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Tort Liability of Labor Unions for Picket Line Assaults

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TORT LIABILITY OF LABOR UNIONS FOR PICKET LINE ASSAULTS

In the tense and volatile atmosphere that accompanies labor disputes, no situation is more likely to produce violence than the picket line. The confrontation of antagonistic parties at the picket line enhances the possibility of personal assaults. Although assaults by pickets will usually be unfair labor practices,[1] the National Labor Relations Act (NLRA)[2] does not provide a mechanism for fully compensating the victims of such assaults.[3] In addition, those who commit picket line assaults will often be judgment-proof.[4] Thus, in order to secure adequate compensation for their injuries, the victims of picket line assaults must be able to attach tort liability to labor unions.[5]

This article will discuss whether tort actions against unions for picket line assaults are preempted by the National Labor Relations Act, and if not preempted, what forums are available to hear such actions. This article will also examine the theories that have been used to hold unions liable for the assaults committed by their picketers. Included in this discussion will be an analysis of the policy considerations offered in support of the various theories of liability.

I. Federal Preemption and Choice of Forum

Three potential forums are available for the adjudication of labor relations disputes: the state courts, the federal courts, and the

[1] Section 8 (b)(1)(A) of the National Labor Relations Act makes it an unfair labor practice for a labor organization or its agents to restrain or coerce an employee attempting to exercise his section 7 rights to organize, bargain collectively through agents of his own choosing, or to refrain from such concerted activity. 29 U.S.C. § 158(b)(1)(A) (1970). The National Labor Relations Board has found picket line assaults to be a violation of section 8 (b)(1)(A). Teamsters Local 783 [Coca-Cola Bottling Co. of Louisville], 160 N.L.R.B. 1776 (1966); Local 888, UAW [Miami Plating Co.], 144 N.L.R.B. 897 (1963).

[2] 29 U.S.C. §§ 151-168 (1970).

[3] The National Labor Relations Act only grants the National Labor Relations Board the power to make an award of back pay, not damages for pain and suffering. 29 U.S.C. § 160(c) (1970). *See also* UAW-CIO v. Russell, 356 U.S. 634 (1958); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

[4] 13 Manpower Report of the President 282 (1975).

[5] The tort liability of labor unions for picket line assaults is discussed in Evans, *The Law of Agency and the National Unions*, 49 Ky. L.J. 295 (1961); Myers, *State Damage Suit by an Employer Against a Labor Union for Injuries Incurred Through Violence During a Strike*, 34 Tenn. L. Rev. 609 (1967); Comment, *The Liability of Labor Unions for Picket Line Assaults*, 21 U.C.L.A.L. Rev. 600 (1973).

National Labor Relations Board (NLRB). In *San Diego Building Trades Council v. Garmon,*[6] the Supreme Court held that where the "activity is arguably subject" to section 7 or 8 of the National Labor Relations Act, the state and federal courts "must defer to the exclusive competence of the National Labor Relations Board."[7] The Court reasoned that unless the National Labor Relations Board had exclusive jurisdiction over questions of labor policy, the multiplicity of tribunals would produce incompatible rules and frustrate the development of a national labor policy.[8] Furthermore, the Court discerned a congressional intent to entrust the administration of a national labor policy to a centralized administrative agency equipped with special procedures and expertise concerning labor relations problems.[9]

Nevertheless, the Supreme Court has recognized several exceptions to this preemption doctrine.[10] Most notably, the Court has consistently allowed state courts to adjudicate tort claims arising from violence incident to labor disputes.[11] Originally, the Court justified this exception by focusing on the inability of the NLRB to provide adequate remedies for the victims of labor violence.[12] More recently, the *Garmon* Court based the exemption of violent conduct from preemption on the kind of conduct involved, rather than the kind of relief being sought.[13] The Court stressed the states' overriding interest in the maintenance of public order[14] and noted that labor violence touches interests deeply rooted in local feelings and responsibilities.[15] Subsequent decisions have reaffirmed this justification for exempting labor violence from federal preemption.[16] Thus, although picket line assaults are "arguably"

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[6] 359 U.S. 236 (1959).

[7] *Id.* at 245.

[8] *Id.* at 242-45.

[9] *Id.* at 242.

[10] The Court has held that state courts may hear libel suits, Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966), claims for alleged breach of a collective bargaining agreement, Smith v. Evening News Ass'n, 371 U.S. 195 (1962), and claims for breach of a bargaining representative's duty of fair representation, Vaca v. Sipes, 386 U.S. 171 (1967). For a discussion of the preemption doctrine, see generally Cox, *Labor Law Preemption Revisited,* 85 HARV. L. REV. 1337 (1972); Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon,* 72 COLUM. L. REV. 469 (1972).

[11] *See* Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); UAW v. Russell, 356 U.S. 634 (1958); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

[12] *See* UAW v. Russell, 356 U.S. 634 (1956); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954). *See also* note 3 *supra.*

[13] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247-48 (1958).

[14] *Id.* at 247.

[15] *Id.* at 244.

[16] Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976); UMW v. Gibbs, 383 U.S. 715 (1966).

subject to section 8 of the NLRA,[17] states are not preempted from adjudicating tort claims arising from picket line violence.

The availability of the federal judiciary as an alternative forum requires satisfaction of certain jurisdictional requirements. Since unions are considered citizens of the states where their members reside,[18] federal diversity jurisdiction is unlikely. Yet the federal courts might be able to exercise pendent jurisdiction[19] over tort claims resulting from picket line assaults. The federal courts have exercised pendent jurisdiction over state tort claims resulting from union violence when these tort claims have arisen from the same nucleus of operative facts as a suit under section 303 of the Labor Management Relations Act,[20] the provision dealing with secondary boycotts. In these cases, the individual who had suffered harm from the economic pressures of the secondary boycott had also suffered property damage from union violence.[21] Similarly, if an individual who brought a section 303 suit for damage resulting from a secondary boycott was also assaulted during that boycott, a federal court is capable of exercising pendent jurisdiction over the state tort claim for the picket line assault. Since pendent jurisdiction is discretionary, even if this unlikely situation should occur, a federal court would not necessarily have to assume jurisdiction over the state tort claim.[22] Thus, tort actions for picket line assaults will usually be adjudicated in state courts.[23]

II. THEORIES FOR IMPOSING TORT LIABILITY ON UNIONS

A. Conspiracy

At common law labor unions had no existence as legal entities independent of their members.[24] Consequently, the courts based

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[17] *See* note 1 *supra*. *See also* note 6 and accompanying text *supra*.

[18] United Steelworkers v. R. H. Bouligny, Inc., 382 U.S. 145 (1965).

[19] In UMW v. Gibbs, 383 U.S. 715, 725 (1966), the Court held that the federal courts may exercise pendent jurisdiction whenever the state and federal claims "derive from a common nucleus of operative facts," and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." The Court further noted that pendent jurisdiction is discretionary. *Id.* at 726-27 (1966).

[20] Section 303 of the Labor Management Relations Act allows a person injured by a secondary boycott to bring suit for damages in a federal district court or any court having jurisdiction over the parties. 29 U.S.C. § 187 (1970).

[21] *See* UMW v. Gibbs, 383 U.S. 715 (1966); Ritchie v. UMW, 410 F.2d 827 (6th Cir. 1969).

[22] *See* note 19 *supra*. The reluctance of federal courts to make needless decisions of state determinations of law would militate against pendent jurisdiction. UMW v. Gibbs, 383 U.S. 715, 726 (1966). The federal courts would be especially reluctant to exercise jurisdiction over tort actions for picket line assaults since the state has a special interest in the adjudication of these actions. *See* notes 14-15 and accompanying text *supra*.

[23] *See* Comment, *The Liability of Labor Unions for Picket Line Assaults*, 21 U.C.L.A. L. REV. 600, 606-08 (1973).

[24] Walker v. Locomotive Engineers, 186 Ga. 811, 199 S.E. 146 (1938); Karges Furniture Co. v. Amalgamated Woodworkers Local 131, 165 Ind. 421, 75 N.E. 877 (1905); St. Paul

union liability for picket line assaults on the theory that all members of a union were engaged in a civil conspiracy.[25] Since unions can now be sued as unincorporated associations in most jurisidictions,[26] courts rarely rely upon this theory today, although it is still used occasionally in attempts to hold unions liable for picket line violence.[27]

B. Consent

Courts commonly rely upon a theory of consent to hold unions liable for picket line assaults committed by their members.[28] Under this theory, unions are responsible for actions they authorize or ratify.[29] There are two distinct standards for imposing liability on unions under this theory.

1. The Norris-La Guardia Test—Section 6 of the Norris-La Guardia Act provides that unions may not be held responsible for the unlawful acts of their members without clear proof of actual union participation in, authorization for, or ratification of such acts.[30] By requiring "clear proof" and "actual" participation, authorization, or ratification, this section establishes stringent criteria for imposing liability on unions for the acts of their members. Derived from the *Coronado Coal Cases,*[31] this test was incorporated into the Norris-La Guardia Act in order to protect unions from being weakened by damage judgments resulting from events beyond their control.[32]

Xypothetae v. St. Paul Bookbinders Union, 94 Minn. 351, 102 N.W. 725 (1905). *See generally* Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation,* 51 YALE L.J. 40 (1941).

[25] A civil conspiracy is typically defined as a combination between two or more persons to accomplish a lawful purpose by unlawful means. Koehring Co. v. National Automatic Tool Co., 257 F. Supp. 282 (N.D. Ind. 1966). McKee v. Hughes, 133 Tenn. 455, 181 S.W. 930 (1915). *See also* Burdick, *The Tort Conspiracy as a Crime, And Conspiracy as a Tort,* 7 COLUM. L. REV. 229 (1907); Charlesworth, *Conspiracy as a Ground of Liability in Tort,* 36 L.Q. REV. 38 (1920). For a decision applying the conspiracy theory to a picket line asault, see Hall v. Walters, 226 S.C. 430, 85 S.E.2d 729 (1955), *cert. denied,* 349 U.S. 953 (1955).

[26] Myers, *State Damage Suit by an Employer Against a Labor Union for Injuries Incurred Through Violence During a Strike,* 34 TENN. L. REV. 609, 622 (1967).

[27] *See, e.g.,* UMW v. Gibbs, 383 U.S. 715 (1966).

[28] Evans, *The Law of Agency and the National Union,* 49 KY. L.J. 295, 300-04 (1961).

[29] *Id.* at 300.

[30] 29 U.S.C. § 106 (1970).

[31] Coronado Coal Co. v. UMW, 268 U.S. 295 (1924); UMW v. Coronado Coal Co., 259 U.S. 344 (1922). In determining whether the plaintiff corporation could recover treble damages under section 7 of the Sherman Act for a union conspiracy to restrain interstate commerce, the Court stated that the international union would be liable for strike violence only if it "was shown by substantial evidence to have initiated, participated in, or ratified the interference with plaintiff's business." 259 U.S. at 393. The Court found no "substantial evidence" of union involvement despite the fact that the union president and the union journal reported acts of union violence without criticism.

[32] UMW v. Gibbs, 383 U.S. 715, 737 (1966); S. REP. No. 163, 72d Cong., 1st Sess. 19 (1932).

In an early decision, the Supreme Court held that the standard enunciated in section 6 of the Norris-La Guardia Act applied to both national and local unions.[33] Subsequently, in *UMW v. Gibbs*,[34] the Supreme Court held that this standard should be used in federal court adjudications of state tort claims arising out of labor disputes.[35] The Court reasoned that this standard was necessary to keep unions from being destroyed financially by the punitive damage remedies available in many states.[36] Although the federal courts have never applied the Norris-La Guardia standard to tort claims for picket line assaults,[37] they have applied this standard to tort claims for property damage resulting from picket line violence.[38]

Under section 6, unions may be held liable for violent conduct which they have actually authorized or ratified. To find "actual" authorization or ratification, however, the courts require proof of actual participation by the union or its agents in the violent conduct. In *Ritchie v. UMW*,[39] unidentified saboteurs had dynamited the entrance to a coal mine during a strike. Although UMW officials had stated that such violence would stop if the employers signed a contract, the court held that this was not an actual authorization or ratification under section 6 of the Norris-La Guardia Act. In *Riverside Coal Company v. UMW*,[40] however, the Sixth Circuit Court of Appeals found actual authorization where a UMW district representative, present during the violence, led the picketing and made repeated threats of violence to police officers and nonunion workers. Hence, *Ritchie* and *Riverside Coal* suggest that unions will not be held liable under the courts' interpretation of the Norris-La Guardia standard unless there is actual participation by the union or its agents in the union violence.

To prevail under section 6 of the Norris-La Guardia Act, the plaintiff must establish by "clear proof" the requisite union par-

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[33] United Bhd. of Carpenters v. United States, 330 U.S. 395, 407-09 (1947).

[34] 383 U.S. 715 (1966).

[35] The Court rejected the argument that the provisions of the Labor Management Relations Act (L.M.R.A.) should govern in these situations. The L.M.R.A. provides that ordinary concepts of agency determine union responsibility for the acts of their members. 29 U.S.C. §§ 152(13), 185(e), 187(b) (1970). Noting that Congress did not repeal section 6 of the Norris-La Guardia Act when it enacted the L.M.R.A., the Court discerned a congressional intent to limit the L.M.R.A. standard to the situations covered by the L.M.R.A. 383 U.S. at 736. For a discussion of the L.M.R.A. standard, see notes 62-67 and accompanying text *infra*.

[36] 383 U.S. at 736.

[37] The difficulty of obtaining federal jurisdiction over picket line assaults probably accounts for the lack of cases. *See* notes 17-21 and accompanying text *supra*.

[38] UMW v. Gibbs, 383 U.S. 715 (1966); Ritchie v. UMW, 410 F.2d 827 (6th Cir. 1969); Riverside Coal Co. v. UMW, 410 F.2d 267 (6th Cir. 1969); Lewis v. Pennington, 400 F.2d 806 (6th Cir. 1968); Kayser-Roth Corp. v. Textile Workers Union, 347 F. Supp. 801 (E.D. Tenn. 1972).

[39] 410 F.2d 827 (6th Cir. 1969).

[40] 410 F.2d 267 (6th Cir. 1969).

ticipation.[41] In *UMW v. Gibbs*,[42] the Court interpreted the clear proof standard to require that the plaintiff present "clear, unequivocal and convincing proof," and to persuade by more than a bare preponderance of evidence. Thus, this standard requires less than the criminal burden of proof but more than the "ordinary civil burden of persuasion."[43] Although "clear proof" is a demanding standard, the courts have indicated that this standard may be satisfied by circumstantial evidence[44] or by an analysis of union customs and traditions.[45]

Some states have "little Norris-La Guardia Acts" which also require "clear proof" of actual participation, authorization, or ratification to hold unions liable for picket line violence.[46] Several state courts have held that their statutes apply only to injunctive actions, not to damage actions.[47] In *Benoit v. Local 299, United Electrical Radio & Machine Workers*,[48] however, the Connecticut Supreme Court held that the state's "little Norris-La Guardia Act" encompassed tort actions for picket line violence. The court narrowly construed the Norris-La Guardia standard, finding that a union did not authorize or ratify a picket line assault committed by two union officials.[49] In a later decision, however, the Connecticut court held that an international and local union were liable under this standard where several leading union officials repeatedly participated in strike violence, planned strike activities, and refused to repudiate violent tactics.[50] Apparently only such overwhelming evidence of union participation was sufficient to satisfy the Connecticut court's interpretation of the Norris-La Guardia standard.

The purpose of the Norris-La Guardia test was to protect unions, especially from large punitive damage judgments for acts of violence in which they had not actually participated.[51] It is questionable, however, whether unions need this kind of protection any longer, for unions have developed to the point where they should

[41] 29 U.S.C. § 106 (1970).

[42] 383 U.S. 715, 737 (1966).

[43] *Id.* The Court defined the "ordinary civil burden of persuasion" as persuasion by a preponderance of evidence. *Id.*

[44] Ritchie v. UMW, 410 F.2d 527 (6th Cir. 1969).

[45] United Bhd. of Carpenters v. United States, 330 U.S. 395 (1947).

[46] Many of these acts have terminology similar to the Norris-La Guardia Act. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-114 (West 1965).

[47] *See, e.g.*, Titus v. Tacoma Smeltermen's Local 25, 62 Wash. 2d 461, 383 P.2d 504 (1963); Nelson v. Haley, 232 Ind. 314, 111 N.E.2d 812 (1953).

[48] 150 Conn. 266, 188 A.2d 499 (1963).

[49] *Id.* at 275, 188 A.2d at 503.

[50] United Aircraft Corp. v. International Ass'n of Machinists, 161 Conn. 79, 285 A.2d 330 (1971).

[51] *See* note 32 *supra*. Congress also enacted the Norris-La Guardia Act with a view to protecting unions from injunctions. A. COX, LAW AND THE NATIONAL LABOR POLICY 5 (1960).

accept "ordinary responsibility" for tort damages.[52] To argue that the Norris-La Guardia standard is needed to protect unions from punitive damages reflects a distrust of the courts' ability to limit the imposition of punitive damages to appropriate situations. Even if this distrust is warranted, the better solution would be to eliminate punitive damages, rather than to limit the union's responsibility for the violent conduct of its members.

In addition, the Norris-La Guardia test fails to serve other important policies. Specifically, the test places a heavy burden upon plaintiffs, making it difficult for them to receive compensation. Furthermore, the test is difficult to define and administer[53] and therefore encourages litigation. Besides burdening judicial resources, this leaves parties uncertain as to their rights and responsibilities.

2. Implied Consent—Most state courts have relied upon a theory of "implied consent" to hold both local and international unions liable for picket line assaults.[54] This theory does not demand the "clear proof" required by the Norris-La Guardia standard. Moreover, under this doctrine the courts may imply ratification or authorization from union silence or omissions regarding acts of violence.[55]

State courts have found that local unions had impliedly consented to picket line assaults in a variety of situations. A South Carolina court found that a local union ratified an assault when it arranged bail and paid the fine of a member who committed the assault and failed to expel the picketers who threatened the victim.[56] Similarly, a California court found that a local union ratified an assault when it failed to expel the member who perpetrated the assault.[57] Furthermore, a Tennessee court held that a local union authorized an assault because its officers were present during the assault and apparently encouraged it, even though they did not participate directly in the violence.[58]

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[52] *See* Linn v. United Plant Guard Workers Local 114, 383 U.S. 53, 63 (1966).

[53] The "clear proof" standard is an unfamiliar concept to most courts, and has only been vaguely defined by a listing of synonyms. *See* notes 42-45 and accompanying text *supra*.

[54] Coats v. Construction & Gen'l Laborers Local 185, 15 Cal. App. 3d 908, 93 Cal. Rptr. 639 (1971); McDaniel v. Textile Workers, 36 Tenn. App. 236, 254 S.W.2d 1 (1962); Hall v. Walters, 226 S.C. 430, 85 S.E.2d 729 (1955), *cert. denied*, 349 U.S. 953 (1955).

[55] Coats v. Construction & Gen. Laborers Local 185, 15 Cal. App. 3d 908, 93 Cal. Rptr. 639 (1971).

[56] Hall v. Walters, 226 S.C. 430, 85 S.E.2d 729 (1955), *cert. denied*, 349 U.S. 953 (1955).

[57] Coats v. Construction & Gen. Laborers Local 185, 15 Cal. App. 3d 908, 93 Cal. Rptr. 639 (1971).

[58] McDaniel v. Textile Workers, 36 Tenn. App. 236, 254 S.W.2d 1 (1962). Just before the assault, the individuals who committed the assaults communicated by telephone with the business representative of the union. The business representative said, "you know what our plans are, and you are to carry them out. Keep 'em in until they come out, and when they come out the gate thin 'em out." *Id.* at 250, 254 S.W.2d at 7.

State courts have also held international unions liable under an implied consent theory. A Tennessee court found that an international union ratified an assault when some of its officials were on the scene during the assault, and furnished bail money and attorneys to the members charged with the assaults.[59] Moreover, several courts have relied upon an implied consent theory to hold international unions liable for assaults after finding that the local unions which authorized or ratified the picket line violence were acting as agents of the internationals.[60] To determine whether the local unions were acting as agents for the international, the courts examined the union constitutions to discover the extent of the international's control over local officers,[61] their ability to suspend local charters,[62] and their ability to put locals in trusteeship.[63]

In determining whether unions have committed unfair labor practices, the NLRB must often decide whether picket line violence should be imputed to labor unions. Section 2(13) of the National Labor Relations Act requires that the National Labor Relations Board apply the ordinary law of agency to this issue.[64] According to the Board's interpretation, union consent can be inferred from conduct or acquiescence.[65] The Board has frequently found implied consent where a union failed to indicate disapproval of coercive acts of which it had knowledge, or where it took no steps to prevent further acts of violence.[66]

In suits to enforce NLRB orders, the federal courts have interpreted section 2(13) to allow imputing the violence of a strike participant to the union only where there is a showing of agency, ratification, counseling, incitement, or some other form of union participation in the violence.[67] This approach appears to place

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[59] UAW v. American Metal Prods. Co., 56 Tenn. App. 526, 408 S.W.2d 682 (1964). Two federal cases applying Tennessee agency law held international unions liable because their agents directed local violence. White Oak Coal Co. v. UMW, 381 F.2d 591 (6th Cir. 1963), *cert. denied,* 375 U.S. 966 (1964); UMW v. Meadow Creek Coal Co., 263 F.2d 52 (6th Cir. 1959), *cert. denied,* 359 U.S. 1013 (1959).

[60] International Union of Operating Engineers, Local 675 v. Lassiter, 295 So. 2d 634 (Fla. App. 1975); Overnite Transp. Co. v. International Bhd. of Teamsters, 257 N.C. 18, 125 S.E.2d 277 (1962).

[61] International Union of Operating Engineers, Local 675 v. Lassiter, 295 So. 2d 634, 638 (1975).

[62] *Id.*

[63] Overnite Transp. Co. v. International Bhd. of Teamsters, 257 N.C. 18, 26, 125 S.E.2d 277, 283 (1962).

[64] 29 U.S.C. § 152(13) (1970).

[65] As the National Labor Relations Board found, "Agency is a contractual relationship, deriving from the mutual consent of principal and agent that the agent shall act for the principal. But the principal's consent, technically called authorization or ratification, may be manifested by conduct, sometimes even by passive acquiescence as well as by words." Sunset Line & Twine Co., 79 N.L.R.B. 1487, 1508 (1948) (italics omitted).

[66] *See* Local 248, Meat & Allied Food Workers, 222 N.L.R.B. 1023 (1976); Dairy Employees Local 695, 221 N.L.R.B. 647 (1975).

[67] *See, e.g.,* N.L.R.B. v. Sea-Land Serv., Inc., 356 F.2d 995, 966 (1st Cir. 1966), *cert. denied,* 385 U.S. 900 (1966).

greater emphasis on the commission of some positive act, but by interpreting the ratification concept broadly the federal courts have applied the section 2(13) test in the same manner as the Board. For example, in *Compton v. Puerto Rico Newspaper Guild, Local 225*,[68] the court held that a union directing a strike is responsible for the acts of its pickets if a union agent has established a pattern of coercive conduct which the strikers are expected to follow, or if a union agent receives knowledge of coercive acts being committed by pickets and does nothing to indicate disapproval or prevent the further commission of such acts.[69] Nevertheless, isolated acts of violence have not been imputed to a union merely because the perpetrator of the violence was a union picket.[70]

The implied consent test occupies an intermediate position between the Norris-La Guardia standard and that of respondeat superior.[71] The implied consent standard imposes a lesser burden on plaintiffs than the Norris-La Guardia standard, for under the implied consent test plantiffs need not persuade the factfinder by "clear proof," but can show union consent through union acquiescence or inaction. As a result, this test enables more plaintiffs to receive compensation. The implied consent test, however, does not subject unions to unlimited liability, since under the test unions are not liable for isolated picket line assaults with which they have no actual connection.[72] Finally, this test is easy to administer because the NLRB has developed a well-defined body of case law dealing with union responsibility for picket line violence under the implied consent test.[73]

C. Respondeat Superior

Under the theory of respondeat superior a master is liable for damages caused by the torts of his servants which are performed in the scope of their employment, regardless of the master's authorization or ratification of the misconduct.[74] To impose liability on the basis of respondeat superior, the plaintiff must show both that a master-servant relationship existed and that the servant was acting within the scope of his employment when the misconduct occurred.[75] Though the length of the servant's employment, the method

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[68] 343 F. Supp. 884 (D.P.R. 1972).

[69] *Id.* at 889.

[70] *See* N.L.R.B. v. Service Employees, Local 254, 535 F.2d 1335 (1st Cir. 1976).

[71] *See* notes 72-93 and accompanying text *infra*.

[72] *See* note 70 and accompanying text *supra*.

[73] *See generally* Evans, *The Law of Agency and the National Union*, 49 KY. L.J. 295, 300 (1961).

[74] RESTATEMENT (SECOND) OF AGENCY § 216 (1958).

[75] International Union of Operating Engineers, Local 675 v. Lassiter, 295 So. 2d 634 (1974); United Bhd. of Carpenters v. Humphreys, 203 Va. 781, 127 S.E.2d 98 (1962);

of payment, the nature of the servant's activities, and the master's power of dismissal are all considered in establishing the master-servant relationship,[76] the master's right to control physical conduct of the servant is the most significant.[77] The scope of employment may be defined in several ways. A servant acting improperly may be acting within the scope of his employment when his acts are so closely connected with or incidental to his duties that they carry out the object of the employment.[78] Under a broader definition, a servant acts within the scope of his employment if his conduct is not so unforeseeable that it would be unfair to charge the master with responsibility.[79] Liability under respondeat superior is usually justified on the ground that it spreads the victim's loss throughout society[80] and that it promotes the efficient allocation of economic resources.[81]

Several state courts have recognized that unions may be liable for picket line assaults under a theory of respondeat superior.[82] These courts have found that the pickets were servants of their local[83] or their international union.[84] The issue that separates these courts is whether the assaults were committed within the picket's scope of employment. In *United Brotherhood of Carpenters v. Humphreys,*[85] the court held that two pickets were acting within the scope of their employment when they left the picket line, pursued the plaintiff in an automobile and finally assaulted him at a service station. The court stated that an act is within the scope of a servant's employment whenever the act is "fairly and naturally" incident to the master's business and is done with a view to further the master's interests or from some "emotion which naturally grew

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Langness v. Katoner, 42 Wash. 2d 394, 255 P.2d 551 (1953); Hiroshima v. Pacific Gas & Elec. Co., 18 Cal. App 2d 24, 63 P.2d 340 (1936).

[76] RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

[77] *Id.* at § 220, Comment d. On the difficulty of distinguishing a servant from an independent contractor, see generally RESTATEMENT (SECOND) OF AGENCY § 220, Comments c-m (1958).

[78] W. PROSSER, LAW OF TORTS § 70, at 460-61 (4th ed. 1971).

[79] Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1968).

[80] Smith, *Frolic and Detour,* 23 COLUM. L. REV. 444 (1923).

[81] Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts,* 70 YALE L.J. 499 (1961).

[82] Titus v. Tacoma Smeltermen's Local 25, 62 Wash. 2d. 461, 383 P.2d 461 (1963); United Bhd. of Carpenters v. Humphreys, 203 Va. 781, 127 S.E.2d 98 (1962); Tulsa Gen. Drivers Local 523 v. Conley, 288 P.2d 750 (Okla. 1955).

[83] Titus v. Tacoma Smeltermen's Local 25, 62 Wash. 2d 461, 383 P.2d 461 (1963); Tulsa Gen. Drivers Local 523 v. Conley, 288 P.2d 750 (Okla. 1955).

[84] United Bhd. of Carpenters v. Humphreys, 203 Va. 781, 127 S.E.2d 98 (1962). Although the courts are not explicit as to why a picketer is a servant of the union, the unions' rights to control the pickets and the picketers' receipt of strike benefits are probably crucial elements in courts' determinations. For a discussion of picketers as union servants, see generally, Comment, *The Liability of Labor Unions for Picket Line Assaults,* 21 U.C.L.A.L. REV. 600 (1973).

[85] 203 Va. 781, 127 S.E.2d 98 (1962).

out of or was incident to the attempt to perform the master's business."[86] In contrast, the court in *Tulsa General Drivers Local 523 v. Conley*[87] held that a picket was not acting within the scope of employment when he followed the plaintiff several blocks away from the picket line and assaulted him. The court declared that only acts similar or incident to the conduct authorized were within a servant's scope of employment.[88]

Since most picket line assaults arise from emotions generated by the strike, the union will often be subject to liability under the *Humphreys* test. Only when an assault arises out of strictly personal malice would a union escape liability under this standard. Indeed, it has even been proposed that the personal malice exception should be abolished when a plaintiff is seeking recovery from labor unions for picket line violence.[89] In effect, this would make unions the insurer of all picket line assaults. The broad construction given by the *Humphreys* court to "scope of employment" is inconsistent with the *Conley* court's construction. The *Conley* court limits the "scope of employment" to acts which are similar or incident to authorized conduct. Accordingly, the union must authorize some sort of violent activity if it is to be held liable for picket line assaults. This standard is similar to the implied consent test which holds unions liable for picket line assaults when the unions have established a violent course of conduct that pickets are expected to follow.

Respondeat superior as applied by the *Humphreys* court is attractive because the victim of almost every picket line assault could obtain compensation. It has been argued that labor unions can spread the cost of compensating assault victims "backward" to their membership by increasing union dues, and could also spread this loss "forward" by demanding higher wages, thus increasing the prices of goods to reflect fully the costs of production.[90] This in turn would promote a more efficient allocation of economic resources.[91]

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[86] The court observed that a servant's act is within the scope of his employment if: (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill-advisedly, with a view to further the master's interests, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.

Id. at 787, 127 S.E.2d at 103 (italics omitted).

[87] 288 P.2d 750 (Okla. 1955).

[88] *Id.* at 753.

[89] Comment, *The Liability of Labor Unions for Picket Line Assaults*. 21 U.C.L.A. L. REV. 600, 622 (1973).

[90] *Id.* at 619-20.

[91] For an explanation of the role of respondeat superior in promoting the efficient allocation of economic resources, see generally Calabresi, *supra* note 81.

It is doubtful, however, whether labor unions are effective loss-spreading institutions. Unions cannot spread their loss backward to the membership to any great degree because the union leadership must look toward reelection, and thus is under pressure not to increase dues. Moreover, increased dues may jeopardize union viability by encouraging workers to quit the union and either seek membership in competing unions or choose against union membership altogether. In addition, unions will not be able to spread the loss forward to employers by increased wage demands because employers will be reluctant to increase wages to pay for the costs of union violence.

Finally, although respondeat superior compensates victims, the cost may be too heavy. The role of labor unions in the American economic system has been recognized by legislatures and courts.[92] Tort actions for picket line assaults subject unions to damage suits where potentially destructive punitive damage awards can be made.[93] Holding a union liable where picketers have committed no acts from which the consent of the union can be implied is too high a price to pay for victim compensation.

III. CONCLUSION

The potential for picket line violence is great. When an individual is assaulted by picketers, often his only means of gaining compensation is to bring a tort action against the union. The courts and legislatures have developed three standards for imputing the violence of pickets to unions: the Norris-La Guardia standard, the implied consent test, and respondeat superior.

The Norris-La Guardia test may protect unions to a degree unwarranted by modern economic conditions. Furthermore, this protection is imposed by placing a greater burden of proof upon the victim who is in need of compensation. In contrast, respondeat superior makes the union a bearer of all loss, even though the union cannot effectively spread this cost to its members or to consumers. The implied consent theory is the most appropriate for imposing liability on unions for picket line assaults. Under this test many victims obtain compensation, yet unions are still protected from responsibility for isolated acts of violence. Moreover, this test is easy to administer because of the large body of case law which the courts and the National Labor Relations Board have developed in applying it.

—David R. Case

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[92] *See generally* A. COX, LAW AND THE NATIONAL LABOR POLICY (1960).

[93] *See* Brandwen, *Punitive-Exemplary Damages in Labor Relations Litigation*, 29 U. CHI. L. REV. 460, 477 (1962).