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ONE OF THE MAJOR PROBLEMS IN determination of labor union tort liability is the extent of federal pre-emption of labor law matters—does it preclude either state legislation or court action where interstate commerce is affected? [1] In *Garner v. Teamsters Union*,[2] an employer brought action to enjoin union behavior which violated state law and which could also constitute an unfair labor practice under the Taft-Hartley Act. The United States Supreme Court held that, since Congress had provided for an administrative cease and desist order which could be preceded by a temporary restraining order, the state remedy conflicted with the federal remedy. Therefore, a finding of pre-emption was required. Similarly, in *Guss v. Utah Labor Relations*,[3] the Supreme Court ruled that the state was foreclosed from taking jurisdiction where the state board sought to halt conduct prohibited by both state and federal statutes, even though the National Labor Relations Board refused to take action because the dollar volume did not meet the Board's jurisdictional standards.[4] The decisions in these two cases seem to indicate that the federal government has preempted the field of tort liability and the remedies. However, it is also clear that there are areas over and beyond this in which state law may still apply.[5]

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[1] See: Jenkins, Problems of Federal-State Jurisdiction in Labor Relations, 31 Rocky Mt. L. R. 315 (1959); Metzger, The Supreme Court, Congress, and State Jurisdiction over Labor Relations, 59 Colum. L. R. 6, 269 (1959).

[2] 346 U. S. 485 (1953).

[3] 353 U. S. 1 (1957).

[4] See also: Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U. S. 20 (1957); United Mine Workers v. Arkansas Oak Flooring Co., 351 U. S. 62 (1956).

[5] See: Wortex Mills v. Textile Workers Union, 350 Pa. 3, 109 A. 2d 815 (1954); Mahoney v. Sailors' Union of the Pacific, 45 Wash. 2d 453, 275 P. 2d 440 (1954); Benjamin v. Foidl, 379 Pa. 540, 109 A. 2d 300 (1954); Safeway Stores v. Retail Clerks Int. Assoc., 41 Cal. 2d 567, 261 P. 2d 721 (1954); Weber v. Anheuser-Busch, Inc., 348 U. S. 468 (1955); Adams Dairy v. Burke, 293 S. W. 2d 281 (Mo., 1956); MacDonald v. Feldman, 393 Pa. 274, 142 A. 2d 1 (1958); Perko v. Local No. 207 of Int'l. Assoc. of Bridge, Structural and Ornamental Iron Workers Union et al., 168 Ohio St. 161, 151 N. E. 2d 742 (1958); Baumgartner's Electrical Construction Co. v. DeVries, et al., 91 N. W. 2d 663 (So. Dak., 1958); Lavery's Main St. Grill, Inc. v. Hotel and Restaurant Employees-Bartenders Union Local 288 et al., 146 Conn. 93, 147 A. 2d 902 (1959); Benz v. Compania Naviera Hidalgo, S. A., 233 F. 2d 62 (9th Cir. 1956), affd. 77 S. Ct. 699, 353 U. S. 138 (1956); Grunwald-Marx, Inc. v. Los Angeles Joint Board, Amalgamated Clothing Workers of America, 343 P. 2d 23 (Cal., 1959).

In *United Construction Workers v. Laburnam Construction Corporation,*[6] the Supreme Court permitted an employer to recover substantial compensatory and punitive damages in a tort action in a state court because it did not find a conflict of remedies sufficient to deprive the state court of jurisdiction. In that case, the employer's construction contracts had been canceled when a stranger union tried through secondary pressure, mass picketing, and threats of violence, to force employees who were members of recognized unions to join its ranks. The only federal remedy available to the employer was a cease and desist order which would have provided no real relief. The Court considered the unfair labor practice as merely incidental to the employer's claim and allowed the state remedy to stand.

The ruling in *Laburnam* was extended, clarified, and applied in *UAW-CIO v. Russell.*[7] In this case, an employee was kept from working for five weeks (at a loss of earnings of $100 per week) by the mass picketing and threats of violence of a striking union. The union's conduct was tortious under Alabama law and may have been an unfair labor practice under the Taft-Hartley Act. Instead of bringing an unfair labor practice before the N. L. R. B., which might have resulted in an award of full back pay only, Russell chose to bring a tort action in the state courts[8] for lost wages and punitive damages. He was awarded a judgment of $10,000. The Supreme Court allowed the state decision to stand, pointing out that a back pay award, although incidentally compensatory, is made to effectuate the policies of the Act, thereby vindicating public rather than private rights. In the absence of a clear indication to the contrary, the Court refused to find an intent by Congress to ban a fully compensatory tort action in the state court merely because of the existence of N. L. R. B. jurisdiction. Thus, by delineating public and private rights, the Court theoretically avoided conflicting federal-state remedies which might destroy uniform federal regulations. Following this line of reasoning, it can be concluded that a denial by the N. L. R. B. of an award of back pay to vindicate a public right is consistent with a recovery of back pay plus punitive damages in a state court to vindicate a private right.[9]

[6] 347 U. S. 656 (1954).

[7] 356 U. S. 635 (1958). See also the closely related case of International Assoc. of Machinists v. Gonzales, 356 U. S. 617 (1958), decided by the U. S. Supreme Court on the same day.

[8] Russell v. UAW-CIO, 258 Ala. 615, 64 So. 2d 384 (1953); UAW-CIO v. Russell, 264 Ala. 456, 88 So. 2d 175 (1956).

[9] UAW-CIO v. Russell, supra, n. 7, at 645.

In the recent case of *San Diego Building Trades Council v. Garmon,*[10] the employer brought action against unions for injunction to restrain picketing and for damages. The Superior Court of San Diego County rendered judgment for the employer, and the unions appealed. The California Supreme Court affirmed the judgment. On certiorari the United States Supreme Court reversed the judgment insofar as it granted an injunction and remanded the case. The California Supreme Court then entered judgment awarding damages and the unions brought certiorari. The United States Supreme Court held that, where picketing by unions was arguably within the compass of the section of the National Labor Relations Act dealing with the right of employees as to organization, collective bargaining, etc., or the section dealing with unfair labor practices, the California court had no jurisdiction to award employer damages for injuries caused by picketing on the ground that picketing constituted a tort under state law, although the National Labor Relations Board had declined to exercise its jurisdiction, presumably because the amount of interstate commerce involved did not meet the Board's monetary standards for taking jurisdiction. The court distinguished the *Garmon* case from the *Laburnam* case and the *Russell* case by saying that state jurisdiction prevailed in those cases because the compelling state interest in the maintenance of domestic peace was not overridden in the absence of clearly expressed Congressional direction. The court found no such compelling state interest in the *Garmon* case where the picketing was peaceful.

The *Garmon* decision has had an impact upon the decisions of state courts. An example is *Angell v. Wood, Wire, and Metal Lathers International Union,*[11] where the court held that states must withhold access to their courts until the National Labor Relations Board has determined that the conduct is or is not unfair labor practice and that, where the Board declines to exercise

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[10] San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36 v. Garmon, 45 Cal. 2d 657, 291 P. 2d 1, revd. and remd. 353 U. S. 26, 77 S. Ct. 607, 1 L. Ed. 2d 618; 49 Cal. 2d 595, 320 P. 2d 473 on remand, revd. 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959).

[11] 324 S. W. 2d 83 (Tex., 1959). See also: Retail Clerks' Union, Local 1364 v. Superior Court, 339 P. 2d 839 (Calif., 1959); Chavez v. Sargent, 339 P. 2d 801 (Calif., 1959); United Brick and Tile Division of American-Marietta Co. v. Wilkinson, 325 S. W. 2d 50 (Mo., 1959); Willard v. Huffman, 109 S. E. 2d 233 (N. Car., 1959); Hawthorne-Sommerfield, Inc. v. Hellman, 187 N. Y. S. 2d 387 (1959); Stork Restaurant, Inc. v. Fernandez, 185 N. Y. S. 2d 280 (1959).

its jurisdiction, the states are entirely deprived of power to afford any relief.

All of this has left labor law in a state of turmoil. The comprehensive regulation of industrial relations by Congress has created difficult problems of federal-state regulations. Many of the problems could not have been foreseen by Congress; others were only vaguely defined. It has been necessary for judicial process to fill in many of the details in a complex legislative program. It may be that the recent Act of Congress, the Labor-Management Reporting and Disclosure Act,[12] signed September 14, 1959, will clarify the matter. Section 701 of the Act provides that the jurisdiction which the National Labor Relations Board had on August 1, 1959, continues and that nothing in the National Labor Relations Act, as amended, shall be deemed to bar the courts of any state from assuming and asserting jurisdiction over labor disputes over which the Board declines to assert jurisdiction.

Agency Relationship

In determining who are the agents of the unions and the responsibility of these unions for the behavior of their agents, there are many complex considerations. For one thing, unions are loose organizations consisting of committees within local, district, national, and international organizations. Often the question of the respective liability of these divisions must be decided. In addition, the responsibility of the union for strikes in violation of agreement, for the conduct of committeemen and stewards who handle grievances, and for activities of individual members must be determined. The difficulties are aggravated by the fact that union members, acting voluntarily, may still be acting for the union, or unions could encourage various activities and claim that the parties involved were not authorized.

Under common law, the judicial authorities recognized that unions that function in their own capacity do so as principals and are held liable for their agents' behavior. Because they have created the agency relationship, the unions are held liable for the illegal behavior of the persons who have real or apparent authority to act for the unions, as long as the agents are functioning within the scope of the authority. Activity by an agent which is outside of or beyond the scope of his real or apparent authority

[12] 7 U. S. C. § 701 (Public Law 86-257).

cannot be attributed to the union unless the union thereafter ratifies.

To ascertain who are agents of the union, the N. L. R. B. is regulated by § 2(13) of the Taft-Hartley Act: [13]

> In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

In the case of *International Longshoremen's and Warehousemen's Union (CIO) et al. v. Hawaiian Pineapple Co.*,[14] where a shipper brought action against the international union, the local union, and individuals to recover damages for a secondary boycott, the court interpreted this same provision of the Labor Management Relations Act[15] as follows: "We think the section was intended to cover the acts of officers of the union who deal with employers or the public. That is, if a union permits an officer or other representative to get into a position where he can and does cause trouble proscribed by the act then the union is responsible." [16] In other words, agency has taken on a meaning under the Taft-Hartley Act that includes ostensible authority.

Unions as Entities

For purposes of litigation, a union may be viewed either as an aggregate of individuals or as an entity apart from its members. At common law, a union is an aggregation, not an entity capable of appearing as an interested party in a law suit. In a New York case, the court held that the Taft-Hartley Act is not applicable to common law tort actions in the state courts and said:

> A voluntary unincorporated association is neither a partnership nor a corporation. It has no independent existence as an artificial person separate and apart from its members and the acts of individual members, even though they be officers of a voluntary organization, do not and cannot bind the other members without their consent or unless with full knowledge of the facts they ratify and adopt same as their own acts thereafter . . . (T)he liability which may be imposed in any action in which the association's officers are named in

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13 49 Stat. 450 (1947), 29 U. S. C. § 152 (13) (1952).

14 226 F. 2d 875 (9th Cir., 1955).

15 § 301(e), Labor Management Relations Act, 61 Stat. 156, 157, 29 U. S. C. A. § 185(e).

16 International Longshoremen's and Warehousemen's Union (CIO) et al. v. Hawaiian Pineapple Co., supra, n. 14, at 880.

their representative capacities, as is the case herein, is still that of the members as individuals.[17]

The difficulty presented of attempting to join all members in an action can insulate a union from suit or deny it access to the courts.[18]

Although many states continue to regard unions as aggregates of individuals, the problem of multiple joinder has been solved by the class action which is a form of suit allowing a few individuals to litigate on behalf of all union members.[19] In *Benz v. Compania Naviera Hidalgo, S. A.,* [20] the court held that, where labor unions may not be sued as separate entities, class suit against representative members is proper.

Other jurisdictions have enabled unions and other unincorporated associations to sue or be sued as entities, thereby abandoning the aggregate concept. For example, under Pennsylvania law, class actions are not permitted against unincorporated associations, and an action against an unincorporated labor union must either name the union entity as a party defendant or name one of its officers as a trustee *ad litem.*[21] Generally, the change enabling unions to sue or be sued as entities has been accomplished by statute.[22] In some cases, unions may

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[17] Coleman v. Pokodner, 163 N. Y. S. 2d 161, 164 (1957). See also: Karges Furniture Co. v. Amalgamated Woodworkers, 165 Ind. 421, 423-424, 75 N. E. 877, 878 (1905); Pickett v. Walsh, 192 Mass. 572, 589-590, 78 N. E. 753, 760-761 (1906); Tyler v. Boot and Shoe Workers, 285 Mass. 54, 188 N. E. 509 (1933).

[18] See: Collins v. Barry, 11 Ill. App. 2d 119, 136 N. E. 2d 597 (1956); Milam v. Settle, 127 W. Va. 271, 32 S. E. 2d 269 (1944); Kaplan, Suits against Unincorporated Associations under the Federal Rules of Civil Procedure, 53 Mich. L. Rev. 945, 946 (1955). An abortive attempt to require mandatory incorporation of labor unions, in Colorado in 1943, is discussed in Oleck, Non-Profit Corporations & Assns., 313 (1956).

[19] Ga. Code Ann. §§ 37-1002, -1007 (1936) (equity); O'Jay Spread Co. v. Hicks, 185 Ga. 507, 195 S. E. 564 (1938); Ill. Rev. Stat. ch. 110, § 23 (1956); O'Brien v. Matual, 14 Ill. App. 2d 173, 144 N. E. 2d 446 (1957); Ind. Stat. Ann. § 2-220 (1946); Nelson v. Haley, 232 Ind. 314, 111 N. E. 2d 812 (1953); Mo. Ann. Stat. § 507.070 (1952); Quinn v. Buchanan, 298 S. W. 2d 413 (Mo., 1957); Montgomery Ward & Co. v. Langer, 168 F. 2d 182 (8th Cir., 1948); Tunstall v. Brotherhood of Locomotive Firemen, 148 F. 2d 403 (4th Cir., 1945); Nissen v. International Bd. of Teamsters, 229 Iowa 1028, 295 N. W. 858 (1941); Note, 67 Harv. L. R. 1059 (1954).

[20] Supra, n. 5.

[21] Fry Roofing Co. v. Textile Workers Union of America, AFL-CIO, 149 F. Supp. 695 (D. C. E. D., Pa., 1957).

[22] Conn. Gen. Stat. § 52-76 (1958); Del. Code Ann. title 10, § 3904 (1953); Neb. Rev. Stat. Ann. § 25-213 (1948); N. J. Stat. Ann. § 2A: 64-1 (1952).

appear as entities only if they are defendants.[23] In Ohio, the courts have interpreted the Ohio provision for class actions[24] as permitting labor unions to be sued as entities,[25] and, in the District of Columbia, court decisions have given unions the capacity to litigate as entities.[26]

A union is generally unable to sue or be sued as an entity in West Virginia, and a class action may not be brought on behalf of its members, although the union's existence is recognized for some purposes.[27]

Section 301(b) of the Taft-Hartley Act clearly states that unions are bound by the behavior of their agents. In the courts of the United States, a union can be sued or it can sue both as an entity and in behalf of the members or employees it represents. This section of the law provides that a money judgment against a labor organization in a District Court can be enforced only against the organization as an entity and against its assets—not against any individual member or his assets.[28] By this section, a worker is protected against the reasoning in *Loewe v. Lawlor*[29] in which it was held that mere membership in a union made one responsible for the activities of the organization.

Establishing Agency

The N. L. R. B. has established several controlling basic rules of agency to be applied in determining the responsibility of a union for unfair labor practices. The first rule is that the complainant must prove the existence of the agency relationship and the nature and extent of the agent's authority. Secondly, the agent and the principal each must have voluntarily agreed that the agent can legally act for the principal. The third rule is that the union may be held liable for the acts of the agent if he is functioning within the scope of his apparent authority. Therefore, under the ordinary principles of agency, a union may be held liable for its agent's behavior if the act performed is actually

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23 Cal. Civ. Proc. Code Ann. § 388 (1954); Mont. Rev. Codes Ann. § 93-2927 (1947); N. H. Rev. Stat. Ann. § 510:13 (1955).

24 Ohio Rev. Code Ann. § 2307.21 (Page, 1954).

25 Williams v. United Brotherhood of Carpenters, 81 F. Supp. 150 (D. C. N. D., Ohio, 1948).

26 Busby v. Electric Util. Employees Union, 147 F. 2d 865 (D. C. Cir., 1945).

27 Marion v. Chandler, 139 W. Va. 596, 81 S. E. 2d 89 (1954).

28 See, e.g., Morgan Drive Away v. International Brotherhood of Teamsters, 166 F. Supp. 885 (D. C. S. D., Ind., 1958).

29 208 U. S. 274 (1908).

authorized by the union, if it is ratified by the union after it has occurred, or even if the act is performed without the consent of the union or is strictly forbidden by the organization, if the agent is operating within the scope of his employment.[30]

In applying these common law rules of agency to determine union liability for unfair practices, the N. L. R. B. has ruled that mere advocacy of unionism by rank and file employees is not sufficient to make them agents of the union.[31]

A. Apparent Authority

In terms of these rules of agency, a union is held responsible for the acts of its officers even though their activities are not authorized by the union. It is also held responsible if the officers act without the consent of the parent organization if they are properly elected to their positions and are delegated certain functions by the union constitution and the union bylaws. In *United Mine Workers et al. v. Patton et al.*,[32] both the international union and the district union were held responsible for the acts done by field representatives in organizational activities.

> It is true that there is no evidence of any resolution of either the United Mine Workers or District 28 authorizing or ratifying the strikes. There is evidence, however, that the strikes were called by the Field Representative of the United Mine Workers, who was employed by District 28, and that he was engaged in the organization work that was being carried on by the international union through District 28, which was a mere division of the international union. Members of the union are members of local and district unions as well as the international; and of the $4 monthly dues paid by them, $2 goes to the international union, $1 to the local union and $1 to the district organization. It is clear that in carrying on organization work the field representative is engaged in both the international union and the district and that both are responsible for acts done by him within the scope and course of his employment.[33]

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[30] United Furniture Workers, CIO, 84 NLRB 563 (1949) (Colonial Hardwood Flooring Co.).

[31] Poinsett Lumber and Mfg. Co., 107 NLRB 234 (1953). See also: International Longshoremen's and Warehousemen's Union (CIO) et al. v. Hawaiian Pineapple Co., supra, n. 14.

[32] 211 F. 2d 742 (4th Cir., 1954).

[33] Ibid., at 746. See also United Mine Workers of America v. Meadow Creek Coal Co., 263 F. 2d 52 (6th Cir., 1959); Hindman v. First National

(Continued on next page)

In *Electrical Workers Union (Cory Corporation)* [34] both the local and international union who called a strike were held for various acts of restraint committed by their agents. That the unlawful behavior performed by the agents was specifically forbidden by the union was held irrelevant, the controlling factor being that the agents were functioning within the scope of their apparent authority. Unions have also been held responsible for the conduct of appointed trustees and for members who are not appointed stewards, but perform the nominal duties of the office.[35]

Striking employees are considered agents of the union when they picket to bring about a secondary boycott if they are told by the union officials to follow the employer's trucks and if the officials participate in the picketing.[36] The international union that controls directly the operations and policies of the local unions under its guidance is responsible for a secondary boycott conducted by these locals.[37] It has also been held that the union violated the statute through the activities of its agents who attempted to persuade customers not to buy the products of an employer who was engaged in a strike.[38]

Organizations are liable for any unlawful acts of pickets if the officers of the unions are present when the unlawful behavior takes place,[39] if the business agent controls and guide the actions of the pickets,[40] or if the unions authorize the picketing in any way.[41]

(Continued from preceding page)

Bank of Louisville, 112 F. 931 (6th Cir., 1902); Oman v. U. S., 179 F. 2d 738 (10th Cir., 1949); U. S. v. Waters, 194 F. 2d 866 (7th Cir., 1952); Jefferson Std. Life Ins. Co. v. Hedrick, 181 Va. 824, 27 S. E. 2d 198 (1943).

[34] 84 NLRB 972. See also: United Mine Workers, 106 NLRB 903 (1953) (Tungsten Mining Corp.).

[35] Local 182, International Brotherhood of Teamsters, 111 NLRB 952 (1955) (Lane Construction Company); Local 391, International Brotherhood of Teamsters, AFL, 110 NLRB 748 (1954) (Thurston Motor Lines, Inc.).

[36] International Brotherhood of Teamsters, AFL, 116 NLRB No. 65 (1956) (Ready Mixed Concrete Co.).

[37] International Longshoremen's and Warehousemen's Union (CIO) et al. v. Hawaiian Pineapple Co., supra, n. 14; International Brotherhood of Teamsters, 107 NLRB 161 (1953) (Osceola Foods, Inc.).

[38] International Brotherhood of Teamsters, AFL, 115 NLRB No. 251 (1956) (Coca-Cola Bottling Co. of St. Louis).

[39] United Mine Workers, 95 NLRB 546 (1951) (B. H. Swaney, Inc.).

[40] Carpenters and Painters, AFL, 95 NLRB 969 (1951) (Fairmount Construction Co.).

[41] Baumgartner's Electric Construction Co. v. DeVries, et al., supra, n. 5; Ballas Egg Products Co. v. Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. L.-C. I. O., Local 346, 160 N. E. 2d 164 (Ohio, 1959).

In determining the responsibility of the union for assaults on others by union members, it has been established that the union is liable for such acts, even if unauthorized, if an officer of the union is present,[42] or if the person guilty of the assaults is functioning within the scope of his apparent authority or employment at the time.[43] A union is not responsible for an assault upon other employees by pickets if these pickets are not officers, if no responsible union officer knew of the activities, and if the assault did not occur on the picket line.[44] In *NLRB v. Dallas General Drivers, Warehousemen and Helpers Local No. 725, AFL-CIO*,[45] a picketing employee, Jones, told the union steward, Neely, that he was thinking of going back to work. Neely attempted to dissuade him. Overhearing the conversation were three other striking employees who told Jones that they would beat him up if he did go back to work. Neely kept silent and did not repudiate the threats. The N. L. R. B. held that the union, through Neely's failure to repudiate the threats, was guilty of coercive conduct and ordered the union to cease and desist from threatening employees with violence if they abandon any strike called by the union or in like manner restraining or coercing employees. The court did not sustain the Board's order in this respect, holding that the authority of a union steward to adopt, on behalf of the union, threats made by union members who are not officers, will not be presumed. There was no proof of authorization or ratification.

B. Guilt by Association

Both the courts and the legislatures have endeavored to protect the individual worker from being held liable for the illegal acts of others. In 1908, the United States Supreme Court held that mere membership in a union made the worker responsible for the acts of his agent performed in the due course of their employment.[46] Also, mere membership made one responsible for

[42] Roadway Express Inc., 108 NLRB 874 (1954); Local 914, United Electrical Workers, 106 NLRB 1372 (1953).

[43] NLRB v. Local 55, United Brotherhood of Carpenters, AFL, 205 F. 2d 515 (10th Cir., 1953); Local 135, International Brotherhood of Teamsters, AFL, 112 NLRB 17 (1955) (Midwest Transfer Co.).

[44] National Union of Marine Cooks, CIO, 87 NLRB 54 (1949) (Irwin-Lyons Lumber Co.).

[45] 264 F. 2d 642 (5th Cir., 1959).

[46] Loewe v. Lawlor, supra, n. 29.

damages to the extent of his personal possessions, even if he was unaware of the illegal boycott sanctioned by the union. Section 301(b) of the Taft-Hartley Act relieved the individual union member of such liability.

The Norris-LaGuardia Act,[47] passed in 1932, established the principle that guilt is personal. Section 6[48] of the act makes it clear that individuals can only be held liable for the illegal acts of others or their associates if they ratify, sanction, or participate in the unlawful behavior. In *United Brotherhood of Carpenters and Joiners of America v. United States,*[49] the Supreme Court, in applying §6 of the Norris-LaGuardia Act in criminal prosecution for alleged conspiracy in violation of the Sherman Antitrust Act, said:

> We need not determine whether Sec. 6 should be called a rule of evidence or one that changes the substantive law of agency. We hold that its purpose and effect was to relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization without clear proof that the organization or member, charged with responsibility for the offense, actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration.[50]

However, in 1953, the N. L. R. B. held that mere membership in a union conducting a strike or work stoppage in violation of the contract is adequate justification for discharge. It was not considered significant that the workers discharged were sick or excused from work and did not participate in the unlawful strike. The Board based its reasoning upon the fact that the employees had received letters from the employer that all participants in the unlawful strike would be discharged, but they

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47 47 Stat. 70, (1932), 29 U. S. C. § 101 (1952).

48 47 Stat. 71, (1932), 29 U. S. C. § 106 (1952). "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

49 330 U. S. 395 (1947).

50 Ibid., at 403. See also: United Mine Workers v. Coronado Coal Co., 259 U. S. 344 (1921); Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 (1924); Bianchi v. U. S., 219 F. 2d 182 (8th Cir., 1955); Callanan v. U. S., 223 F. 2d 171 (8th Cir., 1955).

made no effort to disassociate themselves from the unlawful conduct of the union.[51]

In a later case[52] the Board emphasized and justified guilt by association. In this case, the union involved called an unfair labor practice strike against management. Violence in the form of intimidation and property damage was committed by some union members and by some outside sympathizers. Reinstatement was denied the strikers who were not guilty of committing any of the violence or of condoning or authorizing it, because they continued to picket peacefully and did not disavow the unlawful behavior. The Board contended that the fact that they did continue to picket, even though peacefully, and that they failed to condemn the violence or disavow and dissociate themselves from the strike and those guilty of the unlawful behavior was equivalent to approval or ratification of the violence. Under conditions existing in this strike, the Board felt that the complete denial of reinstatement and back pay without considering individual fault would discourage violence in later labor disputes.

The following year the N. L. R. B. did not apply the doctrine of guilt by association in *Bowman Transportation, Inc.*[53] In this case, the Board ruled that violence during a strike would not disqualify a picketing employee for reinstatement without sufficient evidence that he participated in or sanctioned the illegal incidents that occurred. Furthermore, the Board ruled that mere membership in a union council does not establish an agency relationship and that members of a council who did not participate in or ratify an unlawful boycott could not be held for the illegal acts of others because of council membership.[54]

Generally, the courts have not accepted the doctrine of guilt by association. The court, in *NLRB v. Ohio Calcium Company,*[55] held that striking employees cannot be discharged or denied reinstatement in terms of the National Labor Relations Act because they are members of a union that began and continued an unlawful strike; only those who actually participate in the illegal activity can be discharged or denied reinstatement. It has also been held that unauthorized acts of violence performed by individual strikers cannot be charged to other union strikers who

51 Marathon Electric Mfg. Corp., 106 NLRB 1171 (1953).

52 BVD Company, 110 NLRB 1412 (1954).

53 112 NLRB 387 (1955).

54 Pasco-Kennewick Building Trades Council, 111 NLRB 1255 (1955).

55 133 F. 2d 721 (6th Cir., 1943).

do not participate in the violence.[56] Workers who do not participate in the violence need not take steps to disassociate themselves from the illegal behavior.[57] In *NLRB v. Marshall Car Wheel and Foundry Co.*,[58] it was held that individual responsibility is controlling in determining who is entitled to reinstatement in the case of illegal activities. In a 1958 case,[59] the court ruled that the protection provided by § 6 of the Norris-LaGuardia Act does not extend to individuals who engage in an illegal strike in which a labor organization of which they are members is not interested.[60]

Conclusion

In conclusion it may be said that one of the major problems involved in the determination of tort liability of labor unions is that of federal pre-emption. The recent expression by Congress of its intent as to the extent of federal jurisdiction in the labor relations field may avoid much of the existing confusion and duplication.

In the federal courts, a union may be sued or may sue both as an entity and for members or employees it represents. Many states continue to regard unions as aggregates of individuals, but in most of these states the problem of multiple joinder has been solved by the class action.

As for the agency relationship between a union and its members, it is well settled that unions can be held liable for the illegal behavior of those who have real or apparent authority to act for the unions, with the proviso that the agents are functioning within the scope of their authority. Under the Taft-Hartley Act, it is not necessary in determining union liability to prove that the specific acts performed by the union's agent were actually authorized or subsequently ratified by the union, but the agent must be operating within the scope of his employment.

Although the N. L. R. B. has upon occasion followed the doctrine of guilt by association, the courts generally have not accepted this concept. In most instances, unauthorized acts of violence performed by individual strikers cannot be imputed to other union strikers who do not participate in violence.

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56 NLRB v. Deena Artware Inc., 198 F. 2d 645 (6th Cir., 1952), cert. denied, 345 U. S. 906 (1953).

57 NLRB v. Cambria Clay Products Co., 215 F. 2d 48 (6th Cir., 1954).

58 218 F. 2d 409 (5th Cir., 1955).

59 Louisville and Nashville Railroad Co. v. Brown, 225 F. 2d 149 (5th Cir., 1958).

60 Ibid., at 157.