Finally, damages are obtainable not against the individual employees who fomented the strike, but against the union which is often as blameless as the employer.

A contract provision that would itself establish the disciplinary penalties to be exacted on wildcat strikers, giving the employer the power to selectively implement them, might present an effective alternative to selective discharge. The clause might provide for a loss of seniority, pension, or vacation benefits. Possibly, the dispute which caused the walk-out should be considered no longer eligible for the grievance procedure, no matter how meritorious.

All contract proposals, however, no matter how attractive are subject to the political realities of the shop. It is hard to imagine that a union representative, dependent upon the bargaining unit for his continuance in office, would ever arrive at an agreement giving the company automatic authority to exact a penalty upon an employee without review. On the other hand, the company might also be reluctant to enter such an agreement where it would amount to a forfeiture of the right to discharge for cause, even in situations where discharge is wholly warranted. Thus, when the alternative solutions to the wildcat strike are subjected to close scrutiny, it becomes abundantly clear that the solutions offered by the judicial process and arbitration remain the most realistic.

IV. CONCLUSION

The desire on the part of both management and union alike is to avoid the wildcat strike, one of the most serious industrial offenses, and to resort to the grievance procedure as the sole means of dispute settling.[67] However, the employer has been faced with a situation where due to the decisions of courts and arbitrators, he can neither enjoin a stoppage and resume production, nor selectively discharge employees who participated in the walkout and thus stem off repeated incidents.[68] Confining themselves to a narrow literal

[66] Comment, *Injunctive Relief for Breach of a No-Strike Clause: Enforcement of the No-Strike Clause*, 18 WASH. & LEE L. REV. 329, 334 (1961). *See also* Comment, *supra* note 19, at 634.

[67] A great number of collective bargaining contracts contain grievance procedures which state that the grievance procedure shall be the sole means of settling a dispute or controversy arising under the contract.

[68] In fact, it is often the case that wildcat strikes are not isolated incidents. The

reading of the statutes,[69] the courts have abandoned their earlier concern for an orderly system of self-government based on a mutual compliance with contract requirements.[70] Under the elusive concepts of fairness and equality, which are virtually impossible to define, the arbitrators have constructed a system where the employer is often faced with the meaningless choice of discharging all of the strike participants, which would damage the company even further, or dismissing none of them.

Change is needed and should come, first in the form of legislative action which will clarify the meaning of section 4 of the Norris-LaGuardia Act in the light of section 301 and allow injunctions against wildcat strikes in either federal or state courts.[71] Arbitrators should accept the doctrine of selective discharge (or discipline) of wildcat strikers, once their participation is clearly established. Until these steps are taken the no-strike provision will not be the cornerstone of a rational and durable collective bargaining relationship, as was intended. Unless the employer is granted the power to respond meaningfully to an illegal work stoppage, the wildcat strike will remain the employer's dilemma.

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same companies are hit with them repeatedly, particularly where the unauthorized walkout has proved a highly successful method of unlawful coercion.

[69] *See* text accompanying notes 9 & 10 *supra.*

[70] *See* text accompanying note 5 *supra.*

[71] An alternative to outright repeal of Norris-LaGuardia as applied to section 301 suits would be legislation that would reverse *Avco* and prohibit removal under section 1441. However, such a solution would fly in the face of the need for a uniform national labor policy, and thus would not be advisable. *See* note 31 *supra.*