Establishing Union Liability for Unauthorized Strikes

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INTRODUCTION

In labor intensive industries, labor stability is essential to the economic success of industry participants. This is particularly so for those companies which employ unionized labor forces in the coal industry in light of increasingly competitive domestic and international coal markets.[1] Consequently, the wildcat[2] or unauthorized strike presents serious problems for both employers of union workers and the rank and file union membership. Employers face curtailed productivity and ultimately reduced profitability while the union membership must endure lost wages and benefits and the prospect of long term unemployment.[3]

Congress' enactment of Section 301 of the Labor Management Relations Act (LMRA)[4] authorizes an action by an employer against a union[5] for damages resulting from an illegal

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[1] C. PERRY, COLLECTIVE BARGAINING AND THE DECLINE OF THE UNITED MINE WORKERS 127 (1984).

[2] The term "wildcat strike" is defined as a work stoppage, generally spontaneous in character, by a group of union employees without union authorization or approval. A wildcat strike may exist where a local union has supported a strike but has not received the approval of the national or international union. Such action generally is in violation of the applicable bargaining agreement. H. ROBERTS, ROBERT'S DICTIONARY OF INDUSTRIAL RELATIONS 582 (1971). *See also* the definition contained in BLACK'S LAW DICTIONARY 1433 (5th ed. 1979): "A strike called without authorization from the union or in violation of a no-strike clause in the collective bargaining agreement." The term "wildcat strike," as used herein, is meant to be synonymous with an unauthorized strike or an illegal strike in violation of a bargaining agreement.

[3] C. PERRY, *supra* note 1, at 208-09.

[4] Labor Management Relations (Taft-Hartley) Act (LMRA) § 301, 29 U.S.C. § 185 (1982).

[5] In the coal industry, the United Mine Workers of America (UMWA) is organized into local, district, and international unions. The locals have jurisdiction over a single mine, with districts and subdistricts over them organized on a state, or less-than-state, basis. Above the districts is the international, with a president, vice-president, secretary-treasurer, and executive board including delegates from each district. M. FORKOSCH, TREATISE ON LABOR LAW 199-200 (2d ed. 1965). For a description of the governmental structure of the UMWA, *see* C. PERRY, *supra* note 1, at 93.

work stoppage.[6] However, "before a local union, or any union, can be found liable for such damages, the union's responsibility for the work stoppage must be established according to some recognized theory of liability."[7]

Historically, courts have recognized three theories — the (1) agency theory, (2) mass action theory, and (3) all reasonable means theory — to establish union liability for damages caused by unauthorized work stoppages.[8] Courts have typically applied these theories individually or in combination to serve as a basis for finding union liability for wildcat strikes.[9]

In *Carbon Fuel Co. v. UMWA*,[10] the United States Supreme Court specifically addressed the agency and all reasonable means theories. However, the Supreme Court did not directly address the mass action theory. Relying on the Supreme Court's silence in the *Carbon Fuel* decision with respect to the mass action theory, both the Seventh[11] and Tenth[12] Circuit Courts of Appeals have held the mass action theory invalid as a separate theory of union liability. In contrast, the Fourth Circuit[13] recently reaffirmed the validity of the mass action theory thereby establishing a conflict between the circuits.

This Comment reviews the historical development and application of the three theories to better delineate the true scope of

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[6] 29 U.S.C. § 185 (1982) provides in pertinent part:

> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . .
>
> For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

[7] Consolidation Coal Co. v. UMWA, Local 1702, 709 F.2d 882, 884 (4th Cir. 1983).

[8] Consolidation Coal Co. v. UMWA, Local 1261, 725 F.2d 1258, 1260-61 (10th Cir. 1984).

[9] *See* Consolidation Coal Co. v. UMWA, Local 1702, 709 F.2d 882 (4th Cir. 1983); U.S. Steel Corp. v. UMWA, 598 F.2d 363 (5th Cir. 1979); Eazor Express, Inc. v. International Bhd. of Teamsters, 520 F.2d 951 (3d Cir. 1975).

[10] 444 U.S. 212 (1979) [hereinafter *Carbon Fuel II*].

[11] Consolidation Coal Co. v. UMWA, Local 2216, 779 F.2d 1274 (7th Cir. 1985).

[12] *Local 1261*, 725 F.2d 1258.

[13] Consolidation Coal Co. v. UMWA, Local Union No. 2322, 826 F.2d 1059 (4th Cir. 1987) (text in WESTLAW).

each theory. Further, an analysis of the current usage of the theories will determine which theories or parts of them remain valid after the Supreme Court's decision in *Carbon Fuel*. Finally, the Comment reviews the Fourth Circuit's recent decision which validated the mass action theory. The discussion emphasizes the decision's effect on the theory's future.

I. DEVELOPMENT OF THE LIABILITY THEORIES

A. Agency Theory

The agency theory of union liability arises from the notion that the union entity in some way made itself a party to the illegal strike.[14] The Supreme Court first applied the agency theory to union liability in *Coronado Coal v. UMWA*.[15] The case involved an action for damages against the international union for property destruction caused by the actions of the local union.[16] In considering the international union's liability for the local's actions, the Supreme Court stated that in order to impose liability on the international, the plaintiff must clearly show "that what was done was done by [the international's] agents in accordance with their fundamental agreement of association."[17] The Court noted that for a corporation to be held responsible for the wrongs committed by its agents, the plaintiff must first show that the agent was acting within the scope of the corporation's business. The Court reasoned that no stricter rule could be enforced against an unincorporated organization like the international union.[18]

More recently, the agency theory has been applied in determining union liability for strikes by coal miners in violation of implied no-strike promises in collective bargaining agreements.[19] The implied no-strike promise arises from express arbitration clauses in National Bituminous Coal Wage Agreements.[20]

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[14] North River Energy Corp. v. UMWA, 664 F.2d 1184, 1192 (11th Cir. 1981).

[15] 268 U.S. 295 (1925).

[16] *Id.* at 299.

[17] *Id.* at 304.

[18] *Id.*

[19] *See* U.S. Steel Corp. v. UMWA, 519 F.2d 1249, 1250 (5th Cir. 1975).

[20] National Bituminous Coal Wage Agreements are the product of collective bargaining between the Bituminous Coal Operators Association (BCOA) and the United Mine Workers of America (UMWA). The industry wide agreements represent the basic

The mere occurrence of a strike does not raise a presumption rendering the union responsible as an entity separate from its members.[21] The Fourth Circuit, in *United Construction Workers v. Haislip Baking Co.*,[22] held that for the union entity to be held liable for damages resulting from the illegal strike, a company must prove that the union's agents, acting within the scope of their authority, participated in, ratified, or encouraged the continuation of the strike.[23] Actual authority is not necessary since the National Labor Relations Act (NLRA)[24] specifically provides that, in determining whether any person is acting as an agent for another person, the question of whether the actions were actually authorized shall not be controlling.[25] Furthermore, the Fifth Circuit stated in *Vulcan Materials Co. v. United Steelworkers of America*[26] that an agent's actions bind the union entity regardless of whether the actions are specifically authorized by the entity.

Courts have differed on the degree of evidence sufficient to establish an agency relationship between an international or district union entity and the local union. The *Haislip* court placed emphasis on whether the international or district union adopted or encouraged the strike.[27] The Sixth Circuit has held that if the subject matter of the strike's underlying grievance was one in which the district or international had a strong interest, inaction by those entities in ending the strike might imply endorsement by the union.[28] The Fifth Circuit has further held that where the plaintiff shows that the district or international exercises all-pervasive control over the local, the acts of the local may be

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operating contract between the BCOA and the UMWA, addressing such issues as wages and benefits, manpower utilization, and working conditions. C. PERRY, *supra* note 1, at 57-64, 73-91.

[21] *U.S. Steel Corp.*, 519 F.2d at 1253.

[22] 223 F.2d 872 (4th Cir. 1955).

[23] *Id.* at 876-77.

[24] LMRA § 301, 29 U.S.C. § 185 (1982).

[25] 29 U.S.C. § 185 (1982) provides in pertinent part:

> (e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

[26] 430 F.2d 446, 457 (5th Cir. 1970).

[27] *Haislip*, 223 F.2d at 877-78.

[28] *See* Riverton Coal Co. v. UMWA, 453 F.2d 1035, 1042 (6th Cir. 1972), *cert. denied*, 407 U.S. 915 (1972).

imputed to the parent entity.[29] Before adopting this rule, the Fifth Circuit implied in an earlier decision that evidence of past strikes is relevant to the liability question in that "[a] series of strikes which arguably amount to a pattern of activity at the local and district levels . . . may give rise to, or at least support an inference of union 'instigation, support, ratification, or condonation.' "[30]

The difficulty of determining an agency relationship between the international or district and the local depends on the particular circumstances of each case. The presence of a relationship obviously exists where the international, through its agents, affirmatively induced and encouraged its members to refuse to work.[31] In other cases, international union involvement has been less evident.[32] In evaluating union liability, modern courts go well beyond the mere claims of the employer and the denials of the union as evidenced by the rise in prominence of the three liability theories. Interestingly, the Supreme Court in *Coronado Coal*[33] relied almost exclusively on the denials of the international union president.[34] The court held the international was not liable for the local's actions although evidence indicated the international's involvement with formulating the plan carried out by the local union members.[35]

After the *Coronado Coal* decision, problems of proving union liability under common law agency principles became apparent. Specifically, union entities could escape liability merely by asserting that the illegal strikes resulted from each striker's individual decision to participate. Consequently, a union entity generally incurred no liability unless a convention of the entity's membership or its officers, acting at the direction of the mem-

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[29] U.S. Steel Corp. v. UMWA, 598 F.2d 363, 367 (5th Cir. 1979).

[30] U.S. Steel Corp. v. UMWA, 519 F.2d at 1256 (quoting Central Appalachian Coal Co. v. UMWA, 376 F.Supp. 914, 923 (S.D. W.Va. 1974)).

[31] Vulcan Materials Co. v. United Steelworkers of America, 430 F.2d 446, 457 (5th Cir. 1970).

[32] *E.g.*, North River Energy Corp. v. UMWA, 664 F.2d at 1193-94 (only evidence presented that union agents were acting within scope of their authority as union representatives was the fact they failed to report to work); Consolidated Coal Co. v. International Union, UMWA, 500 F.Supp. 72, 75 (D. Utah, C.D. 1980) (fact that all union officials failed to work their shift cannot be construed as union ratification of the strike since officials were subject to threats and intimidation), *aff'd on other grounds*, 725 F.2d 1258 (10th Cir. 1984).

[33] 268 U.S. 295. *See supra* notes 15-18 and accompanying text.

[34] *Id.* at 304.

[35] *Id.* at 301.

bership, authorized the act.[36] This weakness in the agency theory led to the birth, in 1948, of the mass action theory of liability.[37]

B. Mass Action Theory

The weakness in the agency theory came to light during a nationwide strike involving between 350,000 and 450,000 members of the United Mine Workers of America (UMWA).[38] At the time, the UMWA was engaged in a bitter dispute with the signatories of the National Bituminous Coal Wage Agreement of 1947[39] concerning a provision of the agreement relating to pension funds.[40] After a board of inquiry had determined that the miners' strike imperiled the nation's health and safety, President Harry S Truman directed the Attorney General to file a complaint for injunctive relief against the striking miners. The district court issued a preliminary restraining order ordering that the strike cease until a decision on the merits of the controversy could be rendered. In response to the court order to terminate the strike, the President of the United Mine Workers Union, John L. Lewis, declared that miners had left the mines entirely as a result of their own individual volition and without any instruction from union officials. Hence, Lewis concluded there was no organized strike among the miners.[41] This national crisis engendered the mass action theory of union liability.

In order to refute Lewis' argument that an organized strike did not exist, the U.S. District Court for the District of Columbia in *United States v. International Union, UMWA* reasoned that men do not act collectively without leadership. Therefore, the proposition that 350,000 to 450,000 men would all have the same idea to strike concurrently was ridiculous.[42] On this basis, the court held the international union liable for the actions of the membership, without any hard evidence directly linking the international to the strike. The consequence of the court's holding meant that as long as a union collectively functions as a

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[36] United Bhd. of Carpenters v. United States, 330 U.S. 395, 415 (1947) (Frankfurter, J., dissenting).

[37] United States v. International Union, UMWA, 77 F.Supp. 563, 566 (D.D.C. 1948).

[38] *Id.* at 565.

[39] *See supra* note 20 and accompanying text.

[40] *International Union*, 77 F.Supp at 565.

[41] *Id.* at 564.

[42] *Id.* at 566.

union, it must be held responsible for the mass action of its members.[43]

Interestingly, while reviewing correspondence from Lewis to the union membership, the court found language[44] which could be interpreted as code words or signals to the membership secretly intended to cause a strike to occur.[45] The court viewed Lewis' use of this technique to call a strike as a means for the union to avoid responsibility. Accordingly, the court held that the union could not escape liability simply by substituting "a nod, a wink, or a code" in place of the word strike.[46]

Over the years, a number of courts have refined and applied the mass action theory. However, courts have differed as to the theory's specific applicability to the various levels of union hierarchy.[47] The Third Circuit, in *Eazor Express, Inc. v. International Bhd. of Teamsters*,[48] relied primarily on the all reasonable means test[49] in its analysis of international union liability. However, the court applied the mass action theory as an alternative means of holding the international union liable for a strike conducted by the local union in violation of a no-strike agreement. The court stated that the international could be held liable on the theory that mass action by union members must realistically be regarded as union action.[50]

However, one year later in *U.S. Steel Corp. v. UMWA*,[51] the Third Circuit held that liability under the mass action theory "must be limited to the entity whose membership acts in concert. . . . Thus absent a showing of complicity on the part of a larger union entity — the District or International Union, for example — only the local can be held liable under the mass action theory."[52] The Fourth[53] and Fifth[54] Circuits later adopted

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[43] *Id.* at 566-67.

[44] C. PERRY, *supra* note 1, at 138.

[45] *International Union*, 77 F.Supp. at 566.

[46] *Id.* at 567.

[47] *Compare* Carbon Fuel Co. v. UMWA, 582 F.2d 1346 (4th Cir. 1978)[hereinafter *Carbon Fuel I*], *aff'd*, 444 U.S. 212 (1979) *with* Eazor Express, Inc. v. International Bhd. of Teamsters, 520 F.2d 951 (3d Cir. 1975) (cases apply the mass action theory to different levels of union hierarchy).

[48] 520 F.2d 951.

[49] *See infra* notes 53-66 and accompanying text.

[50] *Eazor Express*, 520 F.2d at 963.

[51] 534 F.2d 1063, 1074 (3d Cir. 1976).

[52] *U.S. Steel*, 534 F.2d at 1074.

[53] *Carbon Fuel I*, 582 F.2d at 1349.

[54] U.S. Steel Corp. v. UMWA, 598 F.2d 363, 367 (5th Cir. 1979).

this idea of limiting union liability to the entity whose membership acts in concert.

C. *All Reasonable Means Theory*

In *U.S. Steel Corp. v. UMWA*,[55] the Third Circuit stated its belief that strict union liability should not be based merely upon the conduct of the membership. Looking beyond the mass action of the union members to evaluate union liability, the court stated that "irrespective of the theory upon which union liability for unauthorized strikes is premised, the court must inquire into the reasonableness of the attempts by local and parent union officials to avert or halt wildcat activity by the membership."[56] This proposition represents the theoretical foundation of the all reasonable means theory of union liability.

In *Eazor Express, Inc. v. International Bhd. of Teamsters*,[57] Eazor Express Inc., a motor freight carrier, contracted to acquire Daniels Motor Freight, Inc. Employees of both Eazor and Daniels belonged to the Teamsters International Union. Collective bargaining agreements containing express no-strike clauses governed the relationship between the employees and the employers. The pertinent part of the agreements precluded strikes by the union until exhaustion of all possible means of settlement as contained in the individual agreements.[58] Before the completion of the takeover, Daniels' union employees walked off the job and established picket lines at the Eazor terminal in Pittsburgh.[59]

In an action brought by Eazor Express to recover damages for alleged unauthorized strikes, the Third Circuit agreed with the defendant international union that the local union members wholly initiated the strikes. However, the court affirmed the district court's holding that the union's no-strike agreement necessarily implied an obligation to use every reasonable means to bring an end to the strike (begun by the union membership without authorization from the local or international body).[60] The court stated that no-strike agreements would be illusory if a union was permitted to avoid all responsibility for a strike by

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[55] 534 F.2d 1063, 1074 (3d Cir. 1976).
[56] *Id.*
[57] 520 F.2d 951.
[58] *Id.* at 955.
[59] *Id.* at 956.
[60] *Id.* at 959.

the union membership merely because the strike was not initially authorized or called by the union entity.[61]

In contrast to *Eazor Express* is the Fourth Circuit's decision in *United Construction Workers v. Haislip Baking Co.*,[62] where the court declined to adopt a reasonable efforts test. Instead, the court applied agency principles in limiting the local and international union's liability to situations where the union adopted, encouraged, or prolonged the continuation of the unlawful strike.[63] An explanation for the conflict among circuits may lie in the factual differences of the two cases. In *Eazor Express*, local union officials encouraged the strike,[64] while local union officials in *Haislip* did not authorize or sanction the acts of the membership[65] but actively encouraged the strikers to return to work.[66]

As noted earlier, one year after its decision in *Eazor Express*, the Third Circuit stated that the holding was not intended to place absolute liability on union entities irrespective of the strength of union officer's efforts to dissuade the membership from engaging in illegal conduct.[67] In further extending the all reasonable means theory, the Fifth Circuit in *U.S. Steel Corp. v. UMWA*[68] stated that local union liability for an illegal strike may be avoided by a credible demonstration of union disapproval.

II. THE TURNING POINT: *CARBON FUEL CO. V. UMWA*

The conflict between the Third and Fourth Circuits continued until 1979 and the Supreme Court's decision in *Carbon Fuel Co. v. UMWA*.[69] The case involved an action under Section 301 of the Labor Management Relations Act (LMRA)[70] against three local unions, the district, and the international union. The complaint sought injunctive relief and damages incident to forty-eight work stoppages occurring from 1969 through 1973 at var-

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[61] *Id.* at 960.
[62] 223 F.2d 872 (4th Cir. 1955).
[63] *Id.* at 877-78.
[64] *Eazor Express*, 520 F.2d at 956.
[65] *Haislip*, 223 F.2d at 878.
[66] *Id.* at 875.
[67] *U.S. Steel Corp. v. UMWA*, 534 F.2d at 1074.
[68] 598 F.2d 363, 365.
[69] 444 U.S. 212 (1979).
[70] LMRA § 301, 29 U.S.C. § 185 (1982).

ious mines operated by Carbon Fuel in southern West Virginia. Upon trial in the district court, jury verdicts were returned against the district, the international, and all three locals.[71] On appeal, the Fourth Circuit vacated all damages assessed against the international and district unions but affirmed most of the judgments against the local unions.[72]

The Fourth Circuit affirmed the district court's determination of local union liability on the basis of the mass action theory. Evidence indicated that all members of the defendant locals, including the officers, participated in the strike.[73] Refusing to extend the theory beyond the local union level, the Fourth Circuit adopted the rationale of earlier cases that limited liability to "the entity whose membership acts in concert."[74]

Reviewing the damage awards against the district and international unions, the Fourth Circuit rejected the district court's application of the all reasonable means theory. The court cited the bargaining history between the union and the coal operator in holding that the bargaining agreement did not impose "best effort" duties on the international entity to prevent work stoppages. The Fourth Circuit expressly rejected the Third Circuit's application of the reasonable efforts test in *Eazor Express* and reaffirmed its own decision in *Haislip*. The court opted to apply the agency theory of liability in deciding district and international union liability for the illegal strikes.[75]

The United States Supreme Court granted certiorari to resolve the conflict between the Third and Fourth Circuits.[76] The Supreme Court noted that "Congress gave careful attention to the problem of strikes during the term of collective bargaining agreements, but stopped short of imposing liability upon a union for strikes not authorized, participated in, or ratified by it."[77] Relying on the legislative history of the LMRA, the Court held that Congress intended to limit the unions' responsibility for strikes in breach of contract cases to situations in which the union may be liable under common law rules of agency.[78] The

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[71] Carbon Fuel Co. v. UMWA, 582 F.2d 1346, 1347-48 (4th Cir. 1978).

[72] *Id.* at 1349-51.

[73] *Id.* at 1349-50.

[74] *Id.* at 1349 (quoting U.S. Steel Corp. v. UMWA, 534 F.2d 1063).

[75] *Carbon Fuel I*, 582 F.2d at 1350-51.

[76] *Carbon Fuel II*, 444 U.S. at 212.

[77] *Id.* at 216.

[78] *Id.*

Court noted that Congress, in drafting the LMRA, followed the Supreme Court's reasoning in *Coronado Coal Co. v. UMWA*.[79] As discussed earlier, the Court in *Coronado Coal* held that union liability depended on a showing that union agents had acted in accordance with a fundamental agreement of association with the union.[80]

Reviewing the charges of liability against the international and district unions, the Supreme Court expressly rejected Carbon Fuel's argument. Carbon Fuel maintained that since the parties had agreed to arbitrate their grievances, an obligation was imposed on the district and international unions to use all reasonable means to prevent and terminate any unauthorized strikes. The Court cited Congress' clear intent to restrict an international union's legal responsibility for the acts of its local unions and stated that applying the all reasonable means test "would pierce the shield that Congress took such care to construct."[81] The Supreme Court adopted the Fourth Circuit's position in *Haislip* stating that in the absence of a reasonable means clause, one could not be implied in an instance of arms length bargaining between the parties.[82]

III. JUDICIAL APPLICATION OF THE LIABILITY THEORIES AFTER CARBON FUEL

The result of the Supreme Court's decision in *Carbon Fuel* overwhelmingly validates the agency theory of union liability. However, the decision cripples the all reasonable means theory as a separate theory of union liability. Although the Court did not specifically address the validity of the mass action theory, the decision has led to inconsistent applications of the theory in recent years.

Cases decided in the years after *Carbon Fuel* have differed on which of the three liability theories remain valid in light of the Supreme Court's decision. Apparently, a number of district and circuit courts accept the agency theory as a separate theory of union liability. The primary conflict has been whether and to

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[79] *Id.* at 217; 268 U.S. 295 (1925). *See supra* notes 15-18 and accompanying text.
[80] *Coronado Coal*, 268 U.S. at 304.
[81] *Carbon Fuel II*, 444 U.S. at 217-18.
[82] *Id.* at 221-22.

what extent the mass action theory and the all reasonable means theory survived the *Carbon Fuel* decision.[83]

A. All Reasonable Means Theory

Use of the all reasonable means theory as a separate theory of liability did not survive the *Carbon Fuel* decision.[84] In recent cases, courts have considered the lack of effort by local union officials in returning strikers to work as evidence of the union's ratification and encouragement of the strike, thereby establishing the agency relationship.[85] Other courts have found evidence of whether union officials attempted to lead the union members back to work, whether union officals worked during the strike, and disciplinary action against strikers important in considering agency liability.[86] "Whether action or lack of action by the union is indicative of an agency liability is a question for the jury."[87]

B. Mass Action Theory

1. The Fourth Circuit Decision

Acceptance of the mass action theory has varied since the *Carbon Fuel* decision. Nearly four years after the decision, the Fourth Circuit reaffirmed its acceptance of the theory in *Consolidation Coal Co. v. Local 1702, UMWA*.[88] The court again noted the theory's limited applicability: extending only to "the entity whose membership acts in concert."[89]

In *Local 1702*, the lower court held that the applicability of the rule announced in *Carbon Fuel* did not depend upon the

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[83] *Compare* Consolidation Coal Co. v. UMWA, Local 1702, 709 F.2d 882, 885 (4th Cir. 1983) (holding mass action theory applicable at the local level) *with* Consolidation Coal Co. v. UMWA, Local 1261, 725 F.2d 1258, 1261 (10th Cir. 1984) (holding that neither the all reasonable means theory nor the mass action theory survived *Carbon Fuel II*) *and* Consolidation Coal Co. v. UMWA, Local 2216, 779 F.2d 1274, 1278 (7th Cir. 1985) (holding that only the common law theory of agency is the more desirable standard for liability remaining).

[84] *Local 1261*, 725 F.2d at 1261.

[85] *Local 1702*, 709 F.2d at 885-86.

[86] *Local 2216*, 779 F.2d at 1280.

[87] Old Ben Coal Co. v. UMWA, Local Union No. 1487, 601 F. Supp. 1061, 1065 (S.D. Ill. 1984).

[88] 709 F.2d 882.

[89] *Id.* at 885 (quoting U.S. Steel Corp. v. UMWA, 534 F.2d 1063, 1074 (3d Cir. 1976)).

level of union hierarchy involved and therefore, the mass action theory was no longer a viable theory of liability at any level of union organization.[90] On appeal, the Fourth Circuit refused to accept this argument in light of explicit language in the *Carbon Fuel* decision[91] restricting the scope of the decision to issues involving the international union. In *Carbon Fuel*, the Supreme Court did not review the portion of the lower court's opinion dealing with the application of the mass action theory to local unions.[92]

Along with the Fourth Circuit's decision in *Local 1702*, three district courts have found the mass action theory still viable for application at the local union level.[93] One of these courts has held that the mass action theory no longer applies at any level of union organization.[94] The Eleventh Circuit in *North River Energy Corp. v. UMWA*[95] acknowledged the principles of the mass action theory but found that the particular facts of the case did not warrant application of the theory. Subsequent decisions in the Seventh[96] and Tenth[97] Circuits have explicitly renounced the mass action theory although the Fourth Circuit recently reaffirmed its acceptance of the theory.[98]

2. The Tenth Circuit Decision

One year after the Fourth Circuit's decision in *Local 1702*, the Tenth Circuit ruled that neither the mass action theory nor

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[90] *Id.* at 884.

[91] *Carbon Fuel II*, 444 U.S. at 213. The court noted:

> The question for decision in this case is whether an international union, which neither instigates, supports, ratifies, nor encourages "wildcat" strikes engaged in by local unions in violation of a collective-bargaining agreement, may be held liable in damages to an affected employer if the union did not use all reasonable means available to it to prevent the strikes or bring about their termination.

Id.

[92] *Local 1702*, 709 F.2d at 884-85.

[93] *Id.* at 885, n.4 (citing Dresser Indus. v. United Steelworkers of America, Local 4601, No. 81-627E (W.D.N.Y. 1981); Encino Shirt Co. v. International Ladies' Garment Workers' Union, No. 73-W-5093-NE (N.D. Ala. 1980); Keebler Co. v. Local 492-A, Bakery Workers Int'l Union, No. 80-1798 (E.D. Pa. 1980)).

[94] *Local 1702*, 709 F.2d at 885, n.4 (citing Airco Speer Carbon Graphite v. Local 502, Int'l Union of Elec. Workers of America, 494 F.Supp. 872 (W.D. Pa. 1980)).

[95] 664 F.2d 1184, 1193-94 (11th Cir. 1981).

[96] Consolidation Coal Co. v. UMWA, Local 2216, 779 F.2d 1274.

[97] Consolidation Coal Co. v. UMWA, Local 1261, 725 F.2d 1258.

[98] Consolidation Coal Co. v. UMWA, Local Union No. 2322, 826 F.2d 1059 (4th Cir. 1987) (text in WESTLAW).

the all reasonable means theory survived the Supreme Court's decision in *Carbon Fuel*.[99] The Tenth Circuit further held that the applicability of the *Carbon Fuel* decision did not depend on the level of union hierarchy involved.[100] The court focused on language in the decision where the Supreme Court stated "Congress limited the responsibility of *unions* for strikes in breach of contract to cases when the union may be found responsible according to the common-law rule of agency."[101] The court stated that common law agency principles should be applied in considering union liability for illegal acts by the union membership, no matter what the level of union hierarchy.[102]

One possible alternative explanation of the Tenth Circuit's rejection of the mass action theory involves the undisputed evidence that the local union officers lost control of the local membership.[103] This factual situation parallels that contemplated by the district court in *United States v. International Union, UMWA*[104] where the court held that the union entity would not be liable if the union can show by legitimate testimony that they have lost their hold on the union membership.[105]

3. The Seventh Circuit Decision

The Seventh Circuit rejected the mass action theory as a separate theory of liability in *Consolidation Coal Co. v. Local 2216, UMWA*.[106] The court cited the *Carbon Fuel* case as a basis for its holding,[107] but further held the mass action theory invalid on other grounds. The court stated that the burden of proof in cases involving questions of union liability should be placed on the accusing party rather than on the union itself. The court noted that under the mass action theory, an accusing company need only make the accusation that a strike occurred, and the union must then try to exonerate itself.[108]

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[99] *Local 1261*, 725 F.2d at 1261.

[100] *Id.* at 1262.

[101] *Id.* at 1262-63 (quoting Carbon Fuel Co. v. UMWA, 444 U.S. 212, 216) (emphasis added).

[102] *Id.* at 1263.

[103] *Id.* at 1260.

[104] 77 F.Supp. 563 (D.D.C. 1948).

[105] *Id.* at 567.

[106] 779 F.2d 1274 (7th Cir. 1985).

[107] *Id.* at 1278-79.

[108] *Id.* at 1277.

The Seventh Circuit's decision is noteworthy because of the court's unique treatment of the existence of mass action. Specifically, the court stated that evidence of mass action is relevant and can be used in establishing common law agency liability.[109] Here, the Seventh Circuit implicitly followed the decision in *Old Ben Coal Co. v. Local Union No. 1487, UMWA*[110] where the district court held the mass action theory no longer viable as a separate theory of liability. However, the district court concluded that evidence of mass action is relevant to the question of agency liability. The district court reasoned that the application of the mass action theory through the years had actually served as a legal device by which the agency theory of liability was proven. This idea operates under the basic premise that the mass action could not have occurred absent ratification or authorization by union officials.[111]

The Fifth Circuit in *U.S. Steel Corp. v. UMWA*[112] first mentioned using evidence of mass action to prove union liability under the agency theory. In this case, the court held that a series of strikes amounting to a pattern of activity at the local and district levels may give rise to an inference of union support or ratification of the strike.[113] More recently, the Fourth Circuit has held that the union entity could be liable for unauthorized work stoppages under common law agency principles if the union in some way made itself a party to the strike. The court concluded that mass action by the union members and officers was sufficient to establish the entity's liability under agency principles.[114]

IV. THE FOURTH CIRCUIT REAFFIRMS THE MASS ACTION THEORY

The most recent decision construing the mass action theory of liability is the Fourth Circuit's decision in *Consolidation Coal Co. v. Local Union No. 2322, UMWA*.[115] The 1987 case involved a dispute between the local union and the employer, Consolidated Coal (CONSOL). CONSOL's firing of two union employ-

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[109] *Id.*
[110] 601 F.Supp. 1061 (S.D. Ill. 1984).
[111] *Old Ben*, 601 F.Supp. at 1064.
[112] 519 F.2d 1249.
[113] *U.S. Steel*, 519 F.2d at 1256.
[114] Consolidation Coal Co. v. UMWA, Local 1702, 709 F.2d 882, 886.
[115] 826 F.2d 1059 (4th Cir. 1987) (text in WESTLAW).

ees resulted in a strike by the local union members.[116] Upon trial in the district court, the jury returned a verdict for CONSOL. On appeal, the Fourth Circuit upheld the jury's verdict and the trial court's application of the mass action theory.[117] In so doing, the court reaffirmed its decision in *Consolidation Coal Co. v. Local 1702, UMWA*[118] which recognized two theories under which a local union may be held liable for an unlawful strike — the common law agency theory and the mass action theory.[119]

The union argued that the part of the court's decision in *Local 1702* addressing the mass action theory should be overruled in light of decisions in the Tenth[120] and Seventh[121] Circuits explicitly rejecting the mass action theory. However, without distinguishing the Seventh and Tenth Circuit cases, the Fourth Circuit cited its decision in *Local 1702* as controlling and held the local union liable for the illegal strike action.[122]

Addressing the union's argument regarding the inapplicability of the mass action theory due to a lack of participation by the total union membership, the court stated that the theory applies where all or substantially all of the union members participate. The court reasoned that the strike's purpose of shutting down the employer's production could be easily achieved even if a handful of union members reported for work.[123]

V. IMPLICATIONS OF THE FOURTH CIRCUIT'S DECISION IN *LOCAL 2322*

In refusing to reject the mass action theory as a separate and distinct theory of liability, the Fourth Circuit has breathed life into a theory which has undoubtedly lost independent significance since *Carbon Fuel*.[124] However, since the court in *Local 2322* did not elaborate on its application of the mass action theory, the holding is open to some interpretation.

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[116] *Id.*

[117] *Id.*

[118] 709 F.2d 882 (4th Cir. 1983).

[119] *Local 1702*, 709 F2d at 884.

[120] *Local 1261*, 725 F.2d at 1258.

[121] *Local 2216*, 779 F.2d at 1274.

[122] *Local 2322*, 826 F.2d at 1059 (text in WESTLAW).

[123] *Id.*

[124] *See* Old Ben Coal Co. v. Local Union No. 1487, UMWA, 601 F.Supp. 1061; California Trucking Assoc. v. International Bhd. of Teamsters, 679 F.2d 1275 (9th Cir. 1982); *Local 1261*, 725 F.2d at 1258; *Local 2216*, 779 F.2d at 1274.

On its face, the decision can be read strictly as following the rationale of *Local 1702* and finding the union liable because of the mass action of its members. Alternatively, the court may have used the mass action theory to establish liability under agency principles. The court had previously held that where all members and officials of the local union were involved in an illegal strike, their involvement was evidence that the union had made itself a party to the strike thereby establishing liability under the agency theory.[125] In *Local 2322*, evidence indicated that all but one of the union officers refused to work during the strike.[126] This explanation is consistent with the holding in *Local 1702* and the holdings by the Seventh[127] and Tenth[128] Circuits.

Another issue in considering the implications of the decision in *Local 2322* concerns the opinion and the fact it was not designated for publication by the court.[129] Several federal appeals courts expressly provide that unpublished opinions cannot serve as precedent. The rules of other courts merely imply that such opinions have no precedential authority.[130]

The Fourth Circuit disfavors but allows citation of unpublished opinions. On occasion, the Fourth Circuit has even allowed citation of unpublished opinions as precedent.[131] Namely, the Fourth Circuit allows citation of unpublished opinions for res judicata, law of the case, and collateral estoppel purposes.[132] Although one may cite unpublished decisions in the Fourth Circuit, varying rules in other circuits make it unclear whether unpublished Fourth Circuit decisions will be recognized in other circuits.

CONCLUSION

Although modern courts widely accept the agency theory of liability, the validity of the mass action and all reasonable means

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[125] *Local 1702*, 709 F.2d at 886.

[126] *Local 2322*, 826 F.2d at 1059 (text in WESTLAW).

[127] *Local 2216*, 779 F.2d at 1274.

[128] *Local 1261*, 725 F.2d at 1258.

[129] All federal circuit courts of appeals have issued rules which allow either nonpublication of certain written opinions or dispositions without opinions. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 478 (1988).

[130] *Id.* at 479.

[131] *Id.* at 486, n.88.

[132] *Id.* at 482, n.35.

theories as separate and distinct theories of liability is in question. Other than for use in establishing liability under agency principles, the all reasonable means theory appears to be extinct. However, as evidenced by the Fourth Circuit's opinion in *Local 2322*, the mass action theory remains a viable theory of local union liability in some jurisdictions. Other jurisdictions recognize the mass action theory, but only to the extent of using evidence of mass action of the union members in establishing union liability under common law agency principles. All jurisdictions generally agree that the Supreme Court's decision in *Carbon Fuel* renders the mass action theory inappropriate for application on the district or international union levels.

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