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Wildcat Strikes: The Unions’ Narrowing Path to Rectitude?

M. JAY WHITMAN

INTRODUCTION

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

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

The Sixth Circuit, fortunately, has taken a more realistic view in North American Coal Corp. v. Local 2262, UMW, as has the Third
Circuit in *Penn Packing Co. v. Amalgamated Meat Cutters, Local 195.*

It may even be hoped that the budding heresy of *Eazor* will be pinched off by the Third Circuit. Even so, some careful attention to this area today will save a good deal of future misery on both sides of the labor relations fence.

**MANAGEMENT RESPONSES TO A WILDCAT STRIKE**

It is relatively rare for a wildcat strike\(^8\) to result in a full-blown section 301 damage action. The employer is typically content with a *Boys Market*\(^9\) injunction and a speedy resumption of production. Discharge or discipline of the key strikers, where necessary, is regarded as adequate protection against repeat performances.

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

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


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


\(^{10}\) See, e.g., W. UPHOFF, KOHLER ON STRIKE: THIRTY YEARS OF CONFLICT (1966).
Where a damage action is filed, it is most often used as a bargaining lever. The chance of major liability, however remote, can persuade unions to compromise their grievances. This is especially true of imppecunious unions, particularly locals, who are dealing with a single tentacle of a major conglomerate. Litigation itself can be a serious financial burden.

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

A less obvious reason is that a section 301 Armageddon necessarily involves detailed discussion of an employer's most intimate financial secrets. By making a damage claim, the employer puts its financial injury, and thus its finances, at issue in the litigation. The discovery rules of the Federal Rules of Civil Procedure11 give the union and its accountants the right to explore every corner of the employer's books. If the union conducts its case properly, it will know everything from per-unit profit to the finer details of management compensation. The employer may withdraw parts of the damage claim in an effort to limit the investigation; but it can expect little success, given the liberality of the discovery rules. It it a relatively simple matter for a union accountant to demonstrate how the unexplored area could be used to exaggerate damages. Nor does it stop with the plaintiff's business. Where transfers to related business entities are possible, the union will delve into the related entity. If there is a possibility of misstatement by suppliers or customers, plaintiff will find the union subjecting those parties to process and investigation. Understandably, few employers want to run the full length of this particular gantlet.

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

The Section 301 Lawsuit

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

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

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

\begin{footnotesize}
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\item\textsuperscript{12} Local 174, IBT v. Lucas Flour Co., 369 U.S. 95, 105 (1962).
\item\textsuperscript{13} Gateway Coal Co. v. UMW, 414 U.S. 368, 382 (1974): “Thus, an arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties.”
\item\textsuperscript{15} Local 174, IBT v. Lucas Flour Co., 369 U.S. 95, 105 n 14 (1962): “Insofar as the language of [the state supreme] court's opinion is susceptible to the construction that a strike during the term of a collective bargaining agreement is \textit{ipso facto} in violation of the agreement, we expressly reject it.”
\item\textsuperscript{17} See, e.g., Vaca v. Sipes, 386 U.S. 171 (1967).
\item\textsuperscript{19} 29 U.S.C. § 159(a) (1970); Emporium Capwell Co. v. Western Addition Community Org. (WACO), 95 S. Ct. 977 (1975); NLRB v. Allis-Chalmers, 388 U.S. 175, 180 (1967).
\end{enumerate}
\end{footnotesize}
wheeling” disregard for congressional policies:

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

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

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

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

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

21 *Id.* at 255.
23 The damage awards against all union defendants in these cases are as follows: *Eazor*, $512,001.32; *Adley*, currently at trial on damages; *Wagner Electric*, $70,000; and *Penn Packing*, no cause of action. In a sister case to *Adley*, IBT Local 107 suffered a judgment of $970,000, which was subsequently compromised. *Roadway Express, Inc. v. Highway Truck D. & H.*, Local 107, 299 F. Supp. 1058 (E.D. Pa. 1969). It is fashionable to assume that all unions are rich. With the exception of a few large International Unions, however, most unions and their locals are impecunious by most, let alone commercial, standards.
24 496 F.2d 954 (8th Cir. 1974).
25 497 F.2d 459 (6th Cir. 1974).
The third approach is that of *Penn Packing Co. v. Amalgamated Meat Cutters, Local 195*, a Third Circuit opinion, and *Adley Express Co. v. Highway Truck Drivers & Helpers, Local 107*, an opinion by Judge Becker of the Eastern District of Pennsylvania. These decisions turn first to the language of the no-strike clause. The standard to be applied is drawn from a realistic reading of that clause, in light of the range of pressures and policies which impinge on collective bargaining. Whether a breach exists, and whether it has been cured or excused, is resolved as an issue of fact, not as one of law. *Penn Packing* distinguishes *Eazor* and *Wagner Electric* without either approving or disapproving them.

### The Narrowing Path: The Eazor and Wagner Electric Approach

*Eazor* and *Wagner Electric*

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

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

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28 497 F.2d 888 (3d Cir. 1974).
28 The contract in *Eazor* provided:
The Union and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement, as provided for in this Agreement of any controversy which might arise. 357 F. Supp. at 161. However, other provisions limit and specify the duty owed: "The Union shall not be liable for damages resulting from [an unauthorized strike] of its members. . . . [T]he Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work. . . . [T]he Central States Drivers Council shall not be liable for any strike, breach or default. . . . unless the act is expressly authorized by its Executive Board . . . . Council shall make immediate effort to terminate any strike or stoppage of work which is not authorized by it without assuming liability therefor." Brief for IBT to Third Circuit at 3-4; *Eazor*, 357 F. Supp. at 162. *Eazor* involves the further issue of whether the International Union itself is even a party to the labor agreement and/or the no-strike provision. *Id.* at 167-68. This sort of issue often arises in IBT and UMW cases; but for purposes of this discussion I am assuming that the unions involved are clearly parties to the no-strike clause.
29 *Id.* at 164.
what they cannot do as a union. On that basis, Eazor implies an obligation on the unions “to use all reasonable means at their disposal, both persuasive and punitive, to terminate the work stoppage.” The Eazor decision leaves no latitude for good faith union judgments as to what might, or might not, be productive. To escape damage liability, holds Eazor, the union should have: suspended or expelled strikers from membership; prevented them from getting jobs elsewhere; denied use of union facilities and hiring halls; imposed daily fines; removed local leadership from office; held all votes by secret ballot; and trustee'd the Locals involved. The court does not require that these steps be taken immediately. Rather, it envisions an escalation from persuasion, through various punitive actions, until, like Indochinese guerrillas, the wildcatters capitulate to superior force. If necessary, the union is required to deplete its punitive arsenal. That the strikers are ugly and violent, Eazor reasons, makes all the more imperative the need for “the politics of power rather than the politics of persuasion.”

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

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80 Id. at 164–65.
81 376 F. Supp. at 843.
82 357 F. Supp. at 168 n.18: “The obligation is not discretionary, but mandatory. Therefore it leaves no latitude for political or even good faith judgments as to what might and what might not be productive.”
83 357 F. Supp. at 166–69.
84 376 F. Supp. at 848–49.
86 357 F. Supp. at 167. One can easily imagine the union’s surprise at learning the sweeping nature of the no-strike obligation it voluntarily assumed. This is particularly true of the International Union, which did nothing to sanction, authorize, aid or comfort the strikers. Id. at 168.
87 Wagner Electric Corp. v. Local 1104, IUE, 361 F. Supp. 647 (E.D. Mo. 1973), aff’d, 496 F.2d 954 (8th Cir. 1974). “The Union agrees that during the term of this Agreement there shall be no strikes . . . , stoppage of work, or any other form of interference of production or other operations . . . .” 361 F. Supp. at 648.
88 Id. at 650.
89 These cases accept the proposition that a union is liable for the “mass action” of its members. The key mass action case is Vulcan Materials Co. v. USW, 430 F.2d 446 (5th Cir. 1970), cert. denied, 401 U.S. 963 (1971). In the context of a suit under section 303 of the Taft-Hartley Act for a secondary boycott, the Fifth Circuit held that a union is responsible for the mass action of its members as long as it is a functioning entity. In this, the Fifth Circuit was reasserting a proposition going back to United States v. UMW, 77 F. Supp. 563, 566 (D.D.C. 1948), aff’d, 177 F.2d 29 (D.C. Cir. 1949), cert. denied, 338 U.S. 871 (1949). As we shall see, the “mass action” principle is often and easily mis-applied in the section 301 area.
actions." Following *Eazor*, the Eighth Circuit focused on general principles. Applying those principles, the court affirmed the district court’s holding that the union’s press release ordering a return to work did not toll union liability.

**Construction of the No-Strike Clause**

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

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

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40 496 F.2d at 956.
42 “The Union for itself and for its individual members agrees and guarantees that there shall be no strike, stoppage of work, slowdown, or other interference with production.” *Penn Packing Co. v. Amalgamated Meat Cutters, Local 195*, 497 F.2d 888, 890 (3d Cir. 1974).
43 Id.
to ignore such a "fundamental premise."

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

**The Limited Nature of Union Authority**

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

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

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

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497 F.2d at 890-91.
47 Wagner Electric Corp. v. Local 1104, IUE, 496 F.2d 954, 956 (8th Cir. 1974).
48 IBT v. Crown Cork & Seal Co., 488 F.2d 738 (8th Cir. 1973), reversing the district court's interpretation on the ground that the Supreme Court "require[s] federal courts to place a practical and realistic construction upon labor agreements, giving due consideration to the purpose which they were intended to serve." Id. at 742.

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

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.
to enforce membership obligations in a manner which prejudices job rights. Wildcat strikers are not protected against employer action by section 7 of the NLRA. They may be discharged by their employer, the industrial equivalent of capital punishment. Arbitration decisions which tamper with such discharges have had worse-than-average luck withstanding judicial review. Unlike the union, the employer has a recognized right to prejudice employment rights. A Boys Market injunction, in addition, will bring the considerable authority and power of the federal courts to an employer's aid. The union's "arsenal" has nothing remotely comparable or uncontestable.

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

Practical Restrictions on Union Power

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

52 See, e.g., Lee A. Consaul Co. v. NLRB, 469 F.2d 84, 85 (9th Cir. 1972).
nized, "the principle of exclusive representation is meant to lubricate" the collective bargaining process. Factionalism thins that lubrication, making the probability of strife and deadlock high, and the likelihood of headway minimal. Both employer and union suffer from such an approach.

**Legal Restrictions on Union Flexibility**

1. **Landrum-Griffin Limitations**

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

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58 *Emporium Capwell Co. v. Western Addition Community Org. (WACO)*, 95 S. Ct. 977 (1975).
57 *Id.* It should be noted that union officials are particularly ill-suited, by temperament and training, to be strike-breakers. Employer discipline is likely to be administered with a much more willing hand than union discipline.
60 Section 101(a)(1) assures equal rights to all members, "subject to reasonable rules and regulations in such organization's constitution and bylaws." 29 U.S.C. § 411(a)(1) (1970). Section 101(a)(2) gives the rights of free speech and assembly, provided that "nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." 29 U.S.C. § 422(a)(2) (1970). Section 101(a)(4) protects the right of a member to sue his union, subject to an exhaustion of internal union remedies requirement. 29 U.S.C. § 411(a)(4) (1970). Section 101(a)(5) gives the member a federal right to written specific charges, reasonable time to prepare, and a full and fair hearing before a union may use discipline.
62 It is common, for example, for a union constitution to limit severely the amount of fine which can be imposed by a trial board on a member.
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pline against wildcat strikers. The first proviso to section 101(a)(4) properly requires the individual member's complaint to be directed internally, even where it arises out of a union's action in the strike context. Analogizing to section 101(a)(4), the Ninth Circuit, in a duty of fair representation case, has held that a union member must initially pursue internal union procedures to remedy such union action. This requirement may well solve the dispute by internal means. But, when the plaintiff is bitter, it merely delays his recourse to the courts for four months.

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

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

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


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

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


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

See also Wambles v. IBT, 488 F.2d 888 (5th Cir. 1974) (appointed official can be discharged without cause).
are likely to be elected Local officials. Moreover, if removed from office, both appointed and elected officials may argue that their removal was not for promoting a wildcat. Rather, they can easily claim it is a reprisal for the exercise of Title I membership rights, e.g., their opposition to the leadership's position on the substantive bargaining matters which led to the strike. Reprisal for the exercise of Title I membership rights is actionable under section 609 of Landrum-Griffin. The Second Circuit's recent decision in Schonfeld v. Penza holds that section 609 reprisal claims for removal from office are sometimes actionable, despite the fact that under Title IV of the Landrum-Griffin Act the Secretary of Labor has exclusive jurisdiction over violation of candidacy and office-holding rights. In Calhoon v. Harvey, the Supreme Court held that officeholders and candidates cannot avoid the statutory pre-emption of Title IV by pleading the case as a Title I action. Schonfeld's rationale for not applying the Calhoon pre-emption rule is that a union official is sometimes given the choice of his office or his membership rights, and in appropriate circumstances section 609 requires that officials not be put to such a choice because of the chilling effect such a choice has on membership rights. The Seventh Circuit, in two decisions, has limited the Schonfeld exception to the Calhoon pre-emption rule to cases involving a lengthy history of intra-union warfare. However, the Seventh Circuit accepts the basic premise of Schonfeld that Calhoon does not entirely foreclose section 609 suits for removal from office. The way remains open, then, for union officials to bring section 609 suits against unions who remove them from office in the manner required by Eazor. It remains to be seen whether the Seventh Circuit's restrictive reading of Schonfeld will be accepted. But whether it is or not, the developing liberalism in the section 609 area threatens to play "rock" to Eazor's "hard place," with unions caught between.

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

68 477 F.2d 899 (2d Cir. 1973).
71 The Third Circuit itself has adopted a position similar to Schonfeld. Martire v. Laborers' Local 1058, 410 F.2d 32 (3d Cir. 1969).
against union officials for breach of that duty. It is easy to forget that section 501 deals with more than finances. None other than the Eighth Circuit, in Johnson v. Nelson, held that section 501(a) requires union officers to obey the orders of the membership. In fact, the Eighth Circuit's decision in Pignotti v. Local 3, Sheet Metal Workers' Int'l Ass'n, found a breach of section 501 in an International Union's use of a trusteeship to make a Local act contrary to a vote of its membership.

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

(2) The Union's Duty of Fair Representation

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

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

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

75 477 F.2d 825 (8th Cir. 1973).

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

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


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

80 Griffin v. UA W, 469 F.2d 181, 183 (4th Cir. 1972); Retana v. Apartment, M., H. & Elevator Operators Union, Local 14, 453 F.2d 1018, 1023-24 (9th Cir. 1972); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 231, 284 (1st Cir. 1970). See generally Feller, A General Theory of the Collective Bargaining Agreement, 61 CALIF. L. REV. 663 (1973). It should be noted that the Sixth Circuit has limited Griffin,
of fair representation raises doubts about a union's ability to make the compromises essential to reach a middle ground between a wildcatting membership and an incensed employer. The difficulty is particularly acute where the employer demands a "horse trade," that is, the sacrifice of a few individuals as the price for rescinding the discharges of many. Fair representation suits are increasing in number. Their defense is an expensive, time-consuming burden on unions. Eazor is an incentive for a union either to short-shrift fair representation, or to avoid compromises often necessary to cut short the wildcat and prevent its recurrence. Eazor, in short, promotes the worst solution—litigation.

(3) The Requirements of Antidiscrimination Law

An analogous dilemma can arise because of the federal statutes forbidding race and sex discrimination. Recent developments under Title VII \(^{81}\) and section 1981 \(^{82}\) have made a union's good faith in remedying discrimination less and less relevant. Particularly in the departmental seniority cases, where statistical discrimination exists, damage liability is assessed on practically a strict liability basis.\(^{83}\)

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

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

\(^{84}\) 95 S. Ct. 977 (1975), rev'd 485 F.2d 917 (D.C. Cir. 1973).
\(^{85}\) Laborers' Int'l Union, Local 478 v. NLRB, 503 F.2d 192 (D.C. Cir. 1974).
section 8(b)(1)(B) of the NLRA by bargaining for the appointment of black foremen. The Laborers unsuccessfully argued that Title VII required this sort of action, as racist foremen are frequently the source of a discriminatory atmosphere. And, I might add, such foremen are the usual spark, if not the main cause, of race-related wildcats. If a wildcat strike occurs, the employer, through its exclusive control over the selection of supervisors, retains practical control over the key to settlement. The insensitivity of the Eazor approach gives the employer a means to squeeze the union between section 301 damage liability and an unfair labor practice.

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

**Union Liability: An Issue of Fact or Law?**

The "Vicarious Liability" Approach

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

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81 Theoretically, a union might also file a discrimination suit or argue the employer has failed to mitigate damages.
83 95 S. Ct. 977, 989.
85 95 S. Ct. at 989.
86 That does not mean that the discharge is immune from attack on other statutory grounds in an appropriate case. If the discharges in this case are violative of § 704(a) of Title VII, the remedial provisions of that title provide the means by which Hollins and Hawkins may recover their jobs with back pay.
87 42 U.S.C. § 2000e-5(g). The Court does not disclose what is "an appropriate case."
88 Of course, Emporium itself involved a boycott picket, not a full-fledged wildcat.
89 Wagner Electric Corp. v. Local 1104, IUE, 496 F.2d 954, 956 (8th Cir. 1974). However, it is well established that a union is responsible for the mass action of its rank and file members as long as it is a functioning entity.
rules intended by Taft-Hartley, but a strict rule of vicarious liability.\textsuperscript{94}

The contrast among the three approaches to the application of section 301 to wildcats\textsuperscript{95} can be seen most clearly on this issue. The Sixth Circuit approach in \textit{North American Coal Corp. v. Local 2262, UMW}\textsuperscript{96} rejects the vicarious liability approach in strong terms:

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

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

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

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

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

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

\textsuperscript{96}497 F.2d 459 (6th Cir. 1974), discussed \textit{supra} note 25 & text accompanying.

\textsuperscript{97}Id. at 466-67 (footnote omitted).


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

\textsuperscript{100}29 U.S.C. § 185(e) (1970).

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

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

**The “Mass Action” Agency Theory**

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

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

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¹⁰² 93 Cong. Rec. 4022, 6858 (1947).
¹⁰⁴ E.g., Senator Taft’s summary, 93 Cong. Rec. 6442, 6858 (1947). In this, the Congress was merely approving NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939). Taft-Hartley added the language “or to affect the limitations or qualifications on that right [to strike]” to section 13 of the NLRA. 29 U.S.C. § 163 (1970). The employer’s right to discharge wildcatters is one of the “limitations” preserved by this amendment.
¹⁰⁵ 430 F.2d 446, 455 (5th Cir. 1970), cert. denied, 401 U.S. 963 (1971).
¹⁰⁷ 430 F.2d at 455.
¹⁰⁸ In Canada, where the no-strike prohibition is statutory, perhaps *Vulcan Materials* would be apposite.
by the Eastern District of Pennsylvania.

_Wagner Electric_ relies on _United States v. UMW_ as if the "mass action" rule is a settled matter of law. But _Adley_ itself explains why such an approach is mistaken. _Adley_ does not require authorization as a _sine qua non_ as does the Sixth Circuit's _North American Coal_. Nor does it forget the importance of authorization. For that reason it offers a third approach to _North American Coal_, on the one hand, and _Wagner Electric_ and _Eazor_ on the other.

Working from a typical no-strike clause, _Adley_ reaffirms the proposition that a union can be liable for a stoppage which it _in fact_ instigates, regardless of whether the name "strike" is attached or whether the formal requirements of union authorization have been met. _Adley_ treats union responsibility for the mass actions of its members as an issue of fact, rather than law. For this reason, _Adley_ expressly refuses to hold a union strictly and vicariously liable, even where it instigates a wildcat, "regardless of any unsuccessful effort it may make to terminate it."

To cut short its liability, "the Union has the burden of demonstrating that it exerted very substantial and sincere efforts to get the men back to work. . . ." The court holds that further evidence is needed to determine whether the union's importuning at a certain membership meeting amounts to such efforts.

The _Adley_ reading of _United States v. UMW_ is not only correct, but it supplies the sensitivity lacking in _Wagner Electric_ and _Eazor_. Union damage liability for wildcats is a matter of the intent of the parties and the facts. This is not an area amenable to general recitation of "settled" principles.

_Approaching Union Liability as an Issue of Fact_

There is a sensible approach to this area. If the parties must litigate, the court must begin—as the Third Circuit did in _Penn Packing_—with a realistic reading of the no-strike clause. It is simply not sensible,
absent extraordinary circumstances, to read no-strike clauses as imposing much more than: (1) a duty not to authorize or instigate a wildcat; and (2) a duty to use a union’s best persuasive efforts to end the work stoppage as soon as possible. Insofar as the Sixth Circuit, in *North American Coal*, suggests that the second part of this duty cannot exist, its conclusion is overstated.

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

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

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

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

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

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

*Id.* at 890-91. The Third Circuit held that no guarantee was intended, and that all the union agreed to was “to use its best efforts to end the stoppage as soon as practicable.” *Id.* at 891. The union had urged a return to work, and offered to pay the salaries of discharged stewards, pending arbitration. This was adequate to affirm judgment for the union.
quired by Adley.\textsuperscript{118} Where earlier union instigation or authorization must be undone, perhaps the efforts have to be more vigorous. But the punitive approach of Eazor cannot be defended, even where there is authorization from the onset. The balance of conflicting federal policies is too delicate, the realities too complex, for so blunt an approach.