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Wildcat Strikes: The Unions' Narrowing Path to Rectitude?

M. JAY WHITMAN*

INTRODUCTION

The Taft-Hartley Act¹ has been in effect since 1947. During the intervening 28 years companies have had the federal right, under section 301 of the act,² to sue labor unions for damages because of wildcat strikes. Unfortunately, the experience has taught those involved a plain lesson. Such suits are always hard cases, but they make worse law.

In recent months, the federal courts have provided some notably fine examples of this lesson. The Eighth Circuit, in *Wagner Electric Corp. v. Local 1104, IUE*,³ takes a free-wheeling approach which, however much the particular result is justified, threatens to destroy the delicate balance of management, union, and individual rights which protect us all from industrial warfare. The Pennsylvania district court opinion on which the Eighth Circuit relies, *Eazor Express, Inc. v. IBT*,⁴ graphically illustrates the problem. *Eazor* threatens unions with vast damage liability for reluctance to use the "politics of power," rather than the "politics of persuasion"⁵ in dealing with wildcatting members. Paradoxically, such decisions narrow the unions' path to rectitude so drastically as to give unions a Hobson's choice among financial ruin, economic warfare, and violation of individuals' rights.

The Sixth Circuit, fortunately, has taken a more realistic view in *North American Coal Corp. v. Local 2262, UMW*,⁶ as has the Third

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¹ Taft-Hartley Act (Labor-Management Relations Act of 1947), 29 U.S.C. §§ 141-44, 151-67, 171-87 (1970).

² 29 U.S.C. § 185 (1970).

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.

Id. § 185(a).

³ 496 F.2d 954 (8th Cir. 1974), *aff'g* 361 F. Supp. 647 (E.D. Mo. 1973).

⁴ 357 F. Supp. 158 (W.D. Pa. 1973) (liability), 376 F. Supp. 841 (W.D. Pa. 1974) (damages).

⁵ 357 F. Supp. at 167.

⁶ 497 F.2d 459 (6th Cir. 1974).

Circuit in *Penn Packing Co. v. Amalgamated Meat Cutters, Local 195*.⁷ It may even be hoped that the budding heresy of *Eazor* will be pinched off by the Third Circuit. Even so, some careful attention to this area today will save a good deal of future misery on both sides of the labor relations fence.

MANAGEMENT RESPONSES TO A WILDCAT STRIKE

It is relatively rare for a wildcat strike⁸ to result in a full-blown section 301 damage action. The employer is typically content with a *Boys Market*⁹ injunction and a speedy resumption of production. Discharge or discipline of the key strikers, where necessary, is regarded as adequate protection against repeat performances.

Restricting the remedy to an injunction and discipline is a sensible result for both management and the union. With well-known exceptions,¹⁰ employers are interested in production and profits, rather than ideology. They want the plant to produce, not only well, but predictably. A wildcat strike does more than stop production; it introduces uncertainty into "the quiet life" of the business and casts doubts where none belong. The closely integrated supply and distribution systems of industry presume predictability. A business with a reputation for labor problems, let alone wildcats, simply cannot provide its customers with that predictability.

A *Boys Market* injunction buttressed by discipline meets the employer's dual needs. The injunction restores production quickly. The union is unlikely to contest its issuance, for fear of ratifying a breach of the no-strike clause in the labor agreement. The considerable authority and power of the federal courts is the employer's protection against escalation of the conflict. Thus contained, the underlying dispute is returned to a predictable forum—negotiation and arbitration. While discharges and discipline may aggravate the situation, their susceptibility to negotiation and arbitration is well understood. A union can normally tolerate a *Boys Market* injunction and defend discharged strikers without long-term injury to a stable collective bargaining relationship.

⁷ 497 F.2d 888 (3d Cir. 1974), *aff'g* 85 L.R.R.M. 2022 (E.D. Pa. 1973). See also *Anheuser-Busch, Inc. v. Teamsters Local 633*, 88 L.R.R.M. 2785 (1st Cir. 1975), *rev'g* 87 L.R.R.M. 2308 (D.N.H. 1974).

⁸ The term "wildcat strike" normally means a work stoppage which is in violation of either: (1) a no-strike clause in the collective bargaining agreement; (2) the rules, by-laws, and constitution of the union; or (3) both. Unless otherwise indicated, I use the term in the third sense.

⁹ *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

¹⁰ See, e.g., W. UPHOFF, *KOHLER ON STRIKE: THIRTY YEARS OF CONFLICT* (1966).

Where a damage action is filed, it is most often used as a bargaining lever. The chance of major liability, however remote, can persuade unions to compromise their grievances. This is especially true of impecunious unions, particularly locals, who are dealing with a single tentacle of a major conglomerate. Litigation itself can be a serious financial burden.

There are important practical reasons for stopping here, and not going the "full route" with a section 301 damage action. The most obvious is that such an employer irrevocably commits himself to a death match with the union. The company will either destroy the union with the litigation, or the union will break the company at the next round of negotiations. Meanwhile, civilized labor relations will disappear without trace or memory.

A less obvious reason is that a section 301 Armageddon necessarily involves detailed discussion of an employer's most intimate financial secrets. By making a damage claim, the employer puts its financial injury, and thus its finances, at issue in the litigation. The discovery rules of the *Federal Rules of Civil Procedure*¹¹ give the union and its accountants the right to explore every corner of the employer's books. If the union conducts its case properly, it will know everything from per-unit profit to the finer details of management compensation. The employer may withdraw parts of the damage claim in an effort to limit the investigation; but it can expect little success, given the liberality of the discovery rules. It is a relatively simple matter for a union accountant to demonstrate how the unexplored area could be used to exaggerate damages. Nor does it stop with the plaintiff's business. Where transfers to related business entities are possible, the union will delve into the related entity. If there is a possibility of misstatement by suppliers or customers, plaintiff will find the union subjecting those parties to process and investigation. Understandably, few employers want to run the full length of this particular gantlet.

It is easy to see, then, why section 301 damage suits are hard cases. It is less easy to explain why they generate bad law. The absence of an adequate analytic framework is the most probable cause, as we shall see.

THE SECTION 301 LAWSUIT

Analysis of these cases must begin with the no-strike clause in the labor agreement. The point is so obvious that it is frequently over-

¹¹ FED. R. CIV. P. 26-37.

looked. A section 301 action is for simple breach of contract, so one must start with the language of the contract. To be sure, a no-strike clause may be implied.¹² But, unless the no-strike obligation is voluntarily assumed, it simply does not exist.¹³ In Canada, for example, there are statutory prohibitions against strikes during the term of a collective bargaining agreement.¹⁴ There need not be a no-strike clause, except in Ontario where the law requires one be inserted in every labor agreement. In the United States, the Supreme Court has expressly rejected this approach.¹⁵ One should, then, expect U.S. courts to approach these cases with the familiar contract analysis: Is there a contract? Given the language of the agreement, what is the scope of the contractual obligation? Has there in fact been a breach of that obligation, either by action or inaction? If there is a breach, has it been cured by subsequent union action; or, perhaps, excused by the employer's failure to mitigate?

Of course, labor agreements are hardly garden-variety contracts. They are a breed apart, and must be applied with an eye to the practicalities of the bargaining relationship. That relationship, as well as the union and employer that function within it, is fenced about with a number of important federal policies. The obvious one is the preservation of industrial peace. However, there are others of equal importance: the elimination of discrimination,¹⁶ the duty of fair representation,¹⁷ the preservation of union democracy and membership rights,¹⁸ and the exclusive representation principle,¹⁹ to name a few. In its most recent section 301 case,²⁰ the Supreme Court warned against "free-

¹² Local 174, *IBT v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962).

¹³ *Gateway Coal Co. v. UMW*, 414 U.S. 368, 382 (1974): "Thus, an arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties."

¹⁴ CAN. REV. STAT. ch. L-1, §§ 128, 129(1), 130 (1970); ALTA. REV. STAT. ch. 96, § 101(1) (1970); B.C. REV. STAT. ch. 205, § 54(1) (1960); MAN. REV. STAT. ch. L 10, § 26(1) (1970); N.B. REV. STAT. ch. 124, § 21 (1952); NEWF. REV. STAT. ch. 191, § 23 (1970); ONT. REV. STAT. ch. 232, § 63(1) (1970); PR. ED. IS. REV. STAT. ch. 164, § 13(1) (1951); QUE. REV. STAT. ch. 141, § 95 (1964).

¹⁵ Local 174, *IBT v. Lucas Flour Co.*, 369 U.S. 95, 105 n 14 (1962): "Insofar as the language of [the state supreme] court's opinion is susceptible to the construction that a strike during the term of a collective bargaining agreement is *ipso facto* in violation of the agreement, we expressly reject it."

¹⁶ See 42 U.S.C. §§ 2000e to e-15 (1970); 42 U.S.C. § 1981 (1970).

¹⁷ See, e.g., *Vaca v. Sipes*, 386 U.S. 171 (1967).

¹⁸ See 29 U.S.C. §§ 411-15 (1970).

¹⁹ 29 U.S.C. § 159(a) (1970); *Emporium Capwell Co. v. Western Addition Community Org. (WACO)*, 95 S. Ct. 977 (1975); *NLRB v. Allis-Chalmers*, 388 U.S. 175, 180 (1967).

²⁰ *Howard Johnson Co. v. Detroit Local Jt. Exec. Bd., Hotel Employees Union*, 417 U.S. 249, 255 (1974).

wheeling" disregard for congressional policies:

In *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), this Court held that § 301 of the Labor Management Relations Act authorized the federal courts to develop a federal common law regarding enforcement of collective-bargaining agreements. But *Lincoln Mills* did not envision any free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements. Rather, *Lincoln Mills* makes clear that this federal common law must be "fashion[ed] from the policy of our national labor laws." *Id.*, at 456.²¹

As we shall see, recent damage cases under section 301, particularly *Eazor*,²² are guilty of "free-wheeling." They abandon the contract analysis in favor of general policy pronouncements; then are guided by the single policy of industrial peace, ignoring important countervailing policies.

Recent months have seen the development of three general approaches to the problem of union damage liability under section 301. Some cases have resulted in immense liability, often of union-busting proportions.²³

At one extreme is Judge Teitelbaum's decision in *Eazor*. *Eazor* has been followed in approach, but perhaps not detail, by the Eighth Circuit in *Wagner Electric Corp. v. Local 1104, IUE*.²⁴ This approach requires a union to escalate its intervention through *all* reasonable means, both persuasive and punitive, in order to end the wildcat. The focus is solely on the policy of industrial peace.

At the other extreme is the Sixth Circuit's *North American Coal Corp. v. Local 2262, UMW*,²⁵ which expressly rejects *Eazor*. Relying on equally general propositions, the Sixth Circuit holds that there can be no liability unless there was union initiation, authorization, or encouragement of the wildcat.

²¹ *Id.* at 255.

²² *Eazor Express, Inc. v. IBT*, 357 F. Supp. 158 (W.D. Pa. 1973) (liability), 376 F. Supp. 841 (W.D. Pa. 1974) (damages), discussed *supra* notes 3-4 & text accompanying.

²³ The damage awards against all union defendants in these cases are as follows: *Eazor*, \$512,001.32; *Adley*, currently at trial on damages; *Wagner Electric*, \$70,000; and *Penn Packing*, no cause of action. In a sister case to *Adley*, *IBT Local 107* suffered a judgment of \$970,000, which was subsequently compromised. *Roadway Express, Inc. v. Highway Truck D. & H., Local 107*, 299 F. Supp. 1058 (E.D. Pa. 1969). It is fashionable to assume that all unions are rich. With the exception of a few large International Unions, however, most unions and their locals are impecunious by most, let alone commercial, standards.

²⁴ 496 F.2d 954 (8th Cir. 1974).

²⁵ 497 F.2d 459 (6th Cir. 1974).

The third approach is that of *Penn Packing Co. v. Amalgamated Meat Cutters, Local 195*,²⁶ a Third Circuit opinion, and *Adley Express Co. v. Highway Truck Drivers & Helpers, Local 107*,²⁷ an opinion by Judge Becker of the Eastern District of Pennsylvania. These decisions turn first to the language of the no-strike clause. The standard to be applied is drawn from a realistic reading of that clause, in light of the range of pressures and policies which impinge on collective bargaining. Whether a breach exists, and whether it has been cured or excused, is resolved as an issue of fact, not as one of law. *Penn Packing* distinguishes *Eazor* and *Wagner Electric* without either approving or disapproving them.

THE NARROWING PATH: THE EAZOR
AND WAGNER ELECTRIC APPROACH

Eazor and Wagner Electric

The labor agreements in *Eazor* contain provisions which from a union's point of view, are considered fairly favorable. The no-strike clause is typical of Teamsters' Union (IBT) agreements. However, express language excuses the unions from liability for wildcat strikes, provided they make an "immediate effort" and use "every reasonable means" to end the strikes.²⁸

Eazor begins reasonably enough, remarking that the task of the court is to interpret the agreements.²⁹ However, the court uses only two guides in its interpretation: the employer's expectation of uninterrupted production, and the public policy against employees doing individually

²⁶ 497 F.2d 888 (3d Cir. 1974).

²⁷ 349 F. Supp. 436 (E.D. Pa. 1972).

²⁸ The contract in *Eazor* provided:

The Union and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement, as provided for in this Agreement of any controversy which might arise.

357 F. Supp. at 161. However, other provisions limit and specify the duty owed: "The Union shall not be liable for damages resulting from [an unauthorized strike] of its members. . . . [T]he Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work. . . . [T]he Central States Drivers Council shall not be liable for any strike, breach or default . . . unless the act is expressly authorized by its Executive Board Council shall make immediate effort to terminate any strike or stoppage of work which is not authorized by it without assuming liability therefor." Brief for IBT to Third Circuit at 3-4; *Eazor*, 357 F. Supp. at 162. *Eazor* involves the further issue of whether the International Union itself is even a party to the labor agreement and/or the no-strike provision. *Id.* at 167-68. This sort of issue often arises in IBT and UMW cases; but for purposes of this discussion I am assuming that the unions involved are clearly parties to the no-strike clause.

²⁹ *Id.* at 164.

what they cannot do as a union.³⁰ On that basis, *Eazor* implies an obligation on the unions "to use all reasonable means at their disposal, both persuasive and punitive, to terminate the work stoppage."³¹ The *Eazor* decision leaves no latitude for good faith union judgments as to what might, or might not, be productive.³² To escape damage liability, holds *Eazor*, the union should have: suspended or expelled strikers from membership; prevented them from getting jobs elsewhere; denied use of union facilities and hiring halls; imposed daily fines; removed local leadership from office; held all votes by secret ballot; and trusteeed the Locals involved.³³ The court does not require that these steps be taken immediately. Rather, it envisions an escalation from persuasion, through various punitive actions, until, like Indochinese guerrillas, the wildcatters capitulate to superior force.³⁴ If necessary, the union is required to deplete its punitive arsenal.³⁵ That the strikers are ugly and violent, *Eazor* reasons, makes all the more imperative the need for "the politics of power rather than the politics of persuasion."³⁶

In *Wagner Electric*, the union was sued for breach of a typical no-strike clause.³⁷ There was some evidence of union instigation, although union involvement fell short of authorization.³⁸ Relying on the "mass action" cases³⁹ and *Eazor*, the Eighth Circuit adopted the unqualified proposition that "a union is required to use its best efforts to return striking workers to their jobs if it is not to be held responsible for their

³⁰ *Id.* at 164-65.

³¹ 376 F. Supp. at 843.

³² 357 F. Supp. at 168 n.18: "The obligation is not discretionary, but mandatory. Therefore it leaves no latitude for political or even good faith judgments as to what might and what might not be productive."

³³ 357 F. Supp. at 166-69.

³⁴ 376 F. Supp. at 848-49.

³⁵ 357 F. Supp. at 169; 376 F. Supp. at 843.

³⁶ 357 F. Supp. at 167. One can easily imagine the union's surprise at learning the sweeping nature of the no-strike obligation it voluntarily assumed. This is particularly true of the International Union, which did nothing to sanction, authorize, aid or comfort the strikers. *Id.* at 168.

³⁷ *Wagner Electric Corp. v. Local 1104, IUE*, 361 F. Supp. 647 (E.D. Mo. 1973), *aff'd*, 496 F.2d 954 (8th Cir. 1974). "The Union agrees that during the term of this Agreement there shall be no strikes . . . , stoppage of work, or any other form of interference of production or other operations" 361 F. Supp. at 648.

³⁸ *Id.* at 650.

³⁹ These cases accept the proposition that a union is liable for the "mass action" of its members. The key mass action case is *Vulcan Materials Co. v. USW*, 430 F.2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971). In the context of a suit under section 303 of the Taft-Hartley Act for a secondary boycott, the Fifth Circuit held that a union is responsible for the mass action of its members as long as it is a functioning entity. In this, the Fifth Circuit was reasserting a proposition going back to *United States v. UMW*, 77 F. Supp. 563, 566 (D.D.C. 1948), *aff'd*, 177 F.2d 29 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 871 (1949). As we shall see, the "mass action" principle is often and easily misapplied in the section 301 area.

actions."⁴⁰ Following *Eazor*, the Eighth Circuit focused on general principles. Applying those principles, the court affirmed the district court's holding that the union's press release ordering a return to work did not toll union liability.

Construction of the No-Strike Clause

A major problem with the *Eazor* approach is that the duty it imposes on the union is so severe that, despite disclaimers to the contrary, it cannot reasonably be inferred from the agreement. *Eazor* does not suggest that the union intended to be bound by such an obligation. The analysis is not in terms of the intent of the contracting parties, but in terms of a particular view of federal labor policy. The case does not involve the inference of a no-strike clause from the existence of an arbitration provision.⁴¹ In *Eazor* the labor agreements contained detailed no-strike clauses. Those provisions, more than most, evidence an intent not to subject the union to damage liability for wildcats. They are, for instance, considerably more favorable to the union than the "agree and guarantee" language found in *Penn Packing*,⁴² where it was held that the union did not intend a no-fault indemnity promise.⁴³

The thrust of *Eazor* is that *no* revision of the no-strike clause will effectively limit a union's exposure. A union's intent in agreeing or in applying the agreement is irrelevant. Or, if relevant, it cannot withstand court-imposed inferences drawn from a one-sided view of federal labor policy. The *Eazor* court, for practical purposes, wrote a Canadian no-strike statute into U.S. labor law. This is a serious misunderstanding of the law. The authority to rewrite labor agreements has been denied the NLRB, since to allow it would ignore "the fundamental premise on which the [National Labor Relations] Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."⁴⁴ Given the Supreme Court's proscription of "free-wheeling" in *Howard Johnson*,⁴⁵ the federal courts certainly have no greater authority under section 301

⁴⁰ 496 F.2d at 956.

⁴¹ *Local 174, IBT v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962).

⁴² "The Union for itself and for its individual members agrees and guarantees that there shall be no strike, stoppage of work, slowdown, or other interference with production." *Penn Packing Co. v. Amalgamated Meat Cutters, Local 195*, 497 F.2d 888, 890 (3d Cir. 1974).

⁴³ *Id.*

⁴⁴ *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970), *quoted with approval in NLRB v. Burns Security Services*, 406 U.S. 272, 287 (1972).

⁴⁵ *Howard Johnson Co. v. Detroit Local Jt. Exec. Bd., Hotel Employees Union*, 417 U.S. 249, 255 (1974). See notes 20-21 *supra* & text accompanying.

to ignore such a "fundamental premise."

The proper approach is to construe no-strike promises, like the rest of labor agreements, by realistic assessment of the intent of the parties. This is precisely what the Third Circuit did in *Penn Packing*, the "agree and guarantee" case.⁴⁶ But it is precisely what the Eighth Circuit failed to do in *Wagner Electric*. Even if the result in *Wagner Electric* is correct, its approach is not. There is no discussion of whether the parties intended the "best efforts" standard, under which an order to return to work did not toll liability. Instead, the Eighth Circuit, citing *Eazor*, treats the standard as a matter of settled labor law.⁴⁷ The court thus opens the way for future decisions to disregard intent, and follow *Eazor* in institutionalizing the "politics of power." Ironically, the Eighth Circuit itself recently reversed a section 301 decision in another area for just such an "unrealistic" approach to labor agreements.⁴⁸

The Limited Nature of Union Authority

Another major problem with the *Eazor* approach is that its rendition of federal labor policy is simplistic and, in major respects, flatly wrong. *Eazor* assumes that unions have plain authority to revoke membership, impose fines, suspend local officials, prevent employment elsewhere, and otherwise punish wildcatters.

The authority is hardly plain. A member of a collective bargaining unit has no legal obligation to sign a union membership card. The obligation of union membership, even under a union shop agreement, is purely financial.⁴⁹ However, in the absence of union membership, a union has no authority to impose discipline.⁵⁰

Even where the striker is a card-carrying member, section 8(b)(2) of the National Labor Relations Act⁵¹ makes it unlawful for a union

⁴⁶ 497 F.2d at 890-91.

⁴⁷ *Wagner Electric Corp. v. Local 1104, IUE*, 496 F.2d 954, 956 (8th Cir. 1974).

⁴⁸ *IBT v. Crown Cork & Seal Co.*, 488 F.2d 738 (8th Cir. 1973), reversing the district court's interpretation on the ground that the Supreme Court "require[s] federal courts to take a practical and realistic construction upon labor agreements, giving due consideration to the purpose which they were intended to serve." *Id.* at 742.

⁴⁹ *NLRB v. General Motors Corp.*, 373 U.S. 734, 742-43 (1963).

⁵⁰ *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 184-85 (1967).

⁵¹ 29 U.S.C. § 158(b)(2) (1970):

It shall be an unfair labor practice for a labor organization or its agents—

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

to enforce membership obligations in a manner which prejudices job rights. Wildcat strikers are not protected against employer action by section 7 of the NLRA.⁵² They may be discharged by their employer, the industrial equivalent of capital punishment. Arbitration decisions which tamper with such discharges have had worse-than-average luck withstanding judicial review.⁵³ Unlike the union, the employer has a recognized right to prejudice employment rights. A *Boys Market* injunction, in addition, will bring the considerable authority and power of the federal courts to an employer's aid. The union's "arsenal" has nothing remotely comparable or uncontestable.

To be sure, union constitutions do give authority to fine and discipline members. However, that authority is ill-suited to the role which *Eazor* sets out for it. It is too closely fenced about with legal and practical restrictions.

Practical Restrictions on Union Power

The practical restrictions are well-known.⁵⁴ Most unions are democracies by tradition. The rest are so by Act of Congress.⁵⁵ Rival political factions are to be expected, as is disagreement with union leadership. Such disagreements are likely to be most pronounced and intractable when, as in a wildcat, tempers run high. Even where no factions existed before a work stoppage, the wildcat is likely to create them. The chances of this happening typically increase as the perceived "pro-management" action of the union leadership increases. Extreme action of the sort required by *Eazor*, then, tends to fractionate union strength at precisely the wrong time. For this reason, *Eazor* is particularly mistaken in excluding good-faith union judgments about the probable effectiveness of its actions. As the Supreme Court recently recog-

⁵² See, e.g., *Lee A. Consaul Co. v. NLRB*, 469 F.2d 84, 85 (9th Cir. 1972).

⁵³ See, e.g., *Amanda Bent Bolt Co. v. UAW*, Local 1549, 451 F.2d 1277 (6th Cir. 1971); *Local 342, UAW v. T.R.W., Inc.*, 402 F.2d 727 (6th Cir. 1968), cert. denied, 395 U.S. 910 (1969).

⁵⁴ Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act*, 52 CORNELL L.Q. 672, 701-02 (1967):

As a matter of good sense, there are very sound reasons for a narrow concept of union liability. The union bargains for all employees in an appropriate unit, but it does not necessarily have the loyalty of all employees. Even in a union shop, the willingness to follow union leadership on economic questions, as well as matters of discipline of individual employees, may be of varying degrees and intensity [T]here may be groups within the unit which are hostile to the bargaining agent. Such groups may contain a contending faction or members of a rival union which would like to have the incumbent exposed to liability. Moreover, an employer-sponsored strike is certainly not beyond the realm of possibility.

⁵⁵ Landrum-Griffin Act, 29 U.S.C. §§ 481-83 (1970).

nized, "the principle of exclusive representation is meant to lubricate" the collective bargaining process.⁵⁶ Factionalism thins that lubrication, making the probability of strife and deadlock high, and the likelihood of headway minimal.⁵⁷ Both employer and union suffer from such an approach.

Legal Restrictions on Union Flexibility

(1) Landrum-Griffin Limitations

The legal restrictions on a union's ability to comply with *Eazor* are even more serious. *Eazor* forgets that the membership rights which the union is to deny are protected by Title I of the Landrum-Griffin Act.⁵⁸ No court has yet held that wildcat strikers, ipso facto, lose all protection under Title I. I seriously think such a result would find much acceptance. Yet without it, a union can follow *Eazor* only at a distinct risk of having to defend membership suits brought under section 102 of Landrum-Griffin.⁵⁹ Certainly the provisos to sections 101(a)(1), 101(a)(2), and 101(a)(4), which allow unions to adopt and enforce "reasonable rules," give the union some defense.⁶⁰ But most unions will be understandably reluctant to invite prolonged litigation in order to prove that its action was pursuant to "reasonable rules." The fate of a union whose constitution contains no such rules, or whose internal rules are too limited,⁶¹ is another matter altogether. Short of ultra vires action by the leadership, unions may seek to avoid *Eazor* by revising their constitutions to further limit the range of allowable union disci-

⁵⁶ *Emporium Capwell Co. v. Western Addition Community Org. (WACO)*, 95 S. Ct. 977 (1975).

⁵⁷ *Id.* It should be noted that union officials are particularly ill-suited, by temperament and training, to be strike-breakers. Employer discipline is likely to be administered with a much more willing hand than union discipline.

⁵⁸ 29 U.S.C. §§ 411-15 (1970).

⁵⁹ 29 U.S.C. § 412 (1970).

⁶⁰ Section 101(a)(1) assures equal rights to all members, "subject to reasonable rules and regulations in such organization's constitution and bylaws." 29 U.S.C. § 411(a)(1) (1970). Section 101(a)(2) gives the rights of free speech and assembly, provided that "nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." 29 U.S.C. § 422(a)(2) (1970). Section 101(a)(4) protects the right of a member to sue his union, subject to an exhaustion of internal union remedies requirement. 29 U.S.C. § 411(a)(4) (1970). Section 101(a)(5) gives the member a federal right to written specific charges, reasonable time to prepare, and a full and fair hearing before a union may use discipline. 29 U.S.C. § 411(a)(5) (1970).

⁶¹ It is common, for example, for a union constitution to limit severely the amount of fine which can be imposed by a trial board on a member.

pline against wildcat strikers.⁶²

The first proviso to section 101(a)(4) properly requires the individual member's complaint to be directed internally, even where it arises out of a union's action in the strike context. Analogizing to section 101(a)(4), the Ninth Circuit, in a duty of fair representation case, has held that a union member must initially pursue internal union procedures to remedy such union action.⁶³ This requirement may well solve the dispute by internal means. But, when the plaintiff is bitter, it merely delays his recourse to the courts for four months.

The due process protections of section 101(a)(5) are not qualified by proviso. Literally, they require written notice, preparation time, and hearing even for the wildcat striker. On its face section 101(a)(5) forecloses the sort of short-circuited disciplinary procedures suggested by *Eazor*.

The courts, notably the Fifth Circuit, have held that appointed union officials can be summarily removed for disobedience.⁶⁴ This accords with the established rule that section 101(a)(5) protects membership rights, not the right to hold office.⁶⁵ However, *Eazor* contemplates denial of membership, not just union office. Membership rights have the full protection of section 101(a)(5).

In light of recent decisions, moreover, there is increasing doubt about a union's authority to remove an offender from office. Some argue that the Fifth Circuit's *Sewell*⁶⁶ decision, which upholds this authority, should be limited to appointive office. But the recalcitrants in a wildcat

⁶² *International Bhd. of Boilermakers, I.S.B.F. & H. v. Hardeman*, 401 U.S. 233, 242-44 (1971), precludes judicial determination of the scope of offenses warranting a union's discipline of its members.

⁶³ *Buzzard v. Lodge 1040, IAM*, 480 F.2d 35, 41 (9th Cir. 1973).

⁶⁴ *Sewell v. IAM*, 445 F.2d 545, 550-51 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972):

This conclusion, however, does not permit an employee who accepts employment . . . to take the largesse and pay of the union, on one hand, and, on the other, to completely subvert the purposes of his employment by engaging in activities diametrically opposed to the performance of his specified duties To permit an individual to accept union employment, to receive union pay, and to enjoy the prestige of a union position, while spending his employer's time opposing the plans and policies he was employed to execute, would in our judgment, be unreasonable.

See also *Wambles v. IBT*, 488 F.2d 888 (5th Cir. 1974) (appointed official can be discharged without cause).

⁶⁵ *Wood v. Dennis*, 489 F.2d 849, 854 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); *Martire v. Laborers' Local 1058*, 410 F.2d 32, 35 (3d Cir.), *cert. denied*, 396 U.S. 903 (1969); *IAM v. King*, 335 F.2d 340, 341-43 (9th Cir.), *cert. denied*, 379 U.S. 920 (1964); *Airline Stewards v. TWU*, 334 F.2d 805, 808-09 (7th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965); *Sheridan v. United Bhd. of Carpenters & Joiners*, 306 F.2d 152, 155 (3d Cir. 1962).

⁶⁶ *Sewell v. IAM*, 445 F.2d 545 (5th Cir. 1971).

are likely to be *elected* Local officials. Moreover, if removed from office, both appointed and elected officials may argue that their removal was not for promoting a wildcat. Rather, they can easily claim it is a reprisal for the exercise of Title I membership rights, *e.g.*, their opposition to the leadership's position on the substantive bargaining matters which led to the strike. Reprisal for the exercise of Title I membership rights is actionable under section 609 of Landrum-Griffin.⁶⁷ The Second Circuit's recent decision in *Schonfeld v. Penza*⁶⁸ holds that section 609 reprisal claims for removal from office are sometimes actionable, despite the fact that under Title IV of the Landrum-Griffin Act⁶⁹ the Secretary of Labor has exclusive jurisdiction over violation of candidacy and office-holding rights. In *Calhoon v. Harvey*,⁷⁰ the Supreme Court held that officeholders and candidates cannot avoid the statutory pre-emption of Title IV by pleading the case as a Title I action. *Schonfeld's* rationale for not applying the *Calhoon* pre-emption rule is that a union official is sometimes given the choice of his office or his membership rights, and in appropriate circumstances section 609 requires that officials not be put to such a choice because of the chilling effect such a choice has on membership rights.⁷¹ The Seventh Circuit, in two decisions,⁷² has limited the *Schonfeld* exception to the *Calhoon* pre-emption rule to cases involving a lengthy history of intra-union warfare. However, the Seventh Circuit accepts the basic premise of *Schonfeld* that *Calhoon* does not entirely foreclose section 609 suits for removal from office. The way remains open, then, for union officials to bring section 609 suits against unions who remove them from office in the manner required by *Eazor*. It remains to be seen whether the Seventh Circuit's restrictive reading of *Schonfeld* will be accepted. But whether it is or not, the developing liberalism in the section 609 area threatens to play "rock" to *Eazor's* "hard place," with unions caught between.

Title I and section 609 problems aside, the *Eazor* approach also forgets that the law of section 501 of Landrum-Griffin⁷³ has been advancing. Section 501 imposes fiduciary duties on all union officials, and section 501(b) gives union members a right of private derivative action

⁶⁷ 29 U.S.C. § 529 (1970).

⁶⁸ 477 F.2d 899 (2d Cir. 1973).

⁶⁹ 29 U.S.C. §§ 481-83 (1970).

⁷⁰ 379 U.S. 134, 194-95 (1964).

⁷¹ The Third Circuit itself has adopted a position similar to *Schonfeld*. *Martire v. Laborers' Local 1058*, 410 F.2d 32 (3d Cir. 1969).

⁷² *Driscoll v. IUOE, Local 139*, 484 F.2d 682, 688 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); *Wood v. Dennis*, 489 F.2d 849 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974).

⁷³ 29 U.S.C. § 501 (1970).

against union officials for breach of that duty. It is easy to forget that section 501 deals with more than finances. None other than the Eighth Circuit, in *Johnson v. Nelson*,⁷⁴ held that section 501(a) requires union officers to obey the orders of the membership. In fact, the Eighth Circuit's decision in *Pignotti v. Local 3, Sheet Metal Workers' Int'l Ass'n*,⁷⁵ found a breach of section 501 in an International Union's use of a trusteeship to make a Local act contrary to a vote of its membership.

A union can be scissored between this line of section 501 cases and *Eazor*. Presumably a union official could, under court order, safely⁷⁶ disregard a membership order. But such decisions by union officials are usually made without such protections. Sometimes no-strike clauses are unclear. A membership may take one reading and order a strike, despite the doubts of the leadership. *Eazor* would, in such a case, force the leadership to choose between the risk of major section 301 damages, and the risk of a section 501(b) action by his membership. The choice will not be any easier when the official realizes that he must pay for the defense of a section 501(b) suit out of his own pocket. Since section 501 actions are derivative, ordinarily union lawyers are disqualified.⁷⁷

(2) The Union's Duty of Fair Representation

In addition to practical restrictions and Landrum-Griffin, fair representation and anti-discrimination law can constrain a union's latitude to deal with wildcatters.

The judicially-evolved duty of fair representation requires a union to act with good faith and honesty.⁷⁸ Anything less—for example, negligence—does not state a claim.⁷⁹ However, in some circumstances arbitrary or perfunctory handling of the grievance can subject the union to fair representation liability.⁸⁰ Expansion of the "arbitrariness" prong

⁷⁴ 325 F.2d 646 (8th Cir.), *aff'g* 212 F. Supp. 233 (D. Minn. 1963). Judge Larson's opinion below contains an exhaustive discussion on the relevant legislative history.

⁷⁵ 477 F.2d 825 (8th Cir. 1973).

⁷⁶ Protection from a successful section 501(b) action is one thing. Protection from the voters at the next election is quite another. The latter protection is, of course, beyond any court's authority.

⁷⁷ *Yablonski v. UMW*, 454 F.2d 1036, 1041-42 (D.C. Cir. 1971).

⁷⁸ *Amalgamated Ass'n of S., E.R. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299-301 (1971); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Humphrey v. Moore*, 375 U.S. 335 (1964).

⁷⁹ *See, e.g., Dente v. International Org. of Masters, M. & P., Local 90*, 492 F.2d 10, 12 (9th Cir. 1973); *Hubicki v. ACF Indus.*, 484 F.2d 519, 526 (3d Cir. 1973); *Lewis v. Magna American Corp.*, 472 F.2d 560, 561 (6th Cir. 1973).

⁸⁰ *Griffin v. UAW*, 469 F.2d 181, 183 (4th Cir. 1972); *Retana v. Apartment, M., H. & Elevator Operators Union, Local 14*, 453 F.2d 1018, 1023-24 (9th Cir. 1972); *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 231, 284 (1st Cir. 1970). *See generally* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973). It should be noted that the Sixth Circuit has limited *Griffin*,

of fair representation raises doubts about a union's ability to make the compromises essential to reach a middle ground between a wildcatting membership and an incensed employer. The difficulty is particularly acute where the employer demands a "horse trade," that is, the sacrifice of a few individuals as the price for rescinding the discharges of many. Fair representation suits are increasing in number. Their defense is an expensive, time-consuming burden on unions. *Eazor* is an incentive for a union either to short-shrift fair representation, or to avoid compromises often necessary to cut short the wildcat and prevent its re-occurrence. *Eazor*, in short, promotes the worst solution—litigation.

(3) The Requirements of Antidiscrimination Law

An analogous dilemma can arise because of the federal statutes forbidding race and sex discrimination. Recent developments under Title VII⁸¹ and section 1981⁸² have made a union's good faith in remedying discrimination less and less relevant. Particularly in the departmental seniority cases, where statistical discrimination exists, damage liability is assessed on practically a strict liability basis.⁸³

Where the wildcatters are women or members of a minority group, the *Eazor* approach narrows the path to rectitude considerably. A wildcat and the resulting discharges can undo years of affirmative action. Even if individual discrimination suits are successfully defended, the union can be left with markedly less defensible statistics on minority and female population. Title VII and section 1981 seemingly require a full-blooded defense of the affected class, if only to preserve defensible statistics. *Eazor* threatens the union with damage liability for the same defense.

The problem is even more complicated where the work stoppage itself is directed at discrimination. Prior to the Supreme Court's reversal of *Emporium Capwell Co. v. Western Addition Community Organization*,⁸⁴ the District of Columbia Circuit, in *Laborers International Union, Local 478 v. NLRB*,⁸⁵ held that the Laborers violated

supra, to its facts, *Johnson v. IBT, Local 89*, 488 F.2d 250, 257 (6th Cir. 1973).

⁸¹ 42 U.S.C. §§ 2000e to e-15 (1970).

⁸² 42 U.S.C. § 1981 (1970).

⁸³ *Meadows v. Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *United States v. Georgia Power Co.*, 474 F.2d 906, 921 (5th Cir. 1974); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 876-77 (6th Cir. 1973); *Moody v. Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973), *cert. granted*, 95 S. Ct. 654 (1974); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

⁸⁴ 95 S. Ct. 977 (1975), *rev'g* 485 F.2d 917 (D.C. Cir. 1973).

⁸⁵ *Laborers' Int'l Union, Local 478 v. NLRB*, 503 F.2d 192 (D.C. Cir. 1974).

section 8(b)(1)(B) of the NLRA⁸⁶ by bargaining for the appointment of black foremen. The Laborers unsuccessfully argued that Title VII required this sort of action, as racist foremen are frequently the source of a discriminatory atmosphere. And, I might add, such foremen are the usual spark, if not the main cause, of race-related wildcats. If a wildcat strike occurs, the employer, through its exclusive control over the selection of supervisors, retains practical control⁸⁷ over the key to settlement. The insensitivity of the *Eazor* approach gives the employer a means to squeeze the union between section 301 damage liability and an unfair labor practice.

The Supreme Court's decision in *Emporium* puts *Laborers* in doubt and answers some questions about the job action directed at discrimination. It is now clear that the exclusive representation principle of section 9(a) of the NLRA⁸⁸ precludes fragmentation of the bargaining unit along racial lines.⁸⁹ At least, those who attempt it are not protected by section 7 of the NLRA.⁹⁰ But the Court carefully reserves the question of whether members of the affected class have a Title VII remedy against the union and the employer.⁹¹ *Emporium* offers little comfort to a union forced by *Eazor* to choose between Title VII and section 301 liability. At best, it establishes that wildcatting for antidiscriminatory reasons is not a section 7 right.⁹²

UNION LIABILITY: AN ISSUE OF FACT OR LAW?

The "Vicarious Liability" Approach

I turn now to the third and final problem with the *Eazor* and *Wagner Electric* approach. *Wagner Electric*, in particular, treats union liability for the mass action of its rank and file members as a settled matter of law, rather than an issue of fact.⁹³ It imposes, not the agency

⁸⁶ 29 U.S.C. § 158(b)(1)(B) (1970).

⁸⁷ Theoretically, a union might also file a discrimination suit or argue the employer has failed to mitigate damages.

⁸⁸ 29 U.S.C. § 159(a) (1970).

⁸⁹ 95 S. Ct. 977, 989.

⁹⁰ 29 U.S.C. § 157 (1970).

⁹¹ 95 S. Ct. at 989.

That does not mean that the discharge is immune from attack on other statutory grounds in an appropriate case. If the discharges in this case are violative of § 704(a) of Title VII, the remedial provisions of that title provide the means by which Hollins and Hawkins may recover their jobs with back pay.

⁹² U.S.C. § 2000e-5(g). The Court does not disclose what is "an appropriate case."

⁹³ Of course, *Emporium* itself involved a boycott picket, not a full-fledged wildcat.

⁹³ *Wagner Electric Corp. v. Local 1104, IUE*, 496 F.2d 954, 956 (8th Cir. 1974): However, it is well established that a union is responsible for the mass action of its rank and file members as long as it is a functioning entity

rules intended by Taft-Hartley, but a strict rule of vicarious liability.⁹⁴

The contrast among the three approaches to the application of section 301 to wildcats⁹⁵ can be seen most clearly on this issue. The Sixth Circuit approach in *North American Coal Corp. v. Local 2262, UMW*⁹⁶ rejects the vicarious liability approach in strong terms:

It has been clear to Congress for many years that imposition upon unions of vicarious liability for the unauthorized acts of individuals could easily mean the elimination of labor unions as a social institution in America. The clearest expression of Congressional concern is, of course, the Norris-LaGuardia Act and, specifically, Section 6 thereof.

Irresponsible or violent acts by individual workers (or by agents provocateur) if automatically attributable to the union on the scene could, of course, serve to destroy it. But such vicarious liability is repugnant to due process of law. And this circuit has repeatedly recognized that unions may only be held responsible for the authorized or ratified actions of [their] officers and agents.⁹⁷

In requiring authorization or ratification as the condition of union liability, the Sixth Circuit readopted its *Blue Diamond Coal*⁹⁸ position, which accords with the Fourth Circuit's famous *Haislip Baking*⁹⁹ opinion. The Sixth Circuit does not overstate the danger of a vicarious liability standard to unions as institutions, as the foregoing hopefully demonstrates.

The Sixth Circuit's assessment of the legislative intent behind section 301 is equally accurate. Section 301, particularly section 301(e),¹⁰⁰ was designed, as Senator Taft freely admitted,¹⁰¹ to sub-

Neither does the issuance of an exculpatory press release absolve a union of liability for the violation of a no-strike provision. A union is required to use its best efforts to return striking workers to their jobs if it is not to be held responsible for their actions.

⁹⁴ In the first *Eazor* opinion, the court declined to follow the vicarious liability cases. 357 F. Supp. at 163 n.7. However, a note to the second *Eazor* opinion adopts the vicarious, "mass action" theory as an alternative ground for the holding on liability. 376 F. Supp. at 843-44 n.1.

⁹⁵ To repeat, these are: (1) the *Wagner Electric* and *Eazor* approach; (2) the *North American Coal* approach; and (3) the *Penn Packing* and *Adley* approach.

⁹⁶ 497 F.2d 459 (6th Cir. 1974), discussed *supra* note 25 & text accompanying.

⁹⁷ *Id.* at 466-67 (footnote omitted).

⁹⁸ *Blue Diamond Coal Co. v. UMW*, 436 F.2d 551, 556 (6th Cir. 1970), *cert. denied*, 402 U.S. 930 (1971).

⁹⁹ *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872, 877-78 (4th Cir.), *cert. denied*, 350 U.S. 847 (1955): "The question is not whether they [the union] did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike." Of similar import is *Yale & Towne Mfg. Co. v. Local 1717, IAM*, 299 F.2d 882, 884 (3d Cir. 1962).

¹⁰⁰ 29 U.S.C. § 185(e) (1970):

For the purposes of this section, in determining whether any person is act-

stitute common law agency rules for the standard of *United Brotherhood of Carpenters & Joiners v. United States*,¹⁰² which required "clear proof" of union authorization. It was hardly intended to impose strict, vicarious liability on unions for wildcats. Instead, Congress confirmed the employer's right of discharge as the appropriate remedy.¹⁰³

The "Mass Action" Agency Theory

Wagner Electric's "mass action" agency theory is drawn from two sources. There, the court puts primary reliance on *Vulcan Materials Co. v. USW*,¹⁰⁴ a secondary boycott case under section 303.¹⁰⁵ But this reliance overlooks the unique purposes of section 303. Section 303 gives a damage remedy for strikes which are unfair labor practices under section 8(b)(4) of the NLRA.¹⁰⁶ It is designed to give an innocent third party a damage remedy against a union that, in violation of federal statute, puts that innocent party in the middle of a labor dispute. Arguably, this policy justifies the rule in *Vulcan Materials* that "as long as a union is functioning as a union it must be held responsible for the mass action of its members."¹⁰⁷ The section 301 damage suit, however, involves no such policy. The strike violates, not a statute, but a contractual no-strike provision.¹⁰⁸ Unlike the secondary employer, the primary employer has its own weapons to use against the wildcat strike. It can discharge and discipline the wildcatters. The Eighth Circuit's uncritical reliance on *Vulcan Materials* forgets all these factors.

Wagner Electric puts secondary reliance on the D.C. Circuit's venerable *United States v. UMW*¹⁰⁹ and cites, as further support, *Adley Express Co. v. Highway Truck Drivers & Helpers, Local 107*,¹¹⁰ decided

ing 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.

¹⁰¹ 93 CONG. REC. 4022, 6858 (1947).

¹⁰² 330 U.S. 395 (1947).

¹⁰³ *E.g.*, Senator Taft's summary, 93 CONG. REC. 6442, 6858 (1947). In this, the Congress was merely approving NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939). Taft-Hartley added the language "or to affect the limitations or qualifications on that right [to strike]" to section 13 of the NLRA. 29 U.S.C. § 163 (1970). The employer's right to discharge wildcatters is one of the "limitations" preserved by this amendment.

¹⁰⁴ 430 F.2d 446, 455 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971).

¹⁰⁵ 29 U.S.C. § 187 (1970).

¹⁰⁶ 29 U.S.C. § 158(b)(4) (1970), which makes it an unfair labor practice for a union to engage in a secondary boycott.

¹⁰⁷ 430 F.2d at 455.

¹⁰⁸ In Canada, where the no-strike prohibition is statutory, perhaps *Vulcan Materials* would be apposite.

¹⁰⁹ 77 F. Supp. 563, 566 (D.D.C. 1948), *aff'd*, 177 F.2d 29, *cert. denied*, 338 U.S. 871 (1949).

¹¹⁰ 349 F. Supp. 436 (E.D. Pa. 1972), *cited*, 496 F.2d at 956.

by the Eastern District of Pennsylvania.

Wagner Electric relies on *United States v. UMW* as if the "mass action" rule is a settled matter of law. But *Adley* itself explains why such an approach is mistaken. *Adley* does not require authorization as a *sine qua non* as does the Sixth Circuit's *North American Coal*. Nor does it forget the importance of authorization. For that reason it offers a third approach to *North American Coal*, on the one hand, and *Wagner Electric* and *Eazor* on the other.

Working from a typical no-strike clause,¹¹¹ *Adley* reaffirms the proposition that a union can be liable for a stoppage which it *in fact* instigates, regardless of whether the name "strike" is attached or whether the formal requirements of union authorization have been met. *Adley* treats union responsibility for the mass actions of its members as an issue of fact, rather than law.¹¹² For this reason, *Adley* expressly refuses to hold a union strictly and vicariously liable, even where it instigates a wildcat, "regardless of any unsuccessful effort it may make to terminate it."¹¹³ To cut short its liability, "the Union has the burden of demonstrating that it exerted very substantial and sincere efforts to get the men back to work"¹¹⁴ The court holds that further evidence is needed to determine whether the union's importuning at a certain membership meeting amounts to such efforts.¹¹⁵

The *Adley* reading of *United States v. UMW* is not only correct, but it supplies the sensitivity lacking in *Wagner Electric* and *Eazor*. Union damage liability for wildcats is a matter of the intent of the parties and the facts. This is not an area amenable to general recitation of "settled" principles.

Approaching Union Liability as an Issue of Fact

There is a sensible approach to this area. If the parties must litigate, the court must begin—as the Third Circuit did in *Penn Packing*¹¹⁶—with a realistic reading of the no-strike clause. It is simply not sensible,

¹¹¹ "The Union and the Employers agree that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means of a settlement as provided for in this Agreement, of any controversy which might arise." *Adley Express Co. v. Highway Truck D. & H., Local 107*, 349 F. Supp. 436, 439 (E.D. Pa. 1972).

¹¹² *Id.* at 443-44.

¹¹³ *Id.* at 444.

¹¹⁴ *Id.*

¹¹⁵ Contrast the Eighth Circuit's dismissal of the union's "back to work" press release in *Wagner Electric*, 496 F.2d at 956, and the district court's similar treatment, 361 F. Supp. at 651.

¹¹⁶ *Penn Packing Co. v. Amalgamated Meat Cutters, Local 195*, 497 F.2d 888, 890 (3d Cir. 1974).

absent extraordinary circumstances, to read no-strike clauses as imposing much more than: (1) a duty not to authorize or instigate a wildcat; and (2) a duty to use a union's best persuasive efforts to end the work stoppage as soon as possible.¹¹⁷ Insofar as the Sixth Circuit, in *North American Coal*, suggests that the second part of this duty cannot exist, its conclusion is overstated.

The next issue is whether the union formally, or in fact, authorized the wildcat. This is an issue of fact. Where the no-strike clause may be violated by less than formal authorization, the question is whether mass action, in the given circumstances, forces the inference of union authorization or instigation. Such an inference is never logically necessary. Nor should it be as lightly drawn as, for example in the section 303 area, where policies and employer remedies are quite different. If there is authorization or instigation, the union's damage liability starts running.

Where there is no authorization or instigation, union liability arises, if at all, from the sort of inaction which can only be explained as ratification of the breach. While section 301(e) requires less than clear proof of actual ratification, it would be anomalous, using a ratification theory, to hold a union liable on weaker evidence than required to support an inference of authorization. The agreement sometimes lists what union action rebuts an inference of ratification. Where that action is taken, liability ought not accrue. Nor can there be liability before ratification can be reasonably found.

Once liability is running, the question is when it stops. Obviously, a return to work ends the breach. But short of that, the union effort required ought to be the "substantial and sincere" persuasive efforts re-

¹¹⁷ The plaintiff contends that the wording in this clause makes the union liable for any loss to the employer caused by work stoppage whether authorized by the union or not—what might be called a "no fault" duty of indemnity on the part of the union.

The district court reasoned that to impose such an unusual obligation, very explicit language in the contract would be required. We agree with this interpretation.

The costs of wildcat strikes are apt to be high, a fact of which employers are keenly aware, but which is certainly not unknown to union officials. Understandably, employers are anxious to secure all the protection possible to prevent such losses and, if possible, to secure indemnity. It is most unlikely that a union would shoulder such a large risk without clearly stating its intention to do so.

Id. at 890-91. The Third Circuit held that no guarantee was intended, and that all the union agreed to was "to use its best efforts to end the stoppage as soon as practicable." *Id.* at 891. The union had urged a return to work, and offered to pay the salaries of discharged stewards, pending arbitration. This was adequate to affirm judgment for the union.

quired by *Adley*.¹¹⁸ Where earlier union instigation or authorization must be undone, perhaps the efforts have to be more vigorous. But the punitive approach of *Eazor* cannot be defended, even where there is authorization from the onset. The balance of conflicting federal policies is too delicate, the realities too complex, for so blunt an approach.

¹¹⁸ *Adley Express Co. v. Highway Truck D. & H., Local 107*, 349 F. Supp. 436, 444 (E.D. Pa. 1972).