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THE LIMITS UPON A LABOR UNION'S "DUTY" TO CONTROL WILDCAT STRIKES

OVERVIEW

Industrial relations and collective bargaining have come a long way since the violent industrial and economic warfare of the pre-1940's period. But as labor unions and business organizations became more facially "professional" in their relationship, some union rank and file members have viewed this professionalism as being both restrictive and conservative and have chosen to resolve certain industrial grievances through the use of wildcat work stoppages.¹ This discordant practice has created strains in the collective bargaining relationship of the negotiating union and the employer, in legal actions to enforce the collective bargaining agreement, in the relationship between the union and its membership, and often in the employer-employee relationship, all of which are disruptive to the scope and purpose of collective bargaining under the federal labor laws.

Section 301² of the Labor Management Relations Act³ provides for enforcement of collective bargaining agreements in federal and state courts against either the breaching union or breaching employer.⁴ A section 301 action is a breach of contract action.⁵ As such, any analysis must be based upon the language of the agreement

¹ A wildcat strike may be defined as a work stoppage by a group of employees, generally spontaneous in character, which is in violation of an express or implied no-strike clause in the collective bargaining agreement and/or in violation of an authorization from orders, bylaws, or constitution of the union. As used in this article a wildcat strike action will consist of only those actions over economic matters, rather than wildcat actions resulting from unfair labor practices or sympathy actions. At the outset it should be noted that a general no-strike clause in a collective bargaining agreement does not cover a sympathy action. *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). Nor does a general no-strike clause in a collective bargaining agreement cover a wildcat dispute arising from an employer unfair labor practice. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). See also *Arlan's Dep't Store*, 133 N.L.R.B. 802 (1961). Since much of this article focuses upon the collective bargaining agreement the limitations noted above are significant.

² 29 U.S.C. § 185 (1976). See *infra* note 17-22 and accompanying text.

³ 29 U.S.C. §§ 141-97 (1976).

⁴ See H.R. REP. No. 245, 80th Cong., 1st Sess., at 46 (1947); S. REP. No. 105, 80th Cong., 1st Sess., at 15-16 (1947).

⁵ *Id.*

between the parties. Moreover, any action for a breach of the labor-management agreement must have a basis in the conduct of the parties. The union and the employer are responsible to each other for a breach attributable to their affirmative conduct.⁶ These simple statements of law and the determination of what conduct is to be held accountable to the parties take on added tiers of complexity when the issues involve not a union sponsored or sanctioned work stoppage but a wildcat breach of the collective bargaining agreement by a faction of disgruntled employee-members.

Aside from section 301 actions, there are several other possible methods available to a parent union and the employer in dealing with a wildcat stoppage and its participants.⁷ However, as will be discussed later, the possible methods of responding to a wildcat work stoppage are not always practical.⁸

Thus, the focus of this article is an examination of the extent to which, under section 301, a union or its membership can be held accountable for the actions of wildcat strikers. Additionally, the article addresses the legal and practical ramifications of a union's duty to the employer to control wildcat strikers so as to provide the employer with his contractually created expectations.

Part I provides a definitional background and examines the statutory construction and history of section 301. Part II examines the leading Supreme Court cases defining the limits of accountability of a union and its members for wildcat breaches of the collective bargaining agreement. Part III examines the contours and impact of the nonstatutory remedies available to an employer experiencing a wildcat work stoppage. Additionally, this section also discusses the remedies available to a parent union against its recalcitrant membership who have chosen to engage in a wildcat work stoppage. Part IV provides a summary synthesis of the relevant law with an aim toward discerning a workable approach to the wildcat work stoppage problem while providing protection to the collective bargaining agreement and the concept of union democracy.

I. HISTORICAL AND LEGISLATIVE FOUNDATIONS OF A SECTION 301 ACTION

Prior to the enactment of the National Labor Relations Act of

⁶ See *infra* notes 17-22 and accompanying text.

⁷ See *infra* notes 87-100 and accompanying text.

⁸ *Id.*

1935, as amended in 1947 by the Labor-Management Relations Act⁹ (hereinafter NLRA), labor unions and business organizations were engaged in industrial and economic warfare with resulting disruptions in the flow of interstate commerce. The battle lines were rather unbalanced, however, in that business organizations often had an added channel of relief through the legal system.¹⁰ This channel was primarily used rather heavily by business organizations with an aim toward crippling unionism and collective bargaining through the use of civil and criminal sanctions rather than to develop a mature, peaceful, and cooperative relationship.

The courts, representing prevailing social and economic views at the time, often held labor unions liable for damages occasioned by organizational, representational, and wildcat work stoppages under common law agency doctrines.¹¹ The application of common law agency doctrines was complicated through the innovative use of union disclaimers and exculpatory provisions in labor contracts, union constitutional provisions disclaiming accountability, and the use of "straw man" type shifts in accountability whereby the union would declare the instigators of the work stoppage (the straw men) as without authority to call the work stoppage.¹² These approaches arguably removed the union from the taint of accountability for the losses occasioned by the work stoppage.¹³ Nevertheless, the courts painted the issue of union accountability with a broad brush and continued not only to hold unions liable for damages occasioned by the work stoppage but individual union members as well.¹⁴

With the passage of the NLRA, a new era of labor-management relations was ushered in. Nevertheless, some of the old problems

⁹ See *supra* note 3 and accompanying text.

¹⁰ A complete historical development is beyond the scope of this article. There are numerous texts on labor history and labor law providing the reader with a thorough background. See, e.g., P. FONER, *HISTORY OF THE LABOR MANAGEMENT IN THE UNITED STATES*, 5 Volumes (1947-80). R. GORMAN, *BASIC TEXT ON LABOR LAW*, (1976); CCH, *LABOR LAW COURSE*, 24th ed. (1979).

¹¹ See generally, Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporations*, 51 *YALE L.J.* 40 (1941); Note, *Trade Union Suability*, 32 *VA. L. REV.* 394 (1946).

¹² See *supra* note 11.

¹³ See *supra* note 11.

¹⁴ See e.g., *Lawlor v. Lowewe*, 235 U.S. 522 (1915). This is the infamous *Danbury Hatters* case which Representative Case described as a "travesty . . . where individual members of a union were harried and their property attached to satisfy a judgement for action taken by (union) officers whom they did not control." Conference Report, H.R. REP. NO. 510, 80th Cong., 1st Sess. (1947).

still remained.¹⁵ Principal among these problems was the multifaceted question of the enforceability of collective bargaining agreements and the issues relating to the accountability problems for a breach of the agreement.¹⁶ A working framework of these issues began with the passage of the Taft-Hartley (Labor-Management Relations Act) amendments to the NLRA in 1947. Specifically, section 301(a) provided:

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.¹⁷

This section provided for the enforceability of collective bargaining agreements, however, it was sections 301(b) and (e)¹⁸ that provided part of the accountability framework by defining the heretofore unincorporated labor organization as a legal, and therefore sueable, entity. The sections also distinguished between union entity liability and the liability of the individual union members.¹⁹ Section 301(b) provided:

¹⁵ These problems basically were: (1) the inability in many states to sue a union as an unincorporated association; (2) the problems of service on the unincorporated association. Some states required service on every member of the union; (3) the inability and difficulty in reaching union funds in the settlement of judgments; And (4) the state laws patterned after federal labor law, particularly the anti-injunction legislation, precluding an employer from certain relief from wildcat breaches.

¹⁶ This is not meant to diminish the scope and importance of issues related to organizational and representational disputes and the problems related with unfair labor practices. However, these issues are beyond the scope of this article. See *supra* note 10.

¹⁷ 29 U.S.C. § 185(a) (1976).

¹⁸ 29 U.S.C. § 185(b) (1976); 29 U.S.C. 185(e) (1976).

¹⁹ The importance of this framework was underscored by President Truman: We shall have to find methods not only of peaceful negotiations of labor contract, but also of insuring industrial peace for the lifetime of such contracts. Contracts once made must be lived up to and should be changed only in the manner agreed upon by the parties. If we expect confidence in agreements made, there must be responsibility and integrity on both sides in carrying them out.

If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective

Any labor organization which represents employees in an industry affecting commerce as defined by this Act and any employer whose activities affect commerce as defined by this Act *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 judgement 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*.²⁰

Section 301(b) provided a statutory agency relationship and the sources to be used for any potential damage recovery. Section 301(e) defined this agency relationship in terms of ordinary principal-agent relationships.²¹ Section 301(e) provides:

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.²²

labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little incentive why an employer would desire to sign such a contract.

Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting commerce should be enforceable in the Federal Courts. Our amendment would provide for suits by the unions as legal entities and against unions as legal entities in the Federal Courts in disputes affecting commerce.

The amendment specifically provides that only the assets of the union can be attached to satisfy a money judgement; the property of the individual members of the organization would not be subject to any liability under such a judgement. Thus the members of the union would be secure all the advantages of limited liability without incorporation of the union.

S. REP. NO. 105, 80th Cong., 1st Sess. (1947). Moreover, this solved the *Danbury Hatters* situation. See *supra* note 14.

²⁰ 29 U.S.C. 185(b) (1976) (Emphasis supplied).

²¹ 29 U.S.C. 185(e) (1976).

²² 29 U.S.C. 185(e) (1976) provides union accountability for wildcat strikes in terms of legal agency principles. Senator Taft offered insight into the agency relationship determination.

If the wife of a man who is working at a plant receives a lot of telephone messages, very likely it cannot be proved that they came from the union. There is no case then. There must be legal proof of agency in the case of Unions as in the case of corporations

93 CONG. REC. 4022 (1947).

The statutory framework has been further defined by the Supreme Court in a series of cases which will be discussed later in the article.

Underlying the above discussion of the statutory language is the method of analysis used by the courts in the enforcement of section 301 actions. In the landmark decision of *Textile Workers v. Lincoln Mills*²³ the Court expressed the view that the policy of the NLRA was to foster industrial peace, redress perceived imbalance of power between labor unions and employers, and promote collective bargaining through making voluntary agreements enforceable by either party.²⁴ To give substance to these policies the process of arbitrating disagreements was specifically approved. The *Lincoln Mills* Court viewed an agreement to arbitrate as the *quid pro quo* for a promise not to strike.²⁵ Additionally, the Court envisioned the development of a federal common law regarding the enforcement of collective bargaining agreements.²⁶

These views of labor law policy governed the court in its landmark *Steelworkers Trilogy*²⁷ decisions in 1960. The *Steelworkers*

²³ 353 U.S. 448 (1957).

²⁴ *Id.*; See generally, *Vaca v. Sipes*, 386 U.S. 171 (1967); *Carey v. Westinghouse Electric Corp.*, 375 U.S. 216 (1964); *Brooks v. NLRB*, 348 U.S. 96 (1954); *Republic Steel v. NLRB*, 311 U.S. 7 (1940).

²⁵ 353 U.S. at 453-55.

²⁶ *Id.* at 456. Quoting from the *Lincoln Mills* opinion:

The question then is, what is the substantive law to be applied in suits under § 301(a)? We conclude that the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnished some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

Id. at 456-57 (citations omitted). See also, *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); see generally, Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301*, 66 YALE L.J. 167 (1956).

²⁷ *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Trilogy provided for the enforcement of arbitration awards²⁸ as well as defining the limits of judicial re-examination of an arbitrator's decision.²⁹ Additionally, the court defined the limits of the arbitrators authority and the role of the collective bargaining process and agreement.³⁰ Following the labor law policy enunciated in *Lincoln Mills*, the Court stated that arbitration is a matter of contract, as such, a party cannot be required to submit to arbitration any dispute which the party has not agreed to submit.³¹ As will be discussed later in the section on remedies, the broad views on labor law policy, particularly the creation of a federal common law regarding the enforcement of collective bargaining agreements, also led the Court to carve out a narrow exception to the Norris-LaGuardia Act's anti-injunction provision in cases involving a section 301 action encompassing a dispute subject to arbitration.³²

It would facially appear that section 301 should be given a reading which *actively* supports the policy of free collective bargaining and arbitration. To a large extent the Court has followed this practice. This policy, however, must also strike an appropriate balance between the policy enunciations of section 301 and the principles of contract and agency law incorporated into the section.

At this point it is useful to examine section 301 in relation to work stoppages occurring during the term of a collective bargaining agreement. First, a section 301 action is for breach of an *existing* labor contract.³³ Therefore, the initial question is whether there is an enforceable contract. If not, the issues derived from a work stoppage can run the full gamut of labor relations problems from organizational disputes to intraorganizational difficulties. In these disputes section 301 has no application.³⁴ If there

²⁸ See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

²⁹ See *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960).

³⁰ See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

³¹ See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

³² See *infra* notes 87-92 and accompanying text.

³³ See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); see also *Boston Printing Pressmans Union v. Potter Press*, 141 F. Supp. 553 (D. Mass. 1956), *aff'd*, 241 F.2d 787 (1st Cir. 1957), *cert. denied*, 355 U.S. 817 (1957).

³⁴ See *supra* notes 1 and 11. A section 301 action does apply if the dispute is grounded in a specific contract clause. A section 301 action applies to unfair

is a collective bargaining agreement, the language of the contract must be examined, the scope of obligation determined, and an analysis conducted of the obligation owed to the corresponding parties and its relationship to the action or inaction of the allegedly breaching party.³⁵

Most commonly, a section 301 action resulting from a work stoppage focuses upon the breach of either a duty to arbitrate clause or a no-strike clause. Although many contracts contain both types of provisions it is important to note that an implied no-strike clause can be derived from a work stoppage governed by a labor contract containing an applicable arbitration clause even in the absence of an express no-strike clause.³⁶

After *Lincoln Mills* the issue of the enforcement of collective bargaining agreements was largely settled in situations where the breach involved either a union sponsored action or an employer sponsored action. An interesting issue as to standing to bring a section 301 suit was addressed by the Court in *Smith v. Evening News Association*.³⁷ As stated above, *Lincoln Mills* recognized labor unions as having standing, as a legal entity and party to the agreement, to bring an action upon an employer's breach.³⁸ Conversely, *Lincoln Mills* recognized the employer's standing to bring an action upon a labor union's breach.³⁹ In *Evening News Association*, the issue centered upon whether an individual employee, acting in his own behalf, had standing to bring a section 301 action in response to an employer breach.⁴⁰ The Court held that individual employees have standing to bring actions as well as labor unions.⁴¹ The Court viewed the word "between" in section 301 as referring to "contracts" rather than "suits". Therefore, the statute did not exclude suits brought by individual employees.⁴² The Court also held that jurisdiction under section 301 is not destroyed if the

labor practice wildcat strikes *only* if such an action is specifically covered in the contract. *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290 (1977); *Mastro Plastics Corp., v. NLRB*, 350 U.S. 270 (1956).

³⁵ See *supra* note 33.

³⁶ See *Teamsters Local 174 v. Lucas Flour Co.* 369 U.S. 95 (1962).

³⁷ 371 U.S. 195 (1962).

³⁸ 353 U.S. 448 (1957).

³⁹ *Id.*

⁴⁰ 371 U.S. 195, 195 (1962).

⁴¹ *Id.* at 200. Although arguably not a direct party to the collective bargaining agreement, individual employees are brought in under separate contracts of employment whether the employee is a union member or not.

⁴² *Id.* at 198-99.

breach of contract under scrutiny also constitutes an unfair labor practice.⁴³ Moreover, a state or federal court is not preempted from exercising jurisdiction under the preemption doctrine⁴⁴ developed in the *San Diego Building Trades Council v. Garmon* line of cases.⁴⁵ Further, as a matter of labor law policy, the Court stated that "[section] 301 is not to be given a narrow reading."⁴⁶

In *Plumbers & Pipefitters v. Local 334*,⁴⁷ the Supreme Court held that section 301 provided jurisdiction to a local union in an intra-union suit against the International Union. The Court viewed the union constitution as a "contract between labor organizations" and therefore section 301 is applicable. In a related case, decided the same term, the Court also held that an employee need not exhaust internal union grievance procedures, unless the procedures provide complete employee relief, prior to the filing of a section 301 suit against an employer or union.⁴⁸

Assuming the existence of a collective bargaining agreement and an applicable contract clause, four additional questions are pertinent in a section 301 action. The answers to these questions are particularly important in discerning accountability and facilitating contract enforcement. (1) Who instigated and controlled the work stoppage? (2) What are the limits, if any, on the scope of contract obligations? (3) Who may an employer hold accountable for the losses suffered? (4) What are the remedies available to the parties of the contract? The issues spawned by these questions are discussed in the remainder of this article.

II. LABOR UNIONS, UNION MEMBERS, AND THE ISSUE OF ACCOUNTABILITY

This section will examine the issue of union accountability for

⁴³ *Id.* at 197.

⁴⁴ *Id.*

⁴⁵ 359 U.S. 236 (1959); *see also* *Grocery Drivers Union Local 848 v. Seven-Up Bottling Co. of Los Angeles* 359 U.S. 434 (1959); *DeVies v. Baumgartners Electric Construction Company*, 359 U.S. 498 (1959). The basis for requiring the state courts to yield primary jurisdiction over matters involved in the regulation of labor management relations which affect interstate commerce is to avoid interference, by the application of varied state laws, with the administration of a uniform labor policy.

⁴⁶ 371 U.S. at 199.

⁴⁷ 101 S.Ct. 2546 (1981).

⁴⁸ *Clayton v. International Union, United Auto., Aerospace, and Agricultural Implement Wkrs.*, 101 S.Ct. 2088 (1981).

unauthorized work stoppages⁴⁹ occurring during the term of the contract by focusing on three instructive cases: *Atkinson v. Sinclair Refining Company*⁵⁰; *Carbon Fuel Company v. United Mine Workers*⁵¹; and *Complete Auto Transit, Inc. v. Reis*.⁵² These cases establish and define the framework of accountability created by the passage of section 301 as it relates to work stoppages occurring during the term of the collective bargaining agreement.

A. *Atkinson v. Sinclair Refining Company*

In *Sinclair Refining Company*, unionized employees of a Chicago refinery struck over the docking of pay of three of their members. The governing labor agreement contained an arbitration clause and a no-strike clause. In a three count complaint, Sinclair Refining Company asked for damages based upon a breach of the no-strike clause, judgement against both the union and against twenty-four individual striking employees,⁵³ and injunctive relief.⁵⁴

In the United States District Court for the Northern District of Indiana, the union filed motions to dismiss arguing that all issues raised by Sinclair were referable or had been referred to arbitration. The union asked for a stay pending the arbitrator's decision. Additionally, the union requested the dismissal of the section 301 action against both the union and the individual members. The district court denied both the request for a stay pending arbitration and the motion to dismiss the section 301 action against the union.⁵⁵ The district court did, however, dismiss the section 301 action against the twenty-four individual members.⁵⁶ Sinclair appealed and the Seventh Circuit affirmed the refusal to dismiss the section 301 action against the union, but reversed the district court's dismissal of the section 301 action against the individual

⁴⁹ See *supra* note 1.

⁵⁰ 370 U.S. 238 (1962).

⁵¹ 444 U.S. 212 (1979).

⁵² 101 S.Ct. 1836 (1981).

⁵³ 370 U.S. at 239-41.

⁵⁴ Injunctive relief was denied in *Sinclair Refining Company v. Atkinson*, 370 U.S. 195 (1961), a companion case to the one discussed. This aspect was overruled in the *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), and modified further in *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976). See also *infra* notes 87-92 and accompanying text.

⁵⁵ 370 U.S. at 240.

⁵⁶ *Id.*

members, thus viewing individual liability as permissible.⁵⁷

The union appealed, and the Supreme Court granted certiorari. The Court took this opportunity to address the components of, and accountability limits within, a section 301 action. The Court, drawing heavily from *Lincoln Mills*, held that in determining whether a section 301 action exists, a court must examine the existing labor agreement.⁵⁸ Specifically, in determining whether an issue developing into a breach of contract is a proper subject of arbitration, the specific language of the clause and the remaining contract language must be examined. A finding that the issue is required to be submitted to arbitration does not preclude the filing of a section 301 action.⁵⁹ The Court viewed the issues raised in *Sinclair* as non-arbitrable and viewed Sinclair Refining's allegation of a violation of the no-strike clause sufficient to maintain a section 301 action against the union.⁶⁰

More importantly, at least for the purpose of this article, the court addressed the issue of accountability to an employer for wildcat work stoppages under a section 301 action. The *Sinclair* Court held that the count asking damages against the individual members should be dismissed.⁶¹ After analyzing the statutory construction and history of section 301 the Court stated:

Consequently, in discharging the duty Congress imposed on us to formulate the federal law to govern § 301(a) suits, we are strongly guided by and do not give a niggardly reading to, § 301 (b). * * * We have already said in another context that § 301 (b) at least evidences "a congressional intention that the union as an entity, like a corporation, should in the absence of an agreement be the sole source of recovery for injury inflicted by it." This policy cannot be evaded or truncated by the simple device of suing union agents or members, whether in contract or tort, or both, in a separate action for damages for violation of a collective bargaining contract for which damages the union itself is liable. The national labor policy requires and we hold that when a union is liable for damages for violation of the no-strike clause, its officers and members are not liable for these damages. Here, Count II, as we have said, necessarily alleges union liability

⁵⁷ *Id.* at 241.

⁵⁸ *Id.* at 241-42.

⁵⁹ *Id.* at 244-45.

⁶⁰ *Id.*

⁶¹ *Id.* at 247.

but prays for damages from union agents. Where the union has inflicted the injury it alone must pay.⁶²

Thus, holding individual members liable for a union authorized breach is effectively precluded by *Sinclair*.

The foundation was laid in a footnote to the *Sinclair* opinion as to the Court's willingness to address two unanswered questions of possible union and union member liability. The footnote read:

In reaching this conclusion, we have not ignored the argument that Count II was drafted in order to anticipate the possible union defense under Count I that the work stoppage was unauthorized by the union, and was a wildcat strike led by the 24 individual defendants acting not in behalf of the union but in their personal and nonunion capacity. The language of Count II contradicts the argument, however, and we therefore do not reach the question of whether the count would state a proper § 301(a) claim if it charged unauthorized, individual action.⁶³

The question of union liability for an unauthorized work stoppage was addressed by the Court in *Carbon Fuel*,⁶⁴ and the question of individual liability for unauthorized work stoppages was treated in *Complete Auto Transit*.⁶⁵

B. *Carbon Fuel Company v. United Mine Workers*

The issue of union accountability for unauthorized work stoppages left unresolved in *Sinclair*, spawned varied responses in the lower courts. Three general theories arose to ascertain union liability for the damages caused by such unauthorized work stoppages.⁶⁶ The first theory has been broadly titled the "all reasonable means" approach and is based upon a union's implied or express promise not to strike. As such, it views the union as having a continuing duty to make every effort to prevent and stop any union member from participating in any unauthorized work stoppage.⁶⁷ A second theory, loosely titled the "mass action"

⁶² *Id.* at 248-49 (citations omitted).

⁶³ *Id.* at 249 n.7.

⁶⁴ See *infra* notes 66-76 and accompanying text.

⁶⁵ See *infra* notes 80-86 and accompanying text.

⁶⁶ See generally Whitman, *Wildcat Strikes: The Unions' Narrowing Path to Rectitude?*, 50 IND. L.J. 472 (1975); Note, *Wildcat Strikes—Carbon Fuel Company v. UMWA*, 81 W. VA. L. REV. 805 (1978).

⁶⁷ For a detailed exposition of this position see Petitioner's Brief, Carbon

approach, posits that when members are acting in concert, such action implies leadership. Therefore, liability may be placed upon the union entity if complicity can be shown on the part of its "official" leadership.⁶⁸ Note that complicity, although poorly defined in the lower courts, often comes very close to the definition of agency as used in section 301(e). These two theories were rejected by the Supreme Court in *Carbon Fuel* in favor of a third theory—that of common law agency as expressed in sections 301(b) and (e).⁶⁹

In *Carbon Fuel v. United Mine Workers*⁷⁰ the local unions of the UMWA were engaged in 48 wildcat strikes occurring during the years 1969 through 1973, allegedly in violation of the terms of two collective bargaining agreements between the UMWA and Carbon Fuel, under the aegis of the National Bituminous Coal Wage Agreements of 1968 and 1971. A section 301 action was filed in the District Court for the Southern District of West Virginia. The district court, adopting an "all reasonable means" theory, found for Carbon Fuel. On appeal, the Fourth Circuit, while affirming in part the judgements against several individual local unions, vacated the judgements against the UMWA (International) adopting an agency approach to union liability. Carbon Fuel appealed to the Supreme Court relying upon the "all reasonable means" theory of union liability.⁷¹

The Supreme Court affirmed, rejecting the "all reasonable means" theory of liability, and expressly adopted the Fourth Circuit's enunciation of the agency theory.⁷² Quoting extensively from the Fourth Circuit's opinion, the Court wrote:

Fuel Company v. UMWA, 444 U.S. 212 (1979). *See also*, Bituminous Coal Operators v. UMWA, 585 F.2d 586 (3d Cir. 1978); Republic Steel Corp. v. UMWA, 570 F.2d 467 (3d Cir. 1978); United States Steel v. UMWA, 534 F.2d 1063 (3d Cir. 1976); Eazor Express, Inc. v. Teamsters, 520 F.2d 951 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1975); Wagner Electric Corp. v. Int'l Union of Elec., Radio and Mach. Wrks., Local 1104, 496 F.2d 954 (8th Cir. 1974).

⁶⁸ *See* Wagner Electric Corp. v. Int'l Union of Elec., Radio and Mach. Wrks., Local 1104, 496 F.2d 954 (8th Cir. 1974); Vulcan Materials Co. v. United Steelworkers of America, 430 F.2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971). *See also* Fishman and Brown, *Union Responsibility for Wildcat Strikes*, 21 WAYNE L. REV. 1017 (1975); Fairweather, *Employer Actions and Options in Response to Strikes in Breach of Contract*, N.Y.U. 18th Ann. Conf. on Labor 129 (1966); *See also supra* note 67.

⁶⁹ *See supra* notes 21-22 and accompanying text.

⁷⁰ 444 U.S. 212 (1979).

⁷¹ *Id.* at 213-15.

⁷² *Id.* at 216-17.

The Court of Appeals stated: 'There was no evidence presented in the district court that either the District or International Union instigated, supported, ratified, or encouraged in any of the work stoppages. . . .' Under Article XVI, § 1, of the UMWA constitution, the Local Unions lacked authority to strike without authorization from UMWA. Moreover, UMWA had repeatedly expressed its opposition to wildcat strikes. Petitioner thus failed to prove agency as required by §§ 301(b) and (e), and we therefore agree with the Court of Appeals that 'under these circumstances it was error for the [District Court] to deny the motions of these defendants for directed verdicts.'⁷³

Carbon Fuel did raise an interesting secondary argument, the contours of which the Court viewed approvingly. Carbon Fuel argued that:

[E]ven if the no-strike obligation to be implied from the promise to resolve disputes by arbitration did not carry with it the further step of implying an obligation on UMWA and District 17 to use all reasonable efforts to end an unauthorized strike, that obligation should nevertheless be implied from the contract provision obligating UMWA and District 17 to 'maintain the integrity of the contract . . .'⁷⁴

The Court reviewed the past bargaining history and existing contractual provisions and found that, while the argument itself had merit, there was nothing in the contract language to expressly hold the UMWA accountable for the damages incurred by Carbon Fuel as a result of the wildcat strike.⁷⁵ On the contrary, the Court found such a reading of the labor agreement diametrically opposed to the bargaining history.

The inescapable conclusion to be drawn from their bargaining history is that, whatever the integrity clause may mean, the parties purposely decided not to impose on the union an obligation to take disciplinary or other actions to get unauthorized strikers back to work. It would do violence to the bargaining process and the national policy furthering free collective bargaining to impose by judicial implication a duty upon UMWA and District 17 that the parties in arms-length bargaining first included and then purposely deleted.⁷⁶

⁷³ *Id.* at 218 (Brackets are part of the quote, citations are omitted).

⁷⁴ *Id.* See also *supra* Brief of Petitioner, note 67.

⁷⁵ *Id.* at 218-22.

⁷⁶ *Id.* at 221.

Thus, in addition to the 301(e) agency method of securing union accountability, the Court left to the bargaining parties the possibility of creating union accountability for wildcat work stoppages through the use of the contractual relationship.

C. *Complete Auto Transit v. Reis*

The remaining question from the *Sinclair* decision as to individual liability for wildcat work stoppages in situations where the union is not held accountable under the agency principles in section 301(b) and (e) or through an express contract provision was addressed by the Court in *Complete Auto Transit v. Reis*.⁷⁷

In June of 1976 the Teamsters Union and three Michigan trucking firms were engaged in collective bargaining negotiations for the purpose of contract renewal. Dissident member employees of the trucking firms staged a wildcat strike holding the view that their union was not properly representing their local interests in the current negotiations. The then existing and applicable labor agreement contained an express no-strike clause and subjected all disputes to a binding grievance and arbitration procedure. Complete Auto Transit filed suit under section 301 in the District Court for the Eastern District of Michigan for damages occasioned by the unlawful work stoppage. Complete Auto did not seek damages from the Teamsters Union but directed their action solely against the wildcat striking employees in their individual capacities. The district court dismissed the complaint and held that an employer may not sue his employees for relief for a breach of a collective bargaining agreement whether or not the union may also be liable. The Sixth Circuit affirmed again holding that section 301 does not create an action for damages against individual union members. Complete Auto appealed the ruling.⁷⁸

The Supreme Court affirmed in a seven to two decision written by Justice Brennan. The Court extensively reviewed the legislative history of section 301 and related statutes and observed:

Section 301 by its terms forbids a money judgement against a union from being enforced against individual union members. It is a mistake to suppose that Congress thereby suggested by negative implication that employees *should* be held liable where their union is not liable for the strike. Although lengthy and

⁷⁷ 101 S.Ct. 1836 (1981).

⁷⁸ *Id.* at 1838.

complex, the legislative history of § 301 clearly reveals Congress' intent to shield individual employees from liability for damages arising from their breach of the no-strike clause of a collective-bargaining agreement, whether or not the union participated in or authorized the illegality. Indeed Congress intended this result even though it might leave the employer unable to recover for his losses.⁷⁹

To support this view, the Court examined a forerunner of section 301 and found persuasive two excerpts from the legislative history. The Court quoted Senator Taft:

If the union violates its collective bargaining agreement *it* is responsible but no individual member is responsible, and he can in no way be deprived of his rights. But if the union tries to keep its contract, and in violation of its undertaking, some of its members proceed to strike, then the employer may fire those members and they do not have the protection of the Wagner Act.⁸⁰

And quoting the House discussion of the bill the Court found Representative Case's remarks persuasive:

Individual members of a union are not made liable for any money judgement, I might point out, but only the union as an entity. If employees strike in violation of their agreement the *only* individual penalty that can be employed is the *forfeiture* of their right to employment under that contract which is cured when the employer reemploys them.⁸¹

Upon further examination of the legislative history, the Court found probative a congressional rejection of a provision imposing "liability against individuals for unlawful concerted activity."⁸²

Accordingly, in affirming the Sixth Circuit, the Court stated:

Thus, while § 301(b) explicitly addresses only union authorized violations of a collective bargaining agreement, the 'penumbra' of § 301(b), as informed by its legislative history, establishes that Congress meant to exclude individual strikers from damages liability, whether or not they were authorized by their union to strike. The Legislative debates and the process of legislative

⁷⁹ *Id.* at 1840 (citations omitted).

⁸⁰ *Id.* at 1841. The provision referred to above is a forerunner of § 301. It was commonly referred to as § 10 of the Case Bill, H.R. REP. NO. 4908, 79th cong. 2d Sess. (1946). See 92 CONG. REC. at 765 and 5705.

⁸¹ *Id.* at 1842, citing 92 CONG. REC. 5930-31.

⁸² *Id.* at 1843.

amendment demonstrate that Congress deliberately chose to allow a damages remedy for breach of the no strike provision of a collective bargaining agreement only against *unions*, not *individuals*, and, as to unions, only when they participated in or authorized the strike. Congress itself balanced the competing advantages and disadvantages inherent in the possible remedies to combat wildcat strikes, and we are 'strongly guided by' its choice.⁸³

The Court also viewed as unsupportable Complete Auto's argument that such a cause of action was indispensable to preserve the integrity of the collective bargaining agreement.⁸⁴ Justice Powell, concurring, also expressed concern over the lack of practical remedies available against wildcat strikers but felt guided by the congressional choice.⁸⁵ Chief Justice Burger and Justice Rehnquist dissented arguing a strict constructionist view of section 301, maintaining that since individual liability was not specifically excluded such a remedy is legislatively permissible.⁸⁶

D. *Summary*

Summarizing thus far, it seems clear that unions have no liability and therefore no accountability for the wildcat work stoppages, unless the union can be brought in under section 301(b) and (e), agency principles, or an express contract provision. Further, individual wildcat strikers are insulated from an employer damages action for breach of contract under section 301, thereby leaving employers with only the more traditional remedies against recalcitrant employees. The question of remedies available to employers and the unions against the wildcat strikers is discussed in the following sections.

III. REMEDIES AVAILABLE TO CONTROL WILDCAT STRIKERS

When faced with a wildcat strike situation both an employer and a union have an array of remedies available to attempt to defuse the wildcat situation or serve as an example to the present employees to prevent future strikes. The remedies are usually used in conjunction with other actions and chosen with an aim toward serving the interests of the proponent union or employer.

⁸³ *Id.* at 1844-45 (citations and footnotes omitted).

⁸⁴ *Id.* at 1845 n.18.

⁸⁵ *Id.* at 1845. (Powell, J., concurring).

⁸⁶ *Id.* at 1849. (Burger, C.J., dissenting).

The interests of the employer are the timely resumption of production and the preservation of profits. The union's interests can be thought of in terms of actions or inactions which best serve the unions internal organizational integrity and labor unity.

A. *Employer Remedies*

When faced with a wildcat work stoppage an employer has three general remedies available: (1) injunctive relief; (2) discipline or discharge; and, (3) a section 301 damage action. The section 301 action has been discussed in the preceding sections of this article. This section will examine the employer injunctive and discipline options in dealing with a wildcat work stoppage.

In *Sinclair Refining Company v. Atkinson*⁸⁷ the Supreme Court held that injunctive relief was made unavailable to the employer in response to a wildcat work stoppage by section four of the Norris-LaGuardia Act of 1931.⁸⁸ The Supreme Court altered this view, overruling *Sinclair Refining* in this regard, in *Boys Markets, Inc. v. Retail Clerks Union Local 770*.⁸⁹ The *Boys Market* decision created a narrow exception to Norris-LaGuardia's prohibition against the use of injunctions to defuse labor strike actions. This narrow exception, adopted in the *Boys Markets* decision, is as follows:

A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction is appropriate despite the Norris-LaGuardia act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity . . . and whether the employer will suffer more from the denial of the injunction than will the union from its issuance.⁹⁰

Thus, *Boys Markets* provided employers with a judicial remedy

⁸⁷ 370 U.S. 195 (1962).

⁸⁸ 29 U.S.C. § 104 (1976).

⁸⁹ 398 U.S. 235 (1976).

⁹⁰ *Id.* at 254, quoting *Sinclair Refining Co. v. Atkinson*, 370 U.S. at 228 (Brennan, J., dissenting).

that could be invoked whenever a strike arose in the face of a mandatory contractual grievance-arbitration procedure.⁹¹ Note, however, that the *Boys Markets* remedy does not apply, absent an express contract provision, to situations where the strike is a sympathy action, or to situations involving an unfair labor practice allegation.⁹²

Normally, if the wildcat dispute is subject to binding grievance-arbitration procedures and a *Boys Markets* injunction is available, this relief serves the employers interests so that further section 301 relief is not pursued. First, it restores production quickly. Second, the employer can then selectively discipline recalcitrant employees in response to the parameters determined by the sensitivity of the situation. Of course the above assumes that the labor-management relationship has not deteriorated to the point where the strikers are militantly opposed to any and all actions on the part of the employer and implementation by the courts. And third, the union is unlikely to fight the injunction in court or aid and counsel the wildcat strikers for fear of ratifying the strike action and thereby subjecting the union to a full section 301 damage action.

An employer always has the option of disciplining or discharging the wildcat strikers as such activity constitutes unprotected concerted actions by the employees and is thereby not protected by the NLRA.⁹³ This may not be an advisable option, as it may aggravate an already existing tense and militant situation rather than serving as an example or a deterrent to other employees.⁹⁴ Additionally, such discipline may polarize a work force causing future discipline problems, production delays, employee soldiering and sabotage, and future employee personnel selection problems. Other problems are equally acute such as tying up the contractual grievance and arbitration procedures with its subsequent costs in money, time, and personnel, as well as possible outside

⁹¹ *Id.*

⁹² *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). *See also supra* note 1.

⁹³ *See NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939); *American News Co.*, 55 N.L.R.B. No. 1302 (1944); *NLRB v. Kaiser Aluminum & Chem. Corp.*, 217 F.2d 366 (9th Cir. 1954); *Harnischfeger Corp. v. NLRB*, 207 F.2d 575 (7th Cir. 1953).

⁹⁴ *See generally Shearer, Legal Remedies and Practical Considerations in Dealing With A Wildcat Strike*, 22 *DRAKE L. REV.* 46 (1972); Comment, *Parent Union Liability for Strikes in Breach of Contract*, 67 *CALIF. L. REV.* 1028 (1979); *see also supra* note 68.

court actions alleging NLRA violations or tort damages.

As such, any decision on the part of an employer as to the scope of his disciplinary reaction to a wildcat strike must be based on a reasoned approach assessing the gravity and sensitivity of the then existing labor-management relationship.

B. *Union Remedies*

It should be recognized again that a wildcat strike is often not in the best interests of the union and in fact is often detrimental for the union as well as the employer. As such, the union often is, at least morally, obligated to take some action to bring the dispute to a conclusion.

Unions have the power to discipline their members for engaging in wildcat work stoppages provided that there is no prohibition of such discipline in the Union's constitution and bylaws. This discipline may take the form of expulsion, suspension and fines.⁹⁵ This disciplinary power is subject to the legal restrictions of union membership, the NLRA protections of section 7 rights, and the Labor-Management Reporting and Disclosure Act's (hereinafter LMRDA) procedural protections.⁹⁶ The restriction of full membership is rather obvious as only those employees who have agreed to subscribe to union discipline rules can be disciplined under the existing federal labor law. The unfair practices delineated in NLRA section 8(b) provide limits upon a union's conduct in disciplining its membership. Additionally, LMRDA sections 101(a)(1),⁹⁷ 101(a)(2),⁹⁸ and 101(a)(4)⁹⁹ allow a union to enforce reasonable rules of conduct but also allow a disciplined member to sue the union for any allegedly improper treatment.¹⁰⁰

In addition to the legal restrictions upon a union's discipline powers in relation to wildcat strikers there are also practical restrictions. First, as in *Complete Auto Transit*, some wildcat strikes are frequently against the incumbent union leadership as well as the employer. This twist often makes disciplinary actions on the part of the union viewed as a political move to stifle opposi-

⁹⁵ See generally Note, *Into the Mire of Uncertainty: Union Disciplinary Fines and NLRA Section 8(b)(1)(A)*, 84 W. VA. L. REV. 411 (1982).

⁹⁶ 29 U.S.C. § 401 (1976).

⁹⁷ 29 U.S.C. § 411(a)(1) (1976).

⁹⁸ 29 U.S. § 411(a)(2) (1976).

⁹⁹ 29 U.S. § 411(a)(4) (1976).

¹⁰⁰ See *supra* note 95.

tion. Second, disciplining wildcat union members will almost always be viewed as the union siding with the employer, thereby spawning dissension and factionalism in the rank and file members. This may have the effect of creating opposition to existing union leadership where none had existed before. And finally, since a union is not required to deter wildcat strikes under the rationale in *Carbon Fuel*, there is nothing to compel a union to discipline its wildcatting members.

Further, there is no "profit" in disciplining the union membership. It is not in the interests of internal union integrity or unity for a union to enforce discipline on its membership for actions perceived as necessary and correct in the eyes of the rank and file.

III. DEVELOPING A UNION DUTY TO CONTROL WILDCAT STRIKERS

It seems clear that Congress chose not to allow employers a remedy against the individual wildcat strikers or the nonparticipating or non-authorizing union. *Carbon Fuel*, discussed earlier, specifically removes any "duty" upon a union to mitigate wildcat strike damage absent a specific contract clause. *Complete Auto Transit* exempts individual wildcat strikers from individual liability. Those previously discussed statutes and cases set up the parameters of an employer's wildcat strike relief.

As discussed previously the legal limits of a union's "duty" to control the wildcat strikers is narrowly drawn. Thus, an employer must rely upon injunctive remedies and internal discipline and discharge which, as discussed earlier, may not serve the interests and needs of the employer. Further, a union may well be disinclined to discipline its membership as these actions may not serve the union's needs and interests. It seems apparent, therefore, that an employer is without an effective remedy to counter wildcat work stoppages under existing federal labor law.

There are two possible methods of overcoming this lack of an effective remedy and simultaneously imposing a duty upon the union to control its recalcitrant members. The first approach would be through legislative intervention, amending section 301 to impose liability for wildcat work stoppages on unions and individual members. The second, and more viable approach, would be through an express clause in the collective bargaining agreement specifically requiring the union to indemnify the employer for its losses and/or control wildcat strikers through the use of internal union

discipline. The remainder of this article will discuss these two alternatives.

Amending section 301 to impose liability on individual wildcat strikers would, in effect, resurrect the spectre of the Danbury Hatters travesty¹⁰¹ along with a plethora of problems stemming from the institution of individual actions. These might include service, joinder and jurisdiction problems, and also problems with defenses, including arguments of National Labor Relations Board deferral, accusations of discrimination and protected concerted activity, and arguments that the local courts lack the necessary labor law expertise. When added to the common problems of civil jury trials, this alternative may create a dismal swamp for overworked trial courts.

In addition to the judicial economy argument, actions against individual union members may be too powerful a weapon to place in the hands of an employer already possessing extensive economic and political power. Such a power struggle, fought both inside and outside the courts, is likely to be no contest. The result would be either to polarize the respective positions of the parties or lead to abuse of a submissive and beaten work force. Either result is inconsistent with industrial peace and labor democracy, and fails to serve the public policies involved.

Amending section 301 to require vicarious liability of unions for wildcat actions can also have disruptive effects on industrial peace and union democracy. First, such liability would be imposed from the outside thereby having the tendency to polarize union positions. This polarization might cause a union to authorize more strikes and render the negotiation of a no strike clause more difficult. Also, a union might adopt the strategy that it is going to be held liable regardless, so it is best to make the greatest political gains out of the situation. Such an amendment, therefore, would probably lead to industrial uncertainty.

More importantly, however, such legislatively imposed vicarious liability virtually destroys any concept of union democracy and thereby destroys the union concept itself. If a wildcat strike by a minority of employee-members binds the entire union then rule by the majority is replaced by rule by the minority. This is obviously not conducive to industrial peace

¹⁰¹ See *supra* note 14 and accompanying text.

and it tends to breed industrial uncertainty in the workplace and in the flow of interstate commerce.

This is not to say that unions, because of their democratic structure, should be immune from damages occasioned by wildcat work stoppages. Imposing liability from the outside, however, is too broad and wrought with danger. A better approach is that which is enunciated in section 301(b) and (e)'s statement of agency relationship, an approach similar to that applied in determining liability of the industrial counterpart and, more importantly, an internal oriented approach.

A second internal approach is through the negotiation of an express clause in the collective bargaining agreement making the union liable for wildcat strike damages. The idea of such a clause was viewed approvingly in the *Carbon Fuel* case. Such a clause serves the interests of industrial peace and union democracy by being voluntarily created and agreed upon by the parties to the collective bargaining agreement.

Negotiation of such a clause, however, could prove difficult for a variety of reasons. First, since it is akin to the standard no-strike clause it is not a mandatory bargaining item.¹⁰² As such, taking the clause to impasse is an unfair labor practice.¹⁰³ Second, the scope of the clause could be drafted too broadly thereby encompassing the relinquishment of certain employee-members' protected rights under NLRA section 7 with respect to concerted activity. Such a clause may constitute an unfair labor practice under the NLRA.¹⁰⁴ And third, the clause has no direct *quid pro quo* thereby rendering its negotiation difficult. This difficulty is compounded by the political and economic unattractiveness of the clause to the union for the reasons previously discussed in the remedies section. Moreover, as the sample clause below will indicate certain aspects of such a clause necessary to make it palatable to the union may make it unattractive to the employer.

The collective bargaining agreement is the key to the wildcat strike problem. And a contract clause is the best approach to the problem of a union's duty to control wildcat strikers. Such a clause might serve several functions in the labor-management relationship. First, the clause could contain a subsection which requires

¹⁰² NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

¹⁰³ *Id.*

¹⁰⁴ *Id.* See also *supra* note 1.

the union to take specific actions in response to a wildcat breach. Second, in addition to specific responses by the union to a wildcat dispute the clause could contain a provision requiring the union and the employer to maintain the integrity of the contract. Such responses emanating from this clause would be governed by the development of an industrial common law. Third, the clause could contain the equivalent to a liquidated damages clause making whole the employer for damages occasioned by the wildcat strike and possibly making the union whole for damages and lost wages occasioned by an unlawful employer lockout or shutdown. Fourth, the clause could provide immunity for wildcat strikers from employer imposed discharge and discipline thereby making union reconciliation efforts easier. Note that this clause would not preclude union discipline of the striking employees. However, note also that the collective bargaining contract can not mandate *union* imposed discipline without triggering a possible unfair practice charge.¹⁰⁵ Finally, such a clause could limit an employer's use of the injunctive remedy and everpresent contempt of court fines for striker non-compliance. This ritual of contempt fines is often an obstacle to strike settlement and in practice the fines are often waived to secure the settlement.

Note that the above discussion is not meant to suggest the creation of a "boilerplate" clause favoring either management or labor union. There are aspects of the clause that both sides will find difficult to accept. But the purpose of the discussion is to demonstrate an alternative and preemptive solution to the wildcat strike problem. With the same purpose in mind, the following sample clause is offered for illustrative purposes:

(a) During the term of this agreement, it is understood that the Union will not cause or authorize its membership to strike, sitdown, slowdown, or engage in any work stoppage or limitation upon production. Furthermore, it is understood that no Union agent shall authorize, encourage, or assist in any such strike or stoppage of any plant or premises of the Company, nor will it participate in, counsel or induce any strike action. Such strike action as used in this provision specifically includes, but is not limited to, economic strikes, unfair labor practice strikes, and sympathy strikes.¹⁰⁶

¹⁰⁵ Allen Bradley Co. v. NLRB, 286 F.2d 442 (7th Cir. 1961).

¹⁰⁶ This is a basic no strike clause, some form of which is found in most col-

(b) During the term of this agreement, it is understood that the Union and the Company hereto affirm their intention to maintain the integrity of the contract and to exercise their best efforts to prevent stoppages of work by strike, lockout, or permanent or partial shutdown pending adjustment or adjudication of the disputes and grievances in the manner provided in this agreement.¹⁰⁷

(c) If a work stoppage occurs during the term of this agreement, the Union's best efforts to stop said action shall, at a minimum, include:

(1) Notify all employees immediately in the event of a strike that the strike is unauthorized and in violation of the agreement;

(2) Publicly announce through the local newspaper and local radio that the strike is unauthorized and in violation of the agreement;

(3) State in writing to the employees that the strike is in violation of the agreement;

(4) Inform employees who participate in the strike that they may be subject to union discipline unless they immediately cease such unauthorized actions;

(5) Make every reasonable effort to communicate, on a continuing basis, with the membership to induce employees to cease such unauthorized actions.¹⁰⁸

(d)(1) Subject to Union compliance with parts (b) and (c), the Union hereby agrees to make whole the company for ____% of the actual provable losses, up to an amount not to exceed \$ _____, incurred as a direct result of an employee instigated action resulting in an unauthorized work stoppage.

lective bargaining agreements. Unfair labor practice strikes and sympathy strikes have been expressly added to get around the problems generated by the *Buffalo Forge* and *Mastro Plastics* opinions. See *supra* note 1. A form of the basic no lockout clause is contained in part (b).

¹⁰⁷ This section is similar in form to the "maintain the integrity of the Contract" clause as used in *Carbon Fuel*. By itself, it may impose a duty upon the union to control wildcat strikers. The following clause clarifies this provision by defining best efforts and thereby contractually requires certain actions on the part of the union. On the union side, if the clause relating to shutdowns, lockouts, and partial or permanent closing, is coupled with a strong subcontracting clause this may make this aspect attractive to the union and provide some worker economic protection. The development of this clause and related aspects could be instrumental in providing the "*quid pro quo*." Note that the subject of partial or permanent closings is not a mandatory bargaining item. See *First Nat'l Maintenance Corp. v. NLRB*, 101 S.Ct. 2573 (1981).

¹⁰⁸ This is not meant to be an exhaustive list but can and should be adjusted to the nuances of a particular labor-management relationship.

(2) The Company hereby agrees to make whole the Union and all affected employees for ____% of the wages lost to all employees ready and able to report for work, up to an amount not to exceed \$ ____, incurred as a direct result of a Company instigated lockout, or permanent or partial shutdown.

(3) Such determination as to actual losses and causality shall be made by a panel of three arbitrators; one selected by the Company, one selected by the Union, and the third selected pursuant to the arbitrator selection procedures contained in this agreement. Such a determination by the panel as to actual losses suffered shall be final and binding upon the parties.¹⁰⁹

(e) Subject to Union compliance with parts (b) and (c), the Company hereby agrees not to take any disciplinary action against any employee who has engaged in an unauthorized work stoppage. This provision does not limit the ability of a Union to discipline its membership for un-authorized strike action.¹¹⁰

(f) Subject to Union compliance with parts (b) and (c), the Company hereby agrees not to resort to the use of an injunction to stop the unauthorized work stoppage unless said request for injunctive relief is agreed to by the Union. Further, subject to compliance with part (d), the Union and the Company agree to waive any and all legal actions arising out of a strike, lockout, or permanent or partial shutdown.¹¹¹

There is no easy solution to the problem of wildcat work stoppages. The above discussion centers upon the collective bargaining process as the key to any solution. However, the collective bargaining process only functions as well as the parties allow it to function. Thus, the *whole* labor-management relationship will dictate whether or not a company will be able to minimize work

¹⁰⁹ This section is most controversial for a variety of reasons discussed throughout this article. Such a provision, however, *demands* a peaceful and cooperative labor-management relationship in order to function properly. Additionally, it may be advantageous to impose time limits on the above discussed procedure for arbitration. *See also infra* note 112.

¹¹⁰ This section is designed to allow the union added leverage necessary to get the striking workers back on the job quickly and settle the dispute through the contractual grievance procedures after the rank and file have made their "point". Further, such a clause may well prove attractive to a labor union for bargaining purposes. *See also infra* note 112.

¹¹¹ This section is also controversial for similar reasons as discussed in note 109. However, it does allow greater flexibility and leverage in bringing the wildcat strikers back to work and may be attractive for bargaining purposes. *See also infra* note 112.

stoppages. If the relationship is plagued with mistrust and unscrupulous behavior then the contract has less value as a predictor of future behavior than does the contract created by a progressive labor-management relationship. The above recommendations can be thought of as band-aid measures. If work stoppages stem from the hostile nature of the labor-management relationship, taking these measures is akin to putting a band-aid on a large, deep gash. It will simply not solve the problem. However, if the nature of the labor-management relationship is progressive and cooperative, the clause in the collective bargaining agreement can go a long way in preventing frequent work stoppages and in removing production uncertainty from the workplace.¹¹²

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¹¹² The clause recommended above is obviously subject to criticism. First, it could be termed "naive" in that very few unions or business organizations would discuss such a provision, let alone agree to one. The response to this is that given the framework in which labor-management relations take place, what else is there. A second observation goes more to the heart of the matter. Such a clause would only be possible in a favorable labor-management environment, the environment in which it is needed least. Perhaps such a clause will, if other aspects of the labor-management relationship are generally positive, achieve the goals of the NLRA.

