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An Employer's Recourse to Wildcat Strikes Includes Fashioning His Own Remedy: Section 301 Does Not Sanction an Individual Damage Suit

An employer negotiating a collective bargaining agreement with a union often seeks a promise of uninterrupted operation, usually a no-strike clause. In exchange, the employer generally agrees to submit grievances to binding arbitration.¹ To enforce these collective bargaining agreements, Congress enacted section 301 of the Labor Management Relations Act of 1947 (Act).² Section 301 provides a federal forum for suits involving collective bargaining agreement violations,³ and suits against a union as an entity.⁴

The Act's purposes are: (1) to make collective bargaining agreements binding on the employer and the union;⁵ and (2) to shield individual employees from personal liability for judgments against their union.⁶ The Supreme Court of the United States, in *Complete Auto Transit, Inc. v. Reis*,⁷ recently narrowed section 301 by holding that an employer could not recover money damages from individual union members who engage in an unauthorized (wildcat) strike in

1 Arbitration clauses occur in about ninety-six percent of sample collective bargaining agreements, and no-strike clauses in about ninety-four percent. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 15, 78 (9th ed. 1979).

2 Also referred to as the Taft-Hartley Act, 29 U.S.C. § 185 (1976). Section 301 of the Act provides in part:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(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. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

3 29 U.S.C. § 185(b) (1976).

4 *Id.* § 185(a).

5 *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453 (1957).

6 *See* 92 CONG. REC. 5705 (1946) (Remarks of Sen. Taft); 93 CONG. REC. 5014 (1947) (Remarks of Sen. Ball); *id.* at 6283 (Remarks of Rep. Case).

7 *Complete Auto Transit, Inc. v. Reis*, 68 L.Ed.2d 248 (1981).

breach of a no-strike contract clause.⁸

This note examines section 301 and union-employee violations of collective bargaining agreements. Part I reviews the judicial interpretation of section 301; part II analyzes the Supreme Court's decision in *Reis*; part III critiques *Reis*; and part IV proposes solutions for employee violations of collective bargaining agreements.

I. Judicial Interpretation of Section 301

The Supreme Court initially viewed section 301 as procedural, merely granting federal court jurisdiction over all labor organization controversies without regard to traditional federal jurisdictional requirements.⁹ In *Textile Workers Union v. Lincoln Mills*,¹⁰ the Court expanded section 301, stating that it

expressly furnishes some substantive law. It points what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.¹¹

The Court concluded that federal courts must fashion from the policies underlying federal labor law the substantive law to be applied in section 301 suits. Further, this law preempts state law when the two are incompatible.¹²

The Supreme Court has considered section 301 in suits by a union against an employer,¹³ an employer against a union,¹⁴ an employee against his union¹⁵ and against his employer,¹⁶ and finally, an employer against his employee.¹⁷

The *Lincoln Mills* decision permitted suit by a union against an employer to enforce an arbitration commitment.¹⁸

8 *Id.* at 261.

9 *See Lincoln Mills*, 353 U.S. at 450 & n.1.

10 353 U.S. 448 (1957).

11 *Id.* at 457.

12 *Id.*; *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 102-103 (1962).

13 *Lincoln Mills*, 353 U.S. 448 (1957).

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

15 *Hines v. Anchor Motor Freight Co.*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Humphrey v. Moore*, 375 U.S. 335 (1964).

16 *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

17 *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962); *Complete Auto Transit, Inc., v. Reis*, 68 L.Ed.2d 248 (1981).

18 353 U.S. 448 (1957).

In *Boys Markets, Inc. v. Retail Clerks Local 770*,¹⁹ an employer enjoined a union from striking in violation of a collective bargaining agreement's no-strike clause. The Court limited this holding by only allowing injunctions when the underlying dispute is arbitrable.²⁰

This limitation was necessary because the Norris-LaGuardia Act prohibits injunctions in suits arising out of labor disputes.²¹ Because the Court felt that injunctions were necessary in certain situations, they reconciled the newer Taft-Hartley Act with the older Norris-LaGuardia Act. The Court justified the exception to the Norris-LaGuardia Act by citing a shift in congressional emphasis from protecting the infant labor movement, to encouraging collective bargaining and administrative techniques for resolving industrial disputes.²²

The Supreme Court has also held that section 301 affords an individual employee the right to enforce a collective bargaining agreement against his employer.²³ Further, the Court has recognized section 301 jurisdiction in employee suits against their union for breaching the union's duty of fair representation.²⁴

Employers have also sued employees for violations of collective bargaining agreements with and without union authorization.²⁵

The Supreme Court in *Atkinson v. Sinclair Refining Co.*²⁶ held that section 301(a) does not authorize a damages action against individual union members whose union authorized or caused a strike in violation of a no-strike clause.²⁷ The Court determined that traditional

19 398 U.S. 235 (1970).

20 *Id.* at 254.

21 Norris-LaGuardia Act, § 4, 29 U.S.C. § 104 (1976), provides in part that "[N]o court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute"

22 378 U.S. at 251. The Supreme Court had originally made this exception to the Norris-LaGuardia Act in *Lincoln Mills*, in dicta and without extensive discussion. It said "we see no justification in policy for restricting section 301(a) to damage suits" 353 U.S. at 458-59.

23 *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). The Court reasoned that "[i]ndividual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based." *Id.* at 200.

24 *Hines v. Anchor Motor Freight Co.*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Humphrey v. Moore*, 375 U.S. 335 (1964).

25 Section 301 does not cover suits by a union against employees. Such suits involve employee discipline, a subject generally covered by union constitutions.

26 370 U.S. 238 (1962).

27 *Id.* at 247. In *Atkinson*, the employer-plaintiff brought a § 301 damage suit against the union for authorizing and causing a strike in violation of a no-strike promise. The employer also sought damages for tortious interference with contractual relations against the individual members in their capacity as union agents. The Court found that the employer's charge

agency principles, section 301(a)'s legislative history, and section 301(b)'s express language require that "when a union is liable for damages for violation of a no-strike clause, its officers and members are not liable for these damages."²⁸

The Court in *Atkinson* expressly reserved the question of union member liability for violating a collective bargaining agreement without union involvement.²⁹ The federal courts have since split in their treatment of that issue.³⁰ The United States Court of Appeals for the Seventh Circuit, in the leading case of *Sinclair Oil Corp. v. Oil, Chemical & Atomic Workers Int'l Union*,³¹ probed the express language and legislative history of section 301 and found that the section did not expressly prohibit or authorize employer damage suits against union wildcat strikers. Section 301, the Court determined, did evidence the congressional intent of placing responsibility for collective bargaining agreement breaches on the union and of protecting union members from liability for union wrongs. Congress did not intend to sanction suits against employees, so the Court limited the employer's remedies to discipline and discharge of wildcat strikers.³²

Several federal district courts have allowed damage suits against individual union employees striking without union authorization.³³

against the individuals in their official capacity merely restated the union's liability. *Id.* at 249.

28 *Id.*

29 *Id.* at 249 n.7.

30 Cases holding against wildcat strikers liability under § 301 are *Putnam Fabricating Co. v. Null*, 631 F.2d 311 (4th Cir. 1980), *cert. denied*, 101 S.Ct. 2314 (1981); *United Steelworkers v. Lorain*, 616 F.2d 919 (6th Cir. 1980), *cert. denied*, 101 S.Ct. 2313 (1981); *Complete Auto Transit, Inc. v. Reis*, 614 F.2d 1110 (6th Cir. 1980), *aff'd*, 68 L.Ed.2d 248 (1981); *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers Int'l Union*, 452 F.2d 49 (7th Cir. 1971); *Westinghouse Elec. Corp. v. Electrical, Radio & Machine Workers*, 470 F. Supp. 1298 (W.D. Pa. 1979).

Cases allowing damage suits under § 301 against wildcat strikers are *Certain-Teed Corp. v. United Steelworkers*, 484 F. Supp. 726 (M.D. Pa. 1980); *United Teachers v. Thompson*, 459 F. Supp. 667 (N.D.N.Y. 1978); *Alloy Cast Steel Co. v. United Steelworkers*, 429 F. Supp. 445 (N.D. Ohio 1977); *DuQuoin Packing Co. v. Meat Cutters Local P-156*, 321 F. Supp. 1230 (E.D. Ill. 1971).

31 452 F.2d 49 (7th Cir. 1971). In *Sinclair*, the plaintiff-employer sought damages from individual workers who refused to cross a picket line maintained by a different bargaining unit of the same union. The employees violated a no-strike agreement and defied express union directions to cross the picket line. See *Westinghouse Elec. Corp. v. Electrical, Radio & Machine Workers*, 470 F. Supp. 1298, 1299 (W.D. Pa. 1979) (district courts adopting *Sinclair's* holding).

32 452 F.2d at 54. The Fourth Circuit, convinced by *Sinclair's* reasoning as well as nine years of congressional inaction, reached the same result in *Putnam Fabricating Co. v. Null*, 631 F.2d 311, 313 (4th Cir. 1980).

33 In *DuQuoin Packing Co. v. Meat Cutters Local P-156*, 321 F. Supp. 1230 (E.D. Ill. 1971), the court held individual employees liable for damages. It reasoned that Congress

However, in *Complete Auto Transit, Inc. v. Reis*, the Supreme Court resolved the issue, holding that section 301 does not sanction damage suits against individual employees for breach of a no-strike clause.³⁴

In *Reis*, three plaintiff-employers signed identical collective bargaining agreements with the Teamster's Union. The agreement contained a no-strike clause and subjected all disputes to a binding grievance and arbitration procedure. The defendants were the plaintiffs' employees, who staged a wildcat strike because the union allegedly failed to properly represent them in negotiations for amendments to the agreement. The employers brought a section 301 suit against the employees only, seeking an injunction and damages.

enacted § 301 to prevent damage suits where union involvement existed, a *Danbury Hatters* situation. (The *Danbury Hatters* cases, *Lawlor v. Loewe*, 235 U.S. 522 (1915), and *Loewe v. Lawlor*, 208 U.S. 274 (1908), involved an illegal union-directed boycott of an employer's hats. The Supreme Court levied a treble damage antitrust judgment against the union and attached individual union members' homes to satisfy the employer's losses. Congress enacted § 301 to avoid such measures against employees. 93 CONG. REC. 5014 (1946) (remarks of Sen. Ball)). The *DuQuoin* court also found that individual liability afforded unions proper control over their members and was consistent with the policy of enforcing no-strike clauses. 321 F. Supp. at 1233.

In *United Teachers v. Thompson*, 459 F. Supp. 677 (N.D.N.Y. 1978), the court allowed a damage suit against union employees because the usual remedies of discipline and discharge were not available since the employees had resigned. *Thompson* involved a collective bargaining agreement that required teachers on sabbatical to return to work after their leave for at least a corresponding length of time. The agreement required pro-rata leave expenses to be paid into a fund by any employee who did not return or remained for a time shorter than his leave. The employer sued two teachers who resigned immediately after their leave had ended.

A Pennsylvania District Court adopted *Thompson's* reasoning in *Certain-Teed Corp. v. United Steelworkers*, 484 F. Supp. 726 (M.D. Pa. 1980).

The Third Circuit did not consider the question in *Republic Steel Corp. v. United Mine-workers*, 570 F.2d 467, 478 (3rd Cir. 1978). The court, however, in dictum, remarked that individuals could not be held liable, citing *Atkinson* and *Sinclair*. Thus, the Third Circuit would probably agree with *Reis*.

The court in *Alloy Cast Steel Co. v. United Steelworkers*, 429 F. Supp. 445 (N.D. Ohio 1977), relying on some isolated language from two Supreme Court cases, held that "where there is no actionable violation by the unions, the court is not foreclosed from hearing and deciding whether individual members violated the contract." *Id.* at 451. In the first case cited by the court, *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962), the Supreme Court said that § 301 was to be interpreted broadly so as not to prevent an individual employee from suing his employer for damages for breaching the collective bargaining agreement. In the second case, *Hines v. Anchor Motor Freight*, 424 U.S. 554, 562 (1976), the Court said that "§ 301 contemplated suits by and against individual employees as well as between union and employers . . ." In *Reis*, the Sixth Circuit distinguished the *Smith* language while criticizing *Alloy Cast Steel* because the issue before the Court was one of jurisdiction, not whether § 301 created a cause of action. 614 F.2d at 1116. The Sixth Circuit said the language in *Hines* did not compel allowing an individual damage suit, because *Hines* dealt with an employee action against his employer. *Id.*

34 68 L.Ed.2d at 261.

The District Court for the Eastern District of Michigan held that the strike was not arbitrable because it was an internal dispute between a union and its members and denied the plaintiff's request to enjoin the strikers. The union and strikers then resolved their differences leaving only the question of amnesty for the strikers in dispute between the employers and the union. The district court found this dispute arbitrable and enjoined the strike. Nine months later, the same court granted the strikers' motion to dissolve the injunction³⁵ and dismissed the claim for damages, relying on *Sinclair*.³⁶ The Sixth Circuit affirmed the damage action dismissal, also adopting the Seventh Circuit's interpretation of section 301 in *Sinclair*. The Supreme Court granted the case certiorari.³⁷

II. *Reis*: No Individual Liability for Union Members

Because section 301 did not furnish the necessary substantive law, the Supreme Court, in adhering to its *Lincoln Mills* mandate,³⁸ delved into the section's legislative policy to fashion an effective judicial remedy.³⁹ Further, under *Atkinson*, the Court was bound to give substantial deference to congressional intent,⁴⁰ which it traced in reaching its decision in *Reis*. The Court examined the history of section 10 of the Case Bill,⁴¹ which was vetoed by President Truman in 1946. Section 10 was the "direct antecedent" of section 301 and contained similar provisions.⁴² In passing the Case Bill, the House and Senate "clearly intended to protect employees from the sanction of a suit for damages . . . whether or not the union participated in or authorized the strike."⁴³

35 Because the focus of this note is individual liability, the injunction portion of the decision is not pursued.

36 452 F.2d 49 (7th Cir. 1971).

37 101 S.Ct. 265 (1980).

38 See text accompanying note 11 *supra*.

39 See *Lincoln Mills*, 353 U.S. at 457.

40 See *Atkinson*, 370 U.S. at 248-49.

41 H.R. REP. NO. 4908, 79th Cong., 2d Sess. (1946), reprinted in 68 L.Ed.2d at 256 n.7.

42 *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962). The Court found that because § 10 and § 301 were substantially the same, § 10's legislative history is highly relevant in ascertaining congressional intent concerning § 301. *Id.* at 511-12.

43 68 L.Ed.2d at 248. The Court based this finding on statements by Senator Taft that workers who strike in violation of their no-strike agreement are not protected by the Act and are subject to discharge. *Id.* at 256 (citing 92 CONG. REC. 5705-06 (1946)). Because the Senator did not say that individuals were to be held liable in damages for engaging in unauthorized strikes, the Court reasoned that such was not intended. Rather, it reasoned that the opposite was intended.

The irony of the Court's reasoning was noted in Justice Rehnquist's dissent. *Id.* at 267 n.2. He chided the Court for using "negative implication," which the Court itself had cau-

Six months after the Case Bill was vetoed, Representative Case introduced a bill that evolved into section 301. He said the bill "had no provision for suing individual workers, as such, or rendering any judgment against them."⁴⁴

By examining section 10's history, the Supreme Court found that Congress' intent in enacting section 301 evidenced their antipathy for individual union member liability for union actions over which they had no control,⁴⁵ as in *Danbury Hatters*.⁴⁶

Although Congress, in enacting section 301, focused on avoiding a repeat of *Danbury Hatters*,⁴⁷ the Court cited legislative history which indicated that Congress may have considered individual liability for unauthorized strikes.⁴⁸ A proposed House Bill that the Senate rejected contained a provision creating a damages action against "any person engaging in an unlawful concerted activity."⁴⁹ Based upon this bill's rejection, the Case Bill's legislative history, and Congress' hostility toward individual liability where the union is involved, the Supreme Court concluded that Congress did not intend to sanction employer damage actions against individual employees for violating a collective bargaining agreement, whether or not the union was involved. Congress intended this result, the Court said, "even though it might leave the employer unable to recover for his losses."⁵⁰

The plaintiffs contended that this result would not "insure the continued integrity of the collective bargaining process by serving as

tioned against in the majority opinion. *Id.* at 255. In an earlier case, the Court had warned that "it is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946).

The Court also emphasized Representative Case's statement on the House floor that [I]ndividual members of a union are not made liable for any money judgment, I might point out, but only the union as an entity. If employees strike in violation of their agreement, the only individual penalty that can be employed is the forfeiture of their right to employment under that contract which is cured when the employer reemploys them.

92 CONG. REC. 5930-31 (1946).

This statement referred to the portion of the Case Bill that provided for loss of employee status for wildcat strikers. Senate Amendment No. 3 to H.R. REP. NO. 4908, 79th Cong., 2d Sess. (1946). Besides showing that Congress intended that any remedy against an employee in an unauthorized strike be limited to discharge, it is equally clear that the Case Bill debates focused on situations concerning union involvement.

44 68 L.Ed.2d. at 257 n.10.

45 *Id.* at 267 (Burger, C.J., dissenting).

46 See note 4 *supra* and accompanying text.

47 *Id.*

48 68 L.Ed.2d at 258.

49 *Id.* Unlawful concerted activity includes "jurisdictional strikes, sympathy strikes and certain picketing activities." *Id.*

50 *Id.* at 255. But see *id.* at 267 (Burger, C.J., dissenting).

a strong deterrent to recalcitrant parties who refuse to fulfill their obligations" under the agreement.⁵¹

In a lengthy footnote, Justice Brennan, writing for the majority, responded that "it is by no means certain that an individual damages remedy [would] meaningfully increase deterrence of wildcat strikes" any more than the "significant array of other remedies" already available to employers.⁵² Justice Brennan listed remedies including an employer damage action against the union if the union was involved; discharge or discipline of the employees; union discipline of the employees; and injunctive relief.⁵³

In a biting dissent, Chief Justice Burger criticized the majority for creating a "special, privileged class who may with impunity violate an agreement voluntarily reached in arm's-length bargaining."⁵⁴ The Chief Justice reasoned that since Congress, in the legislative history of section 301 and the express language of section 301(b), never addressed the unauthorized individual liability question, the common law contract law of accountability for one's actions should apply.⁵⁵ In response to the Court's other suggested remedies, he said they "are no answer; they may be too little and they surely come too late, after the employer has suffered substantial losses to its business due to a strike that, under the contract, never should have occurred."⁵⁶ Chief Justice Burger charged that the Court's holding penalized the employer for the wildcat strikes and rewarded the errant employees.⁵⁷

51 Brief for Petitioner at 26-27, *Complete Auto Transit, Inc. v. Reis*, 68 L.Ed.2d 248 (1981). The plaintiffs in *Reis* argued that by allowing a damages action against individual employees, the Court would be appropriately filling the void between *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), and *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979). *Atkinson* held that union members are not liable in their individual capacity for union wrongs, while *Carbon Fuel* held that the union is not liable for the employee's action unless an agency relationship is established.

52 68 L.Ed.2d at 260 n.18. Before listing the "other remedies," Justice Brennan added that "[i]t is just as likely that damages actions against individuals would exacerbate industrial strife: 'an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union'" *Id.* (citing the language he used in *Boys Markets* to support injunctive relief during a strike rather than a damages remedy against a union after the parties settle the dispute).

53 68 L.Ed.2d at 260 n.18.

54 *Id.* at 266.

55 *Id.* at 266-67.

56 *Id.* at 268.

57 *Id.* at 269. The Chief Justice's premise is that since § 301's legislative history does not address the question before the Court, then it should be dealt with under the common law of contracts. However, because this suit was brought for breach of a collective bargaining agreement, it is admittedly within the purview of § 301. See *Lincoln Mills*, 353 U.S. at 451-52. Due

III. Critique of *Reis*

The majority's interpretation of section 10 of the Case Bill, section 301's legislative history, and the sufficiency of an employer's remedies is debatable. In discussing section 10, Representative Case remarked that its purpose was "to establish a mutual responsibility when the collective-bargaining process has resulted in a contract."⁵⁸ The Congressman did not clarify which parties were subject to the mutual responsibility. He explained that section 10 suits are limited to the recognized bargaining agent and the employer, rather than the individual.⁵⁹ If Congress intended the mutual responsibility to extend between the employer and union only, perhaps section 10 did not contemplate individual unauthorized strikes. But if Congress intended the mutual responsibility to extend to all the agreement's parties, including the individual employee, then insulating the individual from liability for his own breaches does not foster section 10's purpose as enunciated.

Section 301's legislative history is also subject to varying interpretations.⁶⁰ Representative Case noted the absence of a provision for suing individuals.⁶¹ The majority interpreted this as an indication of congressional intent to preclude individual liability. If it was worthy of mention, it would seem a provision would have been added expressly precluding such liability.

Further, throughout section 301's legislative history runs a congressional concern to avoid the *Danbury Hatters* situation.⁶² A significant factual distinction exists between *Danbury Hatters*, which involved union-authorized action, and *Reis*-type cases involving individual unauthorized action only.⁶³ Despite the Court's decision in

to the unique nature of labor law, the Court must *fashion* from the policy of the labor laws a body of federal law for enforcing collective bargaining agreements. *Id.* at 457. Thus, even though there are situations where ordinary common law could arguably apply, such as here, it must be subservient to federal labor law principles. "The subject matter of § 301(a) is peculiarly one that calls for uniform law." *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

58 92 CONG. REC. 838 (1946)(Remarks of Rep. Case).

59 *Id.* at 766 (Remarks of Rep. Case).

60 "The legislative history of § 301 is cloudy and confusing." *Lincoln Mills*, 353 U.S. at 452 (1957).

61 See 68 L.Ed.2d at 257 n.10.

62 See note 33 *supra*.

63 For articles emphasizing the factual differences see, Kozub, *Wildcat Strikers: Individual Liability Under Section 301?*, 3 INDUS. REL. L.J. 671 (1980) [hereinafter referred to as Kozub]; Note, *Labor Law*, 18 WAYNE L. REV. 1657 (1972) [hereinafter referred to as Labor Law Note]; Recent Decisions, 6 GA. L. REV. 797 (1972); Recent Development, 14 NEW. ENG. L. REV. 848 (1979).

Reis, it is unclear whether Congress intended to preclude damages actions in only the former or in both situations.

In his concurrence, Justice Powell also identifies additional problems with the majority's reasoning. In particular, he asserts that the employer's "array of other remedies" cited by the majority are "largely chimerical."⁶⁴ Justice Powell criticized each of the remedies.

The *Reis* majority claimed that union responsibility for a contract breach does not warrant an individual damages suit because an "employer may seek damages against the union where responsibility may be traced to the union for the contract breach."⁶⁵ This offers no assistance, however, where the union is not responsible for the breach, the situation in *Reis*.⁶⁶ Moreover, practical reasons make this alternative unattractive. Justice Powell points out that a union cannot be held liable absent proof that it authorized or ratified a strike, and that it is a foolish union that would provide such proof.⁶⁷ Also, the discovery procedure attendant to a lawsuit against a union could expose an employer's financial and management secrets. But even if the employer bears that risk and wins the lawsuit, he may find the union local to be judgment-proof.⁶⁸ In addition, a damage suit against the union may poison relations at subsequent negotiations.⁶⁹

Secondly, the Court stated that an employer may discharge or otherwise discipline an employee who unlawfully walks off the job.⁷⁰ Although this alternative may be feasible under certain circumstances, and arguably has a limited deterrent effect,⁷¹ it has at least

64 68 L.Ed.2d at 261 (Powell, J., concurring in part).

65 *Id.* at 261 n.18.

66 See *id.* at 268 n.3. The plaintiffs pleaded that the "work stoppage and tie-up of equipment has been participated in, encouraged and caused by Defendants . . . without the aid and assistance or authorization of the union." Joint Appendix to Writ of Certiorari at 8, *Complete Auto Transit, Inc. v. Reis*, 68 L.Ed.2d 248 (1981).

67 68 L.Ed.2d at 265 (citing *Carbon Fuel*, 444 U.S. 212 (1979)).

68 *Id.* at 264-65 n.9 & n.10.

69 See Whitman, *Wildcat Strikes: The Unions' Narrowing Path to Rectitude?*, 50 IND. L.J. 472, 474 (1975) [hereinafter referred to as Whitman].

70 68 L.Ed.2d at 261 n.18. This is true because a strike in breach of contract is unprotected conduct under the National Labor Relations Act and subjects the striker to discharge. See 68 L.Ed.2d at 263 (citing *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 344 (1939)).

71 For example, in inflationary times when jobs are scarce and there is a ready supply of replacement workers who would be willing to cross a picket line, employees are less likely to risk discharge by illegally striking. The remedy is attractive in this situation because discharging illegal strikers may not economically harm the employer. Discharged or striking workers initially may have the same effect on the employer, because in either circumstance the employer has workers off the job. But discharge adds the deterrent of eliminating the worker's choice about working as well as eliminating any union strike pay he might receive during an authorized strike.

three drawbacks, according to Justice Powell. Discharges may cripple production; the time and expense involved in hiring and training new skilled workers "may very well sound the death knell of the business."⁷² Second, the Board has found that selectively discharging workers because of their union status is illegal. The Board held that an employer cannot more harshly discipline a union officer than other strikers, even where the officer breaches a contractual commitment to help terminate strikes.⁷³ The Seventh Circuit, however, in denying enforcement of a Board decision disallowing stricter discipline of a union officer, said that an employer can discipline a union official more harshly because the employer is "entitled to take into account the union official's greater responsibility and hence greater fault."⁷⁴ An employer therefore may be able to discipline a union officer more harshly when the officer is contractually bound to aid in terminating the strike.⁷⁵ But these practices are unlikely to influence the rank and file to return to work and may prolong the strike by aggravating worker discontent.⁷⁶ Finally, arbitrators may refuse to sustain a striker discharge as being too severe a penalty.⁷⁷

Union discipline of members was the Court's third suggested remedy.⁷⁸ Such an attempt would probably be futile, since a wildcat strike shows a union's inability to control its members. *Carbon Fuel* also held that a union, absent a contractual commitment, has no duty to take affirmative steps to end a wildcat strike.⁷⁹ "Absent such an obligation, there is little incentive for the union to intervene, even where intervention would be useful."⁸⁰

Finally, the Court said that an employer may seek injunctive

72 68 L.Ed.2d at 263-64 & n.7. See also Fishman & Brown, *Union Responsibility for Wildcat Strikes*, 21 WAYNE L. REV. 1017, 1021 (1975) [hereinafter referred to as Fishman].

73 See 68 L.Ed.2d at 264 n.7. (citing Miller Brewing Co., 254 N.L.R.B. No.24 (1981); South Central Bell Telephone Co., 254 N.L.R.B. No. 32 (1981); Precision Casting Co., 233 N.L.R.B. 183 (1977)).

74 *Indiana & Michigan Elec. Co. v. NLRB*, 599 F.2d 277 (7th Cir. 1979) (denying enforcement of 237 N.L.R.B. 226 (1978)).

75 See also *Gould, Inc. v. NLRB*, 612 F.2d 728 (3rd Cir. 1979) (denying enforcement of 237 N.L.R.B. 881 (1978)), cert. denied, 101 S.Ct. 247 (1980).

76 Returning strikers may insist that their discharged colleagues be reinstated as a condition to returning to work. 68 L.Ed.2d 264 (citing Fishman, *supra* note 72 at 1022).

77 68 L.Ed.2d at 264 (citing Handsaker & Handsaker, *Remedies and Penalties for Wildcat Strikes: How Arbitrators and Federal Courts Have Ruled*, 22 CATH. U. L. REV. 279, 284 (1973)).

78 68 L.Ed.2d at 261 n.18. Although seldom used, most unions have the power to discipline members. *Id.* at 264 (citing Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1065 (1951)).

79 444 U.S. 212 (1979). See also Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 311 (1948).

80 68 L.Ed.2d at 264 (Powell, J., concurring in part). The Court recognized in *Carbon*

relief against the union for breach of a no-strike provision where the underlying dispute is subject to binding arbitration.⁸¹ This is irrelevant though, where as in *Reis*, the union had not breached the collective bargaining agreement's no-strike clause, the individual wildcat strikers had.⁸²

Further, the Norris-LaGuardia Act prohibits courts from enjoining "any person or persons" from participating in certain labor-related activities.⁸³ *Boys Markets* provides a limited exception to the Norris-LaGuardia Act, allowing injunctions where the underlying dispute giving rise to the breach is subject to binding arbitration, the agreement contains a mandatory arbitration clause and ordinary equitable principles are present.⁸⁴ But *Boys Markets* only provides narrow relief and does not apply to situations that do not meet its specifications.⁸⁵ The case seems to apply only to unions, thus leaving doubt as to whether its injunction exception applies to individual wildcat strikers.⁸⁶ The injunction remedy also fails, Justice Powell added, because workers usually will not obey it, courts are reluctant to impose contempt penalties and, if ordered, such penalties may be difficult to enforce.⁸⁷

The vapid nature of the remedies in *Reis* dissipates an employer's incentive to agree to binding arbitration. The remedies are available if the employees individually breach the collective bargaining agreement, but these remedies offer little solace when his business has perished because of a wildcat strike. *Reis* also may diminish union bargaining power because the union cannot totally guarantee against an unauthorized strike. Finally, *Reis* may even promote an atmosphere where employees believe they have rights but not responsibilities under the agreement.⁸⁸ This is unfortunate because Con-

Fuel that the collective bargaining agreement can provide for a union's duty to affirmatively intervene to end a strike. 444 U.S. 212, 219 (1979).

81 68 L.Ed.2d at 261 n.18.

82 See note 66 *supra*.

83 29 U.S.C. § 104 (1976).

84 398 U.S. at 253-54.

85 *E.g.* *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976) (injunction not available in sympathy strikes).

86 For an argument that injunctions should lie against individual strikers see Labor Law Note, *supra* note 63 at 1671-74.

87 68 L.Ed.2d at 263. Court fines against individual strikers for disobeying an injunctive order, though apt to be more reasonable, are reminiscent of *Danbury Hatters*. See Note, *Labor Law—Strikes—Individual Union Members Not Liable for Breach of Contractual No-Strike Clause Even When Strike Unauthorized By Union*, 86 HARV. L. REV. 447, 455-56 (1972).

88 See Givens, *Liability of Individual Employees for Wildcat Strikes?*, 4 EMP. REL. L.J. 552, 553 (1979).

gress was especially interested in promoting collective bargaining that resulted in no-strike agreements.⁸⁹

Labor commentators should be alert for indications whether the Court's holding will have a demonstrative effect on the prevalence and substance of no-strike/grievance-arbitration clauses.⁹⁰

IV. Alternatives to an Individual Damage Suit Under Section 301

An employer faced with a wildcat strike usually does not have an effective remedy,⁹¹ but before that walk-out ever occurs, the employer may be able to protect himself through foresight at the bargaining table.

Prior to negotiations, employers should realize that in the wake of *Reis* they may be relinquishing independent authority by agreeing to submit to arbitration in exchange for a union's toothless no-strike promise. The union cannot guarantee that an unauthorized strike will not occur, but merely that it promises not to contribute to one.⁹²

An employer's most effective remedy against wildcat strikes must be secured at the negotiating table in the form of a union guarantee of uninterrupted operation during the agreement. Only in this way will the employer receive the quid pro quo for his concessions.⁹³ In construing such an agreement, the courts will look to its language to ascertain the parties' intent.⁹⁴ Therefore, an explicit clause is necessary providing the employer with relief if individual employees

89 "Statutory recognition of a collective bargaining agreement as a valid, binding and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." S. REP. NO. 105, 80th Cong., 1st Sess. 17-18 (1947).

90 More reason now exists for creative negotiating and contract drafting to achieve the genuine "quid pro quo" that was originally desired. See text accompanying notes 93-108.

91 "It is increasingly clear that the 1947 Taft-Hartley Amendments did not provide employers with an effective remedy for wildcat strikes." 68 L.Ed.2d at 263 (Powell, J., concurring in part).

92 See Comment, *Parent Union Liability for Strikers in Breach of Contract*, 67 CAL. L. REV. 1028, 1045 (1979). Justice Powell noted in his *Reis* concurrence that "[s]trike encouragement sometimes is explicit, but more often is cryptic. A union may employ subtle signals to convey the message to strike. One court noted that unions sometimes employ 'a nod or a wink or a code . . . in place of the word strike'." 68 L.Ed.2d at 262 (citing *United States v. UMW*, 77 F. Supp. 563, 566 (D.D.C.), *aff'd*, 177 F.2d 29 (D.C. Cir. 1948), *cert. denied*, 398 U.S. 871 (1949)).

93 In *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960), the Court called the employer's agreement to arbitrate the "quid pro quo" for the union's promise not to strike.

94 See Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 14 LAB. L.J. 1016, 1020-1023 (1963); Whitman, *supra* note 69, at 479.

breach the collective bargaining agreement. Two clauses could be used—the first allowing an arbitrator's money award against individual employees for damages caused to the employer, and the second requiring the union to use its "best efforts" to terminate wildcat strikes.

A. The Arbitration Clause

The first clause would empower an arbitrator to determine the applicable employer remedy against the individual employee, including discipline, discharge or monetary compensation for employer losses. If the arbitrator awarded a cash judgment and the employees refused to pay, the employer could seek judicial enforcement.⁹⁵ The suit would be brought under section 301 to enforce an arbitrator's award rather than pursue an individual damages suit, which is forbidden by *Reis*.⁹⁶ The Supreme Court has said that the parties are free to draft the arbitration clause as broadly or narrowly as they wish, since arbitration is a creature not of federal law, but of voluntary agreement.⁹⁷ Also, courts generally defer to an arbitrator's decision,⁹⁸ and cannot review the merits of arbitral awards "lest they undermine the federal policy of settling disputes peacefully through arbitration."⁹⁹

This suggested clause may be attacked as violating the substance of *Reis* because it may require an individual employee to pay money to an employer for striking in breach of a no-strike clause. That argument overlooks the crucial "buffer" effect given by an arbitrator. The arbitrator is "usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract."¹⁰⁰ He could use his expert knowledge of plant customs and practices in determining the most equitable re-

95 See *General Dynamics Corp. v. Industrial Union of Marine and Shipbuilding Workers*, 469 F.2d 848, 851 (1st Cir. 1972) (court can judicially enforce an arbitrator's award). See also R. GORMAN, *LABOR LAW*, 619-20 (1976) [hereinafter referred to as GORMAN].

96 See Kozub, *supra* note 63, at 685.

97 See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). See also GORMAN, *supra* note 95, at 552.

98 *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (an arbitrator's award must be enforced if it draws its essence from the collective bargaining agreement even though the court may disagree with the result). See generally Wollett, *The Agreement and the National Labor Relations Act: Courts, Arbitrators and NLRB—Who Decides What?*, 14 LAB. L.J. 1041 (1963).

99 See GORMAN, *supra* note 95, at 555.

100 *Id.*

sult.¹⁰¹ Moreover, the employer and union at the next round of negotiations would review his decisions.

It could also be argued that the union is without power to subject its members to possible liability; that such a clause is an "illegal subject"¹⁰² and thus improper in a collective bargaining agreement. In *NLRB v. Magnavox*,¹⁰³ the Supreme Court nullified a union's promise to the employer that enabled the employer to prohibit employee distribution of literature on company premises. The Court found that the union was protecting its own interests at the expense of its members by not giving them the opportunity for "full freedom of association, self-organization, and designation of representatives of their own choosing."¹⁰⁴

A clause allowing an arbitrator to assess the necessary remedy for an unauthorized strike would not deprive employees of any rights which *Magnavox* deemed important. The risk that wildcat strikers might be held liable for damages balances off against the arbitration-grievance procedure to which the employer and union, the employees' recognized bargaining agent, agreed. Further, the employees can use the arbitration mechanism to resolve problems which might otherwise precipitate a wildcat strike. Employees could still strike to protest unfair labor practices,¹⁰⁵ and they are protected from individual liability when they participate in a union-directed strike.¹⁰⁶

Giving an arbitrator such power is conceivably an "illegal subject" because it is contrary to the public policy enunciated by the Supreme Court in construing section 301's legislative history. However, determining that the Supreme Court intended a broad declaration of public policy is presumptive because the Court was examining a narrow legislative enactment, section 301. Also, in interpreting section 301, the Court arguably did not scan the entire labor picture and weigh any competing policies.

101 *Id.*

102 *See id.* at 529-31. The subjects are considered illegal because they are contrary to the interest of the public or the employees. Cases involving illegal subjects are: *UMW v. Pennington*, 381 U.S. 657 (1965) (clause requiring a union to extract a wage from competing employers to drive them out of business); *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964) (illegal disparate treatment of white and black workers); *Philip Carey Mfg. Co. v. NLRB*, 140 N.L.R.B. 1103 (1963), *modified*, 331 F.2d 720 (6th Cir. 1963) *cert. denied*, 379 U.S. 888 (1964) (granting "superseniarity" credit to strikebreakers unlawfully discriminates against those engaging in union activities).

103 415 U.S. 322 (1974).

104 *Id.* at 325-26 (citing 29 U.S.C. § 151 (1970)).

105 *Lincoln Mills*, 353 U.S. at 281.

106 *Atkinson*, 370 U.S. at 248-49.

Even if the Supreme Court intended a broad policy statement, it must be weighed against the competing public policies of industrial peace, self-government and encouragement of the collective bargaining agreement and the arbitration process. Although the interests of individual employees are not insignificant, the broader public policies should prevail, allowing such clauses in collective bargaining agreements.¹⁰⁷

B. The "Best Efforts" Clause

A second contractual alternative for an employer is a clause requiring a union to use its "best efforts" to end an unauthorized strike. This would require a good-faith attempt by the union to solve the dispute and bring the strikers back to work. An obvious problem would be defining "best efforts."¹⁰⁸ The inquiry would probably require a case by case analysis, weighing among other things, why the strike began; what the union or employer did to avert or cause the strike; and what the union did to end the strike once it began. This balancing test would determine if the union acted reasonably with due diligence using its "best efforts."

It may also be necessary for management to explicitly define when it requires the union's best efforts. In addition to delineating specific foreseeable situations, boilerplate language including "situations unanticipated at contract time" may prove beneficial.

C. Other Alternatives

In addition to contractual alternatives, an injunction can be an effective remedy, since enjoining the strikers in the strike's early stages can prevent severe financial loss. But courts generally do not grant injunctions unless the dispute that precipitated the work stoppage involves an arbitrable issue.¹⁰⁹ The collective bargaining agreement, however, could provide that *any and all* disputes are arbitrable. Such a provision could circumvent the *Boys Markets* limitations and give employers injunctive relief. This type of provision must be read

107 Assuming such a clause would not offend public policy, it is difficult to determine whether a union would accept it. In the coal industry, where wildcat strikes are frequent, the unions might not be receptive to the clause.

108 It may be possible to analogize "best efforts" in the labor context to that in the commercial context. U.C.C. § 2-306 requires buyers and sellers to use best efforts to promote and supply goods in output and requirements contracts. The Official Comment to the section emphasizes a reasonable effort with due diligence made in good faith. Such terms would be judged according to the particular fact situation and general industry standards.

109 *Boys Markets*, 398 U.S. at 253-54.

with the union guarantee of uninterrupted operation; otherwise an injunction against the union would have no effect when the strike is not union authorized.¹¹⁰

Finally, it is uncertain whether Congress will react to *Reis* with legislation allowing individual damage suits. Such legislation could provide for ceiling limitations on individuals' liability or allow suits only in certain equitable circumstances, such as when the wildcat strike causes an employer to go bankrupt, thereby vitiating his injunction, discipline and discharge remedies. However, if the Supreme Court has accurately gleaned Congress' intent, it is doubtful that employers will find relief in prospective legislation.

V. Conclusion

The Supreme Court has decided that our national labor policy mandates that individuals who violate a collective bargaining agreement's no-strike clause without union authorization should not be held accountable in damages to their employer.¹¹¹ Nor can the union be held liable unless it has instigated, supported, ratified or encouraged the strike.¹¹² The Court has stated that traditional remedies are available to protect the employer in these instances. In reality, these remedies are oftentimes neither available nor effective.

The Supreme Court's decision in *Reis* states only that an individual cannot be sued for money damages when he violates a no-strike clause. The holding does not expressly preclude a suit to enforce an arbitrator's award or other contractual undertakings, or an individual damage suit for violating provisions other than the no-strike clause.

Employers must act prior to strikes to incorporate clauses into collective bargaining agreements that will protect them in the event of unauthorized walkouts. Examples are a clause empowering an arbitrator to ascertain an adequate remedy, or one requiring the union to use its "best efforts" to end a strike. Although such provisions may not be readily accepted by the union, this alternative lends itself to vigorous, thoughtful and creative negotiations that will enhance the quality of collective bargaining, and result in each party receiving his quid pro quo. Enhanced collective bargaining can only

110 See note 86 and accompanying text *supra*.

111 *Reis*, 68 L.Ed.2d 248 (1981).

112 *Carbon Fuel*, 444 U.S. 212 (1979).

aid in promoting orderly labor relations which yield industrial peace and harmony.

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