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Viii. Labor

Denson was unnecessary with respect to his failure to receive a reclassification hearing. However, since sufficient evidence was unavailable to determine whether *Wolff* standards prevailed at the rule violation hearing, the Fourth Circuit appropriately remanded.

Reclassification or transfer proceedings are not categorically within or without *Wolff* due process requirements. Rather, the touchstone established by *Meachum* for invoking the *Wolff* requirements is whether the outcome of the proceeding in question may affect a prisoner's state-created liberty interests. A comparison of *Kirby* and *Denson* illustrates the proper application of *Wolff* standards. Plaintiff Kirby was reclassified in North Carolina where good time can be lost upon reclassification. Thus, *Wolff* standards were appropriately applied. Plaintiff Denson was reclassified in Virginia where classification has no bearing on good time accumulation. Hence, the strict *Wolff* requirements should not control.

Although proper application of *Wolff* was not clarified until the recent *Meachum* decision, the Fourth Circuit correctly applied the *Wolff* standards in *Kirby, Bratten, Benfield* and *Johnson.* Even in *Carroll* and *Denson* the Fourth Circuit advised the district courts on remand to await the pending *Meachum* decision.[51] Consequently, the *Meachum* guidelines for application of *Wolff's* standards to transfer and reclassification situations have been strictly adhered to in the Fourth Circuit.

MARK T. COBERLY

VIII. LABOR

The Fourth Circuit recently considered issues in three important areas of labor law: union liability for damages for breach of the duty of fair representation;[1] the application of *Boys Markets* injunctions to sympathy strikes;[2] and the application of agency principles to union misconduct in a representation election.[3] In the duty of fair representation case, the court held the union liable not only for compensatory damages, but also for punitive damages and attorneys' fees.[4] The availability of *Boys Markets* injunctions[5] to halt sympathy

[51] 540 F.2d at 675.

[1] *See* text accompanying notes 9-136 *infra.*

[2] *See* section B *infra.*

[3] *See* section C *infra.*

[4] Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975), *cert. denied,* 425 U.S. 958 (1976).

strikes was the subject of two cases in which the court distinguished an employer suit to enjoin his own employees who refused to cross foreign picket lines[6] from an employer suit to enjoin the foreign pickets themselves.[7] In addition, agency principles of apparent authority provided the basis for union responsibility for the misconduct of members of an employee organizing committee during a representation election campaign effectively resulting in the invalidation of the election.[8]

A. Union Liable for Compensatory Damages, Punitive Damages and Attorneys' Fees for Breach of Duty of Fair Representation.

When an employee allegedly has been discharged or suspended in violation of the collective bargaining agreement and elects to file a grievance through the exclusive bargaining representative,[9] the union owes the employee a duty of fair representation.[10] Determining whether the union has met that duty has proved difficult.[11] However,

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[5] *Boys Markets* injunctions represent an exception to the anti-injunction provisions of the Norris-La Guardia Act and are available only when strict requirements are satisfied. *See* section B *infra*.

[6] Windsor Power House Coal Co. v. District 6 UMW, 530 F.2d 312 (4th Cir. 1976), *cert. dismissed*, 97 S. Ct. 199 (1976).

[7] Consolidation Coal Co. v. UMW, 537 F.2d 1226 (4th Cir. 1976).

[8] NLRB v. Georgetown Dress Corp., 537 F.2d 1239 (4th Cir. 1976).

[9] Under both the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1970), and the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 141 *et seq.* (1970), a union is the exclusive bargaining representative of all employees in the bargaining unit. *See* Steele v. Louisville & Nash. R.R., 323 U.S. 192, 199 (1944) (as exclusive bargaining representative under Railway Labor Act, union has duty to represent all employees fairly in all dealings with the employer); Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944) (labor union selected as a bargaining agent under the National Labor Relations Act is charged with the duty of representing the interests of all employees fairly and impartially). *See also* Vaca v. Sipes, 386 U.S. 171 (1967); Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955), *rev'g* 223 F.2d 739 (5th Cir. 1955).

[10] Judicial pronouncements of the appropriate standards for the duty of fair representation generally have not been enlightening. *See* note 11 *infra*. In an early case, the Supreme Court held that as exclusive bargaining agent, a union had a duty not only to represent the interests of the bargaining unit as a whole but also to protect the interests of individual employees. Steele v. Louisville & Nash. R.R., 323 U.S. 192, 202 (1944).

[11] The Supreme Court in Steele v. Louisville & Nash. R.R., 323 U.S. 192, 204 (1944), held that the union's duty of fair representation obligated the union to act "without hostile discrimination, fairly, impartially, and in good faith." In Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953), the Court stressed the union's need for broad discretion as bargaining representative subject to complete good faith and honesty of purpose in the exercise of that discretion. The Supreme Court more recently treated

once a court finds that the union has breached its duty of fair representation, the problem remains of allocating damages between the union and the employer.[12] When the union and the company have acted wrongfully together, courts have had little problem in holding the union and the employer jointly and severally liable for the employee's damages.[13] A more troublesome question arises when there has been a wrongful suspension or discharge by the company and an independent breach by the union of its duty of fair representation.[14]

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the duty in Vaca v. Sipes, 386 U.S. 171 (1967). The Court described a union's duty as a statutory obligation to serve the interests of all members without hostility or discrimination, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Id.* at 177, *citing* Humphrey v. Moore, 375 U.S. 335, 342 (1964). A breach of that duty thus occurs when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. 386 U.S. at 190. However, the Court then held in Amalgamated Ass'n of St. Employees v. Lockridge, 403 U.S. 274 (1971), that courts must maintain a distinction between honest, mistaken conduct on the one hand, and deliberate, severely hostile, and irrational treatment on the other. *Id.* at 301. *See* Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).

Attempts by lower federal courts to apply the widely cited *Vaca* standard, however, have produced three different results. *Compare* Dill v. Greyhound, 435 F.2d 231 (6th Cir.), *cert. denied*, 402 U.S. 952 (1970) (bad faith) *with* Retana v. Apartment Operators Local 14, 453 F.2d 1018 (9th Cir. 1972) (arbitrary or perfunctory conduct) *and* Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975) (mere negligence). The Fourth Circuit in Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972), read the *Vaca* test (no discrimination, bad faith or arbitrary conduct) as a tripartite standard. The court held that each of those requirements represents a distinct and separate obligation, the breach of any one of which may constitute the basis for a cause of action against the union. *Id.* at 183. *Griffin* also expressly recognized that the union could breach its duty while acting in complete good faith. *Id. See generally* Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEX. L. REV. 1037 (1973); Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973); Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK U.L. REV. 1096 (1974); Note, *Finality and Fair Representation: Grievance Arbitration Is Not Final If the Union Has Breached Its Duty of Fair Representation*, 34 WASH. & LEE L. REV. 309 (1977).

[12] *See* text accompanying notes 33-41 *infra*.

[13] *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 197 n.18 (1967); *cf.* Richardson v. Communication Workers, 443 F.2d 974, 982 (8th Cir. 1971), *cert. denied*, 414 U.S. 818 (1973) (when union wrongfully induces the discharge, it is liable for damages to the extent responsible for the whole).

[14] When there has been a breach of the collective bargaining agreement by the employer and an independent breach of the duty of fair representation by the union, the Supreme Court has noted that joint and several liability is unwarranted. Vaca v. Sipes, 386 U.S. 171, 197 n.18 (1967). The question then becomes how to apportion damages between the union and the employer. In addition, the employee faces different statutes of limitation applying to the contract action against his employer and the

In *Harrison v. United Transportation Union,*[15] the Fourth Circuit Court of Appeals held a union solely liable for compensatory damages in lost wages resulting from a breach of its duty of fair representation.[16] The court also held that, under proper circumstances, a union may be liable for both punitive damages and attorneys fees.[17]

In August, 1970, Seymon Harrison, a conductor on the Norfolk and Portsmouth Belt Line Railroad Company (Belt Line) and a member of Local 854, United Transportation Union (UTU), was suspended for purported insubordination.[18] The suspension was imposed following a formal hearing at which Harrison's case was presented by a union representative.[19] The union representative then filed a claim objecting to the suspension and requesting that Harrison be reinstated.[20] The company denied his claim and the union appealed to the president of Belt Line.[21] In a meeting with the union representative, the president upheld the suspension.[22] Under the terms of the collective bargaining agreement, Harrison or his representative then had sixty days in which to continue the appeal.[23] During the sixty day

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tort action against his union together with the problem of joining the employer and the union. *See* text accompanying notes 47-48 *infra*. *See generally* Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK U.L. REV. 1096 (1974).

[15] 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).

[16] 530 F.2d at 562-63. *See* text accompanying notes 42-99 *infra*.

[17] *Id.* at 563-64. *See* text accompanying notes 102-120 and 122-132 *infra*.

[18] *Id.* at 559-60. On the evening of August 18, 1970, Harrison was involved in a vehement verbal altercation with Lassiter, a superior, regarding why Harrison failed to call the yardmaster before the train on which Harrison was a conductor reached a certain junction and why certain brakemen were not lining up switches. During that discussion Lassiter ordered Harrison to be in his office the following morning. Prior to the scheduled meeting, Harrison spoke with the yardmaster who indicated that he would speak to the superintendent about the matter. Harrison then believed he was no longer required to go to Lassiter's office and did not do so. Upon reporting for his next scheduled work, Harrison was informed that he was being held out of service. Harrison was subsequently charged with insubordination and failure to obey the orders of a superior. *Id.* at 560.

[19] *Id.*

[20] *Id.*

[21] Harrison's initial claim for reinstatement and lost pay was made to the Belt Line superintendent. After the superintendent's denial, the local union representative appealed the decision and turned the claim over to the UTU General Committee of Adjustment for further handling. Brief for Appellant at 8, Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975).

[22] 530 F.2d at 560. In the meeting with the Belt Line president, Harrison's union representative argued that Lassiter's conduct mitigated Harrison's failure to obey the order. The president, however, decided to uphold the previous suspension.

[23] *Id.*

period, union representatives again met with the Belt Line president and discussed a number of grievances, including Harrison's and that of another conductor, Gray.[24] The parties agreed to trade away Harrison's claim for the reinstatement of Gray. Under that agreement the railroad promised that Gray would be reinstated provided the union did not process Harrison's claim until the time for appeal had lapsed.[25] The union's constitution and by-laws required the union to advise Harrison that his claim would not be progressed.[26] The union, however, did not notify Harrison of that decision, resulting in the lapse of his right to pursue his claim individually as well as through a union representative.[27]

Thereafter, Harrison sued both Belt Line and UTU, alleging a conspiracy to deprive him of his right to pursue his grievance.[28] The federal district court held that insufficient evidence existed to prove a civil conspiracy between Belt Line and UTU and directed a verdict

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[24] *Id.*

[25] *Id.* The court noted that following the meeting between the Belt Line president and the union representative, the president made a memorandum explicitly stating that Conductor Gray would be reinstated provided that UTU did not further process the claim of Harrison until time limits expired. *Id.* at 560.

[26] *Id. See* note 27 *infra*.

[27] *Id.* Any appeal from the president's decision was to be filed with the National Railroad Adjustment Board or a Public Law Board. *See* text accompanying note 47 *infra*. The collective bargaining agreement required the union to notify the railroad that it intended to appeal within sixty days of the president's negative decision. 530 F.2d at 560. The agreement also provided that the employee had the right to appeal his claim when the union declined to do so. Brief for Appellee at 11, Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975). An individual employee must also comply with the sixty-day limit. Following notice to the railroad, the agreement provided that the appeal must be made to the Adjustment Board or the Law Board within one year of the president's decision. Brief for Appellant at 9, Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975).

The union gave timely notice to Belt Line that it intended to appeal. 530 F.2d at 560. Subsequently, the union agreed with the company not to process the claim any further. *See* text accompanying note 25 *supra*. Following that agreement, the union failed to inform Harrison that it was not processing his case and his right to appeal both individually and through his union lapsed. 530 F.2d at 560, 562-63.

[28] Harrison's complaint originally included Local 854 of the UTU. The Local was later dismissed by stipulation of all parties before trial leaving the national union and the railroad as defendants. Harrison alleged that Belt Line and the UTU had illegally conspired to withdraw this grievance in return for the reinstatement of a previously discharged co-employee and union member. He further alleged that the defendants intentionally failed to notify him of their disposition of his grievance until statutes of limitation had barred his remedies. Finally, Harrison alleged a breach by the union of its statutory duty to represent him fairly. Brief for Appellee at 3, Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975).

for the railroad.[29] The court submitted the case against the union to the jury and entered judgment on the jury award of compensatory damages for lost wages[30] and punitive damages for breach of its duty of fair representation.[31] On appeal, the Fourth Circuit affirmed the district court, but held that the trial court also should have allowed recovery of reasonable attorneys fees.[32]

The Supreme Court set out the general rule of damages for duty of fair representation cases in *Vaca v. Sipes*.[33] In *Vaca*, the Court held that damages should be apportioned between the employer and the union according to the damage caused by each.[34] Although the Court found no breach of the duty of fair representation by the union,[35] the issue of damages was discussed at length and lower federal courts have adopted the *Vaca* approach.[36] The gravamen of the *Vaca* doc-

[29] 530 F.2d at 560-61. The Fourth Circuit upheld the trial court's dismissal of the railroad for several reasons. First, the railroad had no legal duty to represent its employees and was free to represent its own interests. Second, the court found no proof that the UTU and Belt Line had acted with joint motive to discriminate against Harrison. Finally, the court found no proof that Belt Line had knowledge that the UTU had a duty to give Harrison timely notice. If the railroad had had such knowledge but nevertheless agreed with the union to breach that duty, the dismissal would have been improper. *See* Ferro v. Railway Express Agency, 296 F.2d 847, 851 (2d Cir. 1961). Instead, the court found a lawful motive in the railroad's legitimate need to maintain discipline. In addition, the court noted that the memorandum by the Belt Line president, *see* 530 F.2d at 560 and note 25 *supra*, might have been construed as an indication that various grievances had been swapped. However, such a trade, absent an illegal motive or knowledge by the railroad that the union intended to breach its duty of fair representation, did not prove that the railroad breached any duty to Harrison. Moreover, the court noted that Harrison did not seek recovery from Belt Line on the basis of wrongful suspension but only for civil conspiracy. 530 F.2d at 561.

[30] *Id.* at 559. The Fourth Circuit held that Harrison was entitled to recover his loss of earnings during his suspension from the railroad. *Id.* at 562. The usual monetary measure of damages in cases of wrongful discharge or suspension is the award of back pay less interim earnings. St. Clair v. Local 515, Teamsters, 422 F.2d at 128, 132 (6th Cir. 1969). In addition, where reinstatement is not an appropriate remedy, damages properly include prospective earnings. Thompson v. Brotherhood of Sleeping Car Porters, 367 F.2d 489, 494 (4th Cir. 1966), *cert. denied*, 386 U.S. 960 (1967). Damages may also include loss of normal overtime. International Ass'n of Machinists, Lodge 917 v. Air Prod. & Chem., Inc., 341 F. Supp. 874, 878 (E.D. Pa. 1972).

[31] 530 F.2d at 559, 563-64.

[32] *Id.* at 559, 564. *See* text accompanying notes 122-32 *infra*.

[33] 386 U.S. 171 (1967).

[34] *Id.* at 197-98.

[35] *Id.* at 189-92. *See* notes 10-11 *supra*.

[36] Strictly speaking, the Supreme Court's damage apportionment doctrine in *Vaca* was dictum, since the Court found no breach of duty by the union. However, the Court's discussion was extensive and accordingly has been adopted by lower courts. Woods v. North Am. Rockwell Corp., 480 F.2d 644 (10th Cir. 1973); NLRB v. Local

trine lies in the fact that damages from wrongful discharge[37] stem not from the union's breach of its duty, but rather from the employer's breach of contract.[38] Thus, when an employee suffers a wrongful discharge or suspension by his employer, compensatory damages are attributable to the employer and should not be charged to the union.[39] In the absence of any complicity by the union in the employer's breach of contract,[40] the union normally is liable only for any additional expense and trouble to the employee in processing his grievance.[41]

The *Harrison* court reasoned that UTU's failure to present Harrison's claim to the Railroad Adjustment Board within the prescribed time limits[42] extinguished his personal right to pursue his claim against the railroad.[43] The court followed earlier decisions[44] in holding that the administrative remedies format set out in the Railway Labor Act[45] was the exclusive means of recovery against the employer.[46] The Railway Labor Act provides that disputes unresolved through the

485, IUEW, 454 F.2d 17 (2d Cir. 1972); Richardson v. Communications Workers, 443 F.2d 974 (8th Cir. 1971); Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970); St. Clair v. Local 515, Teamsters, 422 F.2d 128 (6th Cir. 1969).

[37] *See* note 30 *supra*.

[38] 386 U.S. 185-87, 195-98.

[39] *Id.* at 195-98.

[40] *See* cases cited in note 13 *supra*.

[41] 386 U.S. at 197-98. The Court in *Vaca* noted that damages normally attributable to a union for breach of its duty of fair representation are virtually de minimus. *Id.* at 198. *See* St. Clair v. Local 515, Teamsters, 422 F.2d 128, 132 (6th Cir. 1969).

[42] *See* text accompanying note 27 *supra*.

[43] 530 F.2d at 562-63. The *Harrison* court noted that the employee did not seek damages from the railroad based on wrongful suspension. *Id.* at 561. Had Harrison done so, the court would have held that the proper action by the district court would have been to dismiss the employer for failure of the employee to exhaust administrative remedies. *See* Dorsey v. Chesapeake & O. Ry., 476 F.2d 243 (4th Cir. 1973) and note 44 *infra*.

[44] In Dorsey v. Chesapeake & O. Ry., 476 F.2d 243 (4th Cir. 1973), the plaintiff brought suit against his employer for wrongful discharge without exhausting his remedies before the National Railroad Adjustment Board. *See* text accompanying notes 46-47 *infra*. The Fourth Circuit affirmed the trial court's grant of the railroad's motion for summary judgment and interpreted Andrews v. Louisville & Nash. R.R., 406 U.S. 320 (1972), to hold that an employee must exhaust his administrative remedies with the Adjustment Board before bringing a wrongful discharge action in federal court. 476 F.2d at 245. Relying on its earlier decision in *Dorsey*, the Fourth Circuit in *Harrison* held the administrative remedies format of the Railway Labor Act was the exclusive means of recovery against the employer. 530 F.2d at 562.

[45] 45 U.S.C. § 151 *et seq.* (1970).

[46] 530 F.2d at 562-63.

grievance machinery can be appealed to the Railroad Adjustment Board for resolution.[47] Generally, an employee must exhaust those remedies before resorting to the courts,[48] but UTU's failure to notify Harrison of its decision not to press the grievance precluded Harrison from appealing to the Railroad Adjustment Board.[49] *Harrison* did not hold that a union must *always* process employees' grievances. The duty of fair representation is not so broad.[50] Typically, unions must

[47] The Railway Labor Act established the National Railroad Adjustment Board (NRAB). 45 U.S.C. § 153 (1970). The Act provides that disputes between an employee and rail and airline carriers growing out of a grievance or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions shall be handled through the usual contractual grievance process. In the event that adjustment of the dispute is not accomplished after action by the chief operating officer of the railroad designated to handle such minor disputes, the dispute may be referred by either party to the NRAB. 45 U.S.C. § 153(i) (1970). The NRAB has authority to conduct hearings and make findings upon the disputes and to make final awards. 45 U.S.C. § 153(k) (1970). As a general rule, an employee must exhaust those remedies in the Railway Labor Act before he can enter into the federal courts. Andrews v. Louisville & Nash. R.R., 406 U.S. 320, 322 (1972); Mills v. Long Island R.R., 515 F.2d 181 (2d Cir. 1975). Once the dispute is taken before the Adjustment Board and an award is made, judicial review is limited. Generally, courts cannot properly review the Board's award on its merits unless it is found to be wholly baseless and completely without reason. Gunther v. San Diego & Ariz. E. Ry., 382 U.S. 257, 261 (1965); Dorsey v. Chesapeake & O. Ry., 476 F.2d 243 (4th Cir. 1973). *But cf.* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976) (in wrongful discharge suit arising under Labor Management Relations Act, 29 U.S.C. § 301 (1970), the union's breach of duty relieves employee of requirement that disputes be settled through contractual grievance procedures; if union's breach seriously undermines the integrity of the arbitral process, the finality of arbitration is also removed, no longer barring relitigation).

[48] Courts have established exceptions to the exhaustion of administrative remedies doctrine. The Supreme Court has held that an employee may obtain judicial review of his breach of contract claim without first exhausting administrative remedies when the employer repudiates the contractual grievance procedures. Drake Bakeries, Inc. v. Union Workers Local 50, 370 U.S. 254, 260-63 (1962). The employee can also overcome his employer's defense of non-exhaustion when the union, by a breach of its duty of fair representation, prevented the employee from exhausting administrative remedies. Vaca v. Sipes, 386 U.S. 171, 184-86 (1967); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 283 (1st Cir. 1970). Those two exceptions were established in suits arising under the Labor Management Relations Act, 29 U.S.C. § 301 (1970). Under the Railway Labor Act, 44 U.S.C. § 151 *et seq.* (1970), the Supreme Court has also held that where attempts to use the grievance machinery would have proved futile, exhaustion was not necessary. Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 330 (1969).

[49] *See* text accompanying note 47 *supra*.

[50] 530 F.2d at 561. The court noted that while proof of a meritorious grievance does not establish that the union's failure to press the grievance was a breach of its duty of fair representation, such proof constituted circumstantial evidence that failure to process the claim was in bad faith, and therefore, a breach of the union's duty. *See* notes 10-11 *supra*. Moreover, the court reasoned that even if the union acted in good faith

enjoy considerable discretion in deciding whether to process particular grievances.[51] The court reasoned, however, that because the union's conduct caused Harrison to lose his right to pursue the claim against his employer, the union should compensate him for the lost value of that right.[52] In contrast to the general rule of damage apportionment, which would hold the union liable only for Harrison's additional time and expense in pursuing his claim against Belt Line, the court assessed total liability for lost wages against the union.[53]

The *Harrison* majority rejected the argument that the Supreme Court's application of the *Vaca* apportionment doctrine in *Czosek v. O'Mara*[54] precluded union liability for compensatory damages.[55] In *Czosek*, the employee-plaintiffs sued the railroad employer for wrongful discharge and the union for breach of its duty of fair representation.[56] The trial court dismissed the action against the railroad for failure to exhaust administrative remedies under the Railway Labor Act.[57] The Supreme Court in *Czosek* affirmed the dismissal of the

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by not pursuing Harrison's claim, the union breached its duty by consciously deciding not to give Harrison timely notice of its decision to forego his claim. That decision violated the union's constitution and by-laws and represented arbitrary conduct in breach of its duty. 530 F.2d at 561-62.

[51] While a union is subject to standards of complete good faith and honesty of purpose in the exercise of its discretion, Vaca v. Sipes, 386 U.S. 171, 182 (1967), it must be allowed a "wide range of reasonableness" in serving the bargaining unit it represents. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). *See also* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956).

[52] 530 F.2d at 562-63.

[53] *Id.*

[54] Czosek v. O'Mara, 397 U.S. 25 (1970), *aff'g* O'Mara v. Erie Lackawanna R.R., 407 F.2d 674 (2d Cir. 1969).

[55] 530 F.2d at 562-63.

[56] In Czosek v. O'Mara, 397 U.S. 25 (1970), the plaintiffs were former employees of the Delaware, Lackawanna & Western Railroad. In 1960, the Delaware Lackawanna merged with the Erie Railroad to form the Erie Lackawanna, where the plaintiffs continued to work until 1962 when they were furloughed. Never recalled to work, the employees sued the railroad for wrongful discharge in violation of the Interstate Commerce Act, the Railway Labor Act, and the merger implementing agreement between the Erie Lackawanna and the Delaware Lackawanna, and the Firemen and Oilers Union for breach of its duty of fair representation in arbitrarily and capriciously refusing to press the employees' grievances. *Id.* at 26.

[57] 397 U.S. at 26-27. The district court also dismissed the action against the union because the complaint failed adequately to allege a breach of duty since the employees could have processed their own grievances. *Id.* at 27. *See* note 48 *supra*. The Second Circuit reversed the district court with respect to the union, and held that the complaint adequately alleged a breach of the duty. O'Mara v. Erie Lackawanna R.R., 407 F.2d 674 (2d Cir. 1969), *aff'd sub nom.* Czosek v. O'Mara, 397 U.S. 25 (1970). The appellate court, however, affirmed the dismissal of the railroad. 407 F.2d at 679.

railroad, but did not decide the issue of exhaustion of remedies.[58] Because the union feared that damages from the employer's breach of contract would be assessed against it unless the employer was a party, the union attempted to block the dismissal of the railroad.[59] Responding specifically to the union's fear, the Supreme Court held that regardless of whether the employer was joined in the suit, the union would not be liable for compensatory damages.[60] The Court reiterated its *Vaca* holding that the union would be liable only for the increased expense to the employee in collecting lost wages from the employer caused by the union's failure to pursue his claim properly.[61]

The Fourth Circuit majority distinguished *Czosek* on its facts and held that it did not preclude Harrison's recovery of compensatory damages from the union.[62] In *Czosek*, the aggrieved employees had the opportunity either to pursue their claim themselves or to rely upon their union.[63] The majority in *Harrison* reasoned that since the union in *Czosek* never processed the grievance, the employees had fair notice that they should pursue their claim independently.[64] Harrison, however, had no such notice that he should pursue his griev-

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[58] Czosek v. O'Mara, 397 U.S. 25, 27-30 (1970), *aff'g* O'Mara v. Erie Lackawanna R.R., 407 F.2d 674 (2d Cir. 1969). *See* text accompanying notes 47-48 *supra*.

[59] 397 U.S. at 28-29. In *Czosek*, the Supreme Court affirmed the dismissal of the railroad. The Court, however, expressly reserved the question of joinder of the employer when there are no allegations of conspiracy or concerted action tying the union and the employer together. The Court noted that it had no occasion to consider whether, under federal law, the employer may always be sued with the union when a single series of events gives rise to claims against the employer for breach of contract and against the union for breach of the duty of fair representation. Alternatively, while an employee could sue the union in district court for breach of its duty, resort must be had to the Adjustment Board for his remedy against the employer. *Id.* at 30. *See* note 92 *infra*.

[60] 397 U.S. at 29. The Supreme Court in *Czosek* held that:

> Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are *unrecoverable* except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer.

397 U.S. at 29 (emphasis added). *See* cases cited in note 36 *supra*.

[61] 397 U.S. at 29.

[62] 530 F.2d at 562.

[63] 397 U.S. at 28 n.1. The Railway Labor Act provides that parties before the National Railroad Adjustment Board may be heard in person, by counsel or by other representative. 45 U.S.C. § 153 (1970). The employee's right to participate in the grievance process individually is a statutory right. Elgin, J. & E.Ry. v. Burley, 325 U.S. 711, 740 n.39 (1945).

[64] 530 F.2d at 562-63.

ance alone, because the union deliberately failed to notify him of its decision not to take his claim to the Adjustment Board until his right of access to the Board had expired.[65] The *Harrison* court concluded that the loss of the right to enforce the contract against the employer in *Czosek* was as much the fault of the employees as the fault of the union.[66] The Fourth Circuit inferred from *Czosek* that those employees had reason to know that the union was not going to pursue their claim.[67] The loss of their right to press their claim independently of the union was the result of their own inaction; and the Supreme Court, therefore, limited recovery against the union in *Czosek* to the claimants' additional expenses.[68] In contrast, Harrison's grievance initially was processed by the union. Under the Fourth Circuit's reasoning, Harrison justifiably relied upon the UTU's continued handling of his grievance.[69] Therefore, the loss of his contractual remedies was the fault of the union and not of Harrison.[70] The *Harrison* majority concluded that *Czosek* was factually distinguishable and did not control.[71]

Judge Winter, dissenting only to the award of compensatory damages, adopted a stricter reading of the doctrine of damage apportionment between the employer and the union.[72] He interpreted *Czosek* to preclude union liability for compensatory damages for lost wages,[73] and would have held the union responsible only for Harrison's additional expense of pursuing his claim against the railroad. Since Harrison did not seek compensatory damages from Belt Line for wrongful suspension, the dissent concluded that Harrison could not argue that the union's conduct added to the difficulty and expense of recovering such damages.[74]

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[65] *Id.* The court found additional support for its finding that Harrison's reliance upon his union was justified in that the union representative had had the initial investigation postponed so that Harrison's case could be prepared properly. *Id.* at 560-62.

[66] *Id.* at 562. *See* text accompanying notes 75-79 *infra*.

[67] 530 F.2d at 562.

[68] *Id.* at 562-63. *But see* text accompanying notes 75-79 and 90-93 *infra*.

[69] 530 F.2d at 562-63.

[70] *Id.*

[71] *Id. But see* text accompanying notes 90-93 *infra*.

[72] *See* text accompanying notes 33-41 *supra*.

[73] 530 F.2d at 564-66 (Winter, J., dissenting). *See* text accompanying notes 33-61 *supra*.

[74] 530 F.2d at 564-66. Noting that Harrison did not seek damages from Belt Line for wrongful suspension, Judge Winter argued that Harrison would have a cause of action against his employer although the union's misconduct barred him from the Railroad Adjustment Board under the doctrine of failure to exhaust administrative

Traditionally, an assessment of relative fault, serving as the basis for apportioning damages, has been limited to the union and the employer.[75] By distinguishing *Czosek v. O'Mara*, the Fourth Circuit expanded the comparative fault analysis to include the employee. The *Harrison* court combined a reliance test and an analysis similar to contributory negligence to reach its result. Assuming a union's breach of duty and loss of access to the Adjustment Board, under the dual approach of reliance and contributory negligence, a court must determine whether the employee's reliance upon the union's handling of his grievance was justified.[76] When an employee's reliance upon the union's handling of his grievance was reasonable, the union could be held liable for compensatory damages.[77] On the other hand, when the employee has notice that the union might be hostile to his claim, the employee's inaction in not independently processing his claim contributes to the loss of the value of the claim.[78] In the latter case, the union could not be held liable for compensatory damages but only for the additional expense and trouble to the employee. In *Harrison*, the union's failure to process the grievance in violation of its duty of fair representation was sufficient to hold the union liable for all compensatory damages.[79]

If the Supreme Court had envisioned a congressional intent that unions be held liable for compensatory damages, the Court had ample opportunity to so hold, but declined. In *Vaca v. Sipes*, the union had the sole power under the contract to invoke the higher

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remedies. *See generally* Simpson & Berwick, *Exhaustion of Grievance Procedures and the Individual Employee*, 51 TEX. L. REV. 1179 (1973). In addition to other possible grounds for jurisdiction in a suit against the union, Judge Winter reasoned that an independent claim against the employer is permissible under the doctrine of pendent jurisdiction. *Cf.* Lewis, *Fair Representation in Grievance Administration*: Vaca v. Sipes, 1967 SUP. CT. REV. 81, 93 (in suit against union, jurisdiction over employer arguably is present because employer is constructive participant "benefiting" from union's inaction, or because the settlement that results from the employer's action and union's failure to pursue available remedies might be treated as a positive, mutual agreement between the parties concerning employee's status).

[75] Generally, damages are limited to two parties—the employer and the union—in cases of a union breach of its duty of fair representation and an employer breach of contract. The employer is liable for compensatory damages stemming from his breach of contract and the union is liable for any additional expense to the employee in recovering from the employer. Vaca v. Sipes, 386 U.S. 171 (1967); Czosek v. O'Mara, 397 U.S. 25 (1970). *See* text accompanying notes 33-41 *supra*. *See also* Scott v. Anchor Motor Freight, 496 F.2d 276, 281 n.4 (6th Cir. 1974).

[76] *See* text accompanying notes 27 and 64-71 *supra*.

[77] *See* 530 F.2d at 562-63.

[78] *Id.*

[79] *Id.*

stages of the grievance procedure.[80] Generally, an employee may not seek judicial enforcement of his contractual rights against his employer for wrongful discharge if he has not first exhausted the grievance machinery.[81] The Supreme Court in *Vaca* established an exception to that exhaustion doctrine. The Court held that where the employee-plaintiff has been prevented from exhausting contractual remedies by the union's violation of its duty of fair representation, an employer's defense of non-exhaustion cannot stand.[82] If the Court determined that it was Congress's intent that a union be responsible for all compensatory damages when the employee's contractual claim was lost, as the *Harrison* court later held, the exception was unnecessary. The union would simply be liable for all compensatory damages. The Supreme Court in *Vaca*, however, did not even discuss the possibility of holding the union liable for all compensatory damages.[83] Instead, the Court fashioned an exception to the exhaustion doctrine in order that the employee could collect compensatory damages[84] from the employer.

The *Harrison* court's approach ignored the fact that compensatory damages actually stemmed from the employer's wrongful act.[85] In

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[80] 386 U.S. at 185.

[81] *See* note 47 *supra*.

[82] 386 U.S. at 185-86.

[83] In Vaca v. Sipes, 386 U.S. 171 (1967), the Supreme Court emphasized that even though the employer may not have contributed to the employee's difficulty in pursuing his claim through the grievance machinery, the employer had committed a wrongful discharge. *Id.* at 185. *Vaca* reasoned that Congress did not intend that an employer be shielded from the consequences of its acts by wrongful union conduct. Thus, the Court, notwithstanding the exhaustion doctrine, allowed suit against the employer.

Indeed, if the Court had found a congressional intent to hold a union liable for all compensatory damages, the opportunity so to hold was clearer in *Vaca* under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* (1970), than in cases arising under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1970). Under the Railway Labor Act, an employee can contribute to his loss of remedies by not pursuing his right to press his grievance independently of the union. *See* text accompanying note 63 *supra*. The union under the NLRA, however, often has sole power to process a claim to the higher stages of the grievance machinery. 386 U.S. at 185. Thus, if a union failed to process a grievance fairly, it would have been an easy matter to hold the union liable for all of the employee's compensatory damages, since the employee could not have contributed to his loss of remedies. The *Vaca* Court rejected that approach and established an exception to the exhaustion doctrine in order that the employer be held accountable for compensatory damages resulting from his breach contract. *Id.* at 185-86.

[84] 386 U.S. at 185-86. *See* Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 329-31 (1969); Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972); Nemitz v. Norfolk & W. Ry., 436 F.2d 841, 849-50 (6th Cir.), *aff'd*, 404 U.S. 37 (1971).

[85] 386 U.S. at 185-88, 195-98. *See* cases cited in note 36 *supra*. Damages recover-

Vaca, the Supreme Court emphasized that although the employer may not have contributed to the employee's difficulty in pursuing his claim through the grievance machinery, the employer had committed a wrongful discharge.[86] The Court noted that Congress did not intend that wrongful union conduct would shield employers from the consequences of their acts.[87] The Fourth Circuit's assessment of the union for compensatory damages seems in direct conflict with the rationale of *Vaca* that it is the employer's wrong which gives rise to the loss of wages.[88] In addition, insulating the employer with the union's conduct would seem to eliminate any remedy of reinstatement.[89]

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able by employee-plaintiffs as compensatory damages include remuneration for such items as lost wages, overtime and benefits. *See* note 30 *supra*. In cases such as *Harrison* involving wrongful discharge or suspension by an employer, the basis of such losses to the employee originates from the employer's misconduct prior to any subsequent union breach. *See* text accompanying note 96 *infra*.

[86] 386 U.S. at 185-88, 195-98.

[87] Under the holding in *Harrison*, an employer might escape all liability even when it discharged an employee in blatant violation of the collective bargaining agreement. If the employee justifiably relied upon his union to process the claim and the union unfairly permitted the applicable time limitations to expire, the employee could recover lost wages from the union. The employer, however, would then escape all liability for his wrongdoing. Under the Fourth Circuit's holding, a union arguably would then be certain not to breach its duty of fair representation. The union's duty, however, is not sufficiently clear that it would always know its obligations. Federal courts have utilized three separate standards in analyzing that duty. *See* note 11 *supra*. Moreover, a union has a duty to represent not only individual employees, but also the employees as a whole. Steele v. Louisville & Nash. R.R., 323 U.S. 192, 204 (1944). *See* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1179 (1973). At times, these two obligations conflict. *See* Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1962); *see, e.g.*, Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961); Waiters Union Local 781 v. Hotel Ass'n, 82 L.R.R.M. 2646 (D.D.C. 1973). Moreover, it is generally conceded that a union must enjoy broad discretion in its handling of greivances. *See* text accompanying note 51 *supra*. In any event, the clear policy of *Vaca* was to hold the employer responsible for its breach and limit union liability to damages which accrued from its separate misconduct. 386 U.S. at 185-88.

[88] 386 U.S. at 185-88.

[89] The *Harrison* approach seems to eliminate any possibility for reinstatement as a remedy. While reinstatement is not an appropriate remedy in many cases, *see* De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 291 (1st Cir. 1970), it is a proper remedy when an employee would have been reinstated had the grievance been processed properly. *Id. See* International Ass'n of Machinists, Dist. 8 v. Campbell Soup Co., 406 F.2d 1223 (7th Cir.), *cert. denied*, 396 U.S. 820 (1969); Grady v. Trans World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969); Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK U.L. REV. 1096, 1156 (1974).

The majority's reasoning that *Czosek* did not control on the issue of damages because Harrison had no fair opportunity to pursue his claim independently of the union also seems tenuous. There is no suggestion in *Czosek* that its holding was predicated upon recognition that the employees failed to assert their independent right to pursue their claims against the railroad.[90] Significantly, the Supreme Court cited only *Vaca v. Sipes* to support its holding in *Czosek* that damages against the union were not recoverable except to the extent that the union's conduct added to the employee's difficulty and expense.[91] The *Czosek* Court held that the union's liability was to be so limited regardless of whether the employer was a party to the suit.[92] The contributory negligence factor relied upon by the Fourth Circuit to distinguish *Czosek* was never mentioned in the Supreme Court's opinion.[93]

Nevertheless, the majority's justifiable reliance and contributory fault test may be useful in achieving an equitable allocation of damages. In cases arising under the Railway Labor Act, the best approach would be to hold that an employee's justifiable reliance upon his union relieves him of the duty to exhaust administrative remedies. The employer's defense of non-exhaustion should not bar suit against the railroad if an employee reasonably relied upon his union to prosecute his grievance which it unfairly failed to do.[94] This approach

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[90] Harrison v. United Transp. Union, 530 F.2d 558, 564-65 (4th Cir. 1975) (Winter, J., dissenting). *See* Schum v. South Buffalo Ry., 496 F.2d 328, 331 (2d Cir. 1974).

[91] Czosek v. O'Mara, 397 U.S. 25, 29 (1970).

[92] *Id.* at 28-29. The Supreme Court in *Czosek* expressly reserved judgment on whether an employer may always be joined in a suit against the union or whether he may be reached only through the National Railroad Adjustment Board. *Id.* at 28, 30. *Cf.* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568 n.9 (1976) (issue raised and left undecided in *Czosek* of whether employer can always be joined has remained open).

[93] *See* Czosek v. O'Mara, 397 U.S. 25 (1970); Harrison v. United Transp. Union, 530 F.2d 558, 564-65 (4th Cir. 1975) (Winter, J., dissenting).

[94] This approach has been adopted by at least one court. In Schum v. South Buffalo Ry., 496 F.2d 328 (2d Cir. 1974), an employee refused to report for a physical inspection, whereupon disciplinary proceedings commenced. The union agreed to process his grievance, and after the first step in the grievance machinery, the railroad affirmed its decision to terminate Schum's employment. The union thereafter failed to pursue his grievance and Schum received no notice until time limits for appeal had expired. Schum sued the union for breach of the duty of fair representation and the employer for wrongful discharge. The district court granted the railroad's motion for summary judgment because Schum failed to exhaust administrative remedies. The Second Circuit reversed, distinguishing *Czosek* on the issue of justifiable reliance. *See* text accompanying note 73 *supra*. The Second Circuit however, allowed suit against the employer based on the union's breach of duty. The court held that the exhaustion

would allow the proper apportionment of damages when there has been independent union and railroad misconduct. The employer would be liable for the employee's lost wages and benefits resulting from wrongful suspension or discharge.[95] For its breach of the duty of fair representation, the union would be responsible for any added expense to the employee in pursuing his claim against the employer.[96] The suggested approach also accords with the policy of not allowing employers to escape liability because of independent union misconduct. The union's broad discretion in handling grievances would also be preserved.[97] The employee would be responsible for pursuing his claim before the Adjustment Board when the union timely notifies him that it does not intend to press his grievance.[98] Therefore, where the union has reason not to process an employee's grievance, it could satisfy its duty by notifying the employee that he should process his claim alone.[99]

In addition, allowing the union's breach to defeat the employer's motion for dismissal for non-exhaustion of administrative remedies preserves the power of the Adjustment Board.[100] If suit against the

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doctrine did not bar suit against the railroad for breach of contract when the employee reasonably relied upon his union, which breached its duty by unfairly allowing time limits to expire. *Id.* at 331-32.

[95] *See* notes 30 and 60 *supra*.

[96] Several cases have held that an employee cannot recover any damage from his union until he proves that his employer breached his contract. *See, e.g.*, NLRB v. Local 485, IUEW, 454 F.2d 17 (2d Cir. 1972); St. Clair v. Local 515, Teamsters, 422 F.2d 128 (6th Cir. 1969). This approach is consistent with cases in which the employee has the opportunity to pursue his own grievance through the adjustment process under the Railway Labor Act. Moreover, the requirement of employer breach is consistent with the *Harrison* court's use of proof of a meritorious grievance as an element of proving a bad faith breach by the union, while recognizing the possibility of a good faith breach of its duty. Harrison v. United Transp. Union, 530 F.2d 558, 560-61 (4th Cir. 1975).

[97] *See* note 51 *supra*. In cases where a union faces a potential conflict between its obligation to an individual employee and its duty to the bargaining unit as a whole, the union would be permitted to make a decision as to whether to pursue the individual's claim, provided that decision is made in good faith. However, the individual employee's right to pursue his grievance independently of the union would also be preserved so long as the union is required to notify the employee of its decision. *See* cases cited in note 99 *infra*.

[98] *See* text accompanying notes 25-27 *supra*.

[99] *See* Day v. UAW, Local 36, 466 F.2d 83 (6th Cir. 1972) (the union should be required to apply its deadlines fairly); Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969) (union required to inform employee of his rights and duties so that he could take necessary steps to protect his job); Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1179, 1192-1220 (1973).

[100] *See* Andrews v. Louisville & Nash. R.R., 406 U.S. 320, 323-25 (1972); Republic

employer were allowed in every fair representation case despite failure to exhaust administrative remedies, the viability of the Adjustment Board would be lost. In contrast, never allowing a suit against the employer under the non-exhaustion doctrine[101] would permit the employer to escape all liability for his breach in the event the union fails to pursue the claim. The policy of placing responsibility for damages on the party primarily at fault while maintaining the effectiveness of the adjustment process is met if joinder is allowed only when an employee's right to pursue his contractual claim is lost due to his justifiable reliance on the union. If the *Harrison* court's objective was to insure or increase union compliance with the duty of a union to represent its employees fairly, punitive damages could be used to achieve that aim.

In *Harrison*, the Fourth Circuit upheld the award of punitive damages by cryptically analogizing to the award of such damages in civil rights cases.[102] The court noted that three theories support the award of punitive damages. First, punitive damages have been awarded as compensation to insure that plaintiffs can pursue their rights notwithstanding the high cost of litigation.[103] Second, punitive damages have been awarded to punish the wrongdoer for the extraordinary nature of his conduct.[104] Third, and most frequently, punitive

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Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965). There would seem little or no incentive for an employee to press his claim before the Railroad Adjustment Board if the employer could never defend a suit in federal court on the basis of the employee's failure to exhaust his remedies before the Board.

[101] *See* Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975).

[102] 530 F.2d at 563. Punitive or exemplary damages have been awarded to successful plaintiffs since the eighteenth century, when the defendant's conduct was wanton, malicious or reckless. *See* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 517 (1957). While continuously granted since that time, such awards have been subject to criticism. *See* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 77, at 276-77 (1935); *Exemplary Damages, supra* at 522-26, 529-31; Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L. REV. 1296 (1961). Notwithstanding the critics, punitive damages have been awarded to vindicate plaintiffs, punish defendants and deter similar conduct in the future. *See* notes 103-05 *infra*. *See generally* Hagerty & Tynan, *Evaluation of Damages in Civil Rights Litigation*, 25 FED'N INS. COUN. Q. 149 (1975); Comment, *Punitive Damages Under Federal Statutes: A Functional Analysis*, 60 CALIF. L. REV. 191 (1972); Note, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015 (1967); Note, *Measuring Damages for Violations of Individual's Constitutional Rights*, 8 VAL. U.L. REV. 357 (1974).

[103] *E.g.*, Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 367 (S.D. Cal. 1961); *see* Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

[104] *E.g.*, Williams v. City of New York, 508 F.2d 356, 360 (2d Cir. 1974) (punitive damages assessed to punish wrongdoer rather than to restore victim); Stolberg v. Members of Bd. of Trustees for State Coll. of Conn., 474 F.2d 485, 489 (2d Cir. 1973).

damages have been used to deter similar conduct by others.[105] Moreover, proof of actual malice or personal animosity, normally required for an award of punitive damages,[106] has been held unnecessary in civil rights cases.[107] The *Harrison* court, simply by stating that fair representation suits are analogous to civil rights cases, held that proof of animosity or actual malice was not a prerequisite to an award of punitive damages.[108]

This analogy of the plaintiff's plight in duty of fair representation suits to that of civil rights plaintiffs seems generally sound. Courts have held that the federal common law of damages is applicable to both civil rights and labor disputes.[109] In civil rights and fair representation suits, actual damages may be minimal and a plaintiff may lack the necessary legal remedy to protect his interests.[110] Moreover, authority exists for awarding punitive damages in actions specifically based upon the union's breach of its duty of fair representation.[111]

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[105] *E.g.*, Williams v. City of New York, 508 F.2d 356, 360 (2d Cir. 1974) (punitive damages intended to deter repetition of conduct by particular defendant and others who might be tempted to imitate his conduct); Marr v. Rife, 503 F.2d 735, 744 (6th Cir. 1974); Lee v. Southern Home Sites Corp., 429 F.2d 290, 293-4 (5th Cir. 1970).

[106] C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 79, at 280-82 (1935).

[107] Gill v. Manuel, 488 F.2d 799, 801 (9th Cir. 1973).

[108] 530 F.2d at 563. The Fourth Circuit noted only that duty of fair representation suits are analogous to civil rights cases in support of its holding that proof of personal animosity is not a requisite to an award of punitive damages. *Id.* In Gill v. Manuel, 488 F.2d 799 (9th Cir. 1973), the Ninth Circuit noted that a showing of personal animosity in civil rights suits presents a stronger case for punitive damages. The court held, however, that such a showing was not a prerequisite and that punitive damages may be appropriate when the defendant's conduct was willful and malicious. *Id.* at 801-02. The court also held that an award of compensatory damages was not a prerequisite to an award of punitive damages. *Id.* at 802. *See* Basista v. Weir, 340 F.2d 74 (3d Cir. 1965). *Contra*, Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971) (when employee failed to prove any compensatory damages as a result of acts of union, no basis existed for an award of punitive damages). The *Harrison* dissent noted this conflict as to the necessity of proving compensatory damages to support the award of punitive damages but concluded that no compensatory award was required. Although the dissent argued that no compensatory damages were proper against the union and, indeed, that none were shown, Judge Winter felt that the award of punitive damages was proper. The dissent argued that an award of one dollar as compensatory damages against the union should have been allowed. 530 F.2d at 566 (Winter, J., dissenting).

[109] *Compare* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957) *with* Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

[110] *Compare* Stolberg v. Members of Bd. of Trustees for State Coll. of Conn., 474 F.2d 485 (2d Cir. 1973) *with* Rolax v. Atlantic C.L.R.R., 186 F.2d 473 (4th Cir. 1951).

[111] *See* Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970) (since bad faith and arbitrariness can vary greatly, in cases of extreme misconduct punitive damages conceivably should be considered); Patrick v. I.D. Packing Co., 308

Language in *Harrison* supports the award of punitive damages against the UTU under any of the three theories of punitive damages.[112] An award of punitive damages purely as compensation to vindicate plaintiffs' rights, however, would be inappropriate in cases like *Harrison*. The court in *Harrison* emphasized that union liability in duty of fair representation cases is often minimal.[113] It reasoned, therefore, that employee-plaintiffs may need an incentive to protect their rights.[114] The union's duty of fair representation, however, is not always clear and a union must enjoy some discretion in its handling of grievances.[115] Courts must recognize the often conflicting demands which unions face between the interests of the individual and the membership as a whole.[116] Punitive damages would thus be appropriate only when union conduct clearly exceeded the limits of necessary discretion or utterly disregarded an employee's interest.[117] If punitive damages are awarded on the theory of vindicating the plaintiff, any minor breach by the union, irrespective of compensatory damages, would give rise to union liability for punitive damages. Moreover, the

F. Supp. 821 (D.C. Iowa 1969) (exemplary damages not precluded by Labor Management Relations Act). *But see* Butler v. Local 823, Teamsters, 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975) (evidence that employer did nothing more than go along with union's desires with respect to seniority was insufficient to support award of punitive damages); Crawford v. Pittsburgh-Des Moines Steel Co., 386 F. Supp. 290 (D.C. Wyo. 1974) (punitive damages not recoverable from union for alleged breach of its duty of fair representation). Punitive damages have also been awarded where the employer and the union have conspired to discriminate against or deprive an employee of his rights under the bargaining agreement. *See, e.g.*, El Ranco, Inc. v. First Nat'l Bank of Nevada, 406 F.2d 1205 (9th Cir. 1968), *cert. denied*, 396 U.S. 875 (1969); Zamora v. Massey-Ferguson, Inc., 336 F. Supp. 588 (S.D. Iowa 1972).

[112] *See* text accompanying notes 103-106 *supra*.

[113] 530 F.2d at 563, *citing* St. Clair v. Local 515, Teamsters, 422 F.2d 128, 132 (6th Cir. 1969).

[114] 530 F.2d at 563. In justifying its allowance of punitive damages, the court combined the theory of providing an incentive to employee-plaintiffs with a deterrent approach. Since actual damages to an employee may not cover the expense of litigation, the court reasoned that employees might not seek to protect their right to fair representation by the union in the courts. Moreover, the majority added that defendant unions might lack sufficient incentive to curb aggravated conduct in breach of the duty of fair representation if they were certain to be held responsible only for nominal compensatory damages, and did not face the threat of punitive awards. *Id.*

[115] *See* note 51 *supra*.

[116] *See* note 87 *supra*.

[117] *See* Sipe v. Local 191, United Bhd. of Carpenters & Joiners, 393 F. Supp. 865 (M.D. Pa. 1975) (recklessness or wanton indifference); Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970) (extreme conduct). *Cf.* Williams v. City of New York, 508 F.2d 356, 360 (2d Cir. 1974) (punitive damages are assessed to punish defendant rather than to restore victim).

object of the compensatory theory for awarding punitive damages can be accomplished through the award of attorneys fees.[118] For these reasons punitive damages in duty of fair representation cases are more supportable under the theories of deterring conduct or punishing the union for outrageous or extremely arbitrary behavior.[119]

Under the latter two theories, the punitive award in *Harrison* seems proper. The union deliberately sacrificed the interests of one employee for the interests of another, with no discernible benefit to the bargaining unit as a whole.[120] Notwithstanding the union's need for latitude in performing its duty as bargaining representative, a total and deliberate sacrifice of one employee's claim to advance another individual's rights should not fall within the limits of permissible discretion.[121] Such arbitrary conduct reflected a complete disregard of Harrison's rights and should be discouraged.

In addition to affirming the award of compensatory and punitive damages, the Fourth Circuit held that the district court should have allowed Harrison to recover reasonable attorneys' fees.[122] Attorneys' fees generally cannot be recovered unless there is statutory or con-

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[118] *See* text accompanying notes 130-32 *infra*.

[119] *Cf.* Williams v. City of New York, 508 F.2d 356, 360 (2d Cir. 1974) (punitive damages assessed to punish defendant rather than to restore victim). The trend in civil rights cases is toward awarding punitive damages only when the defendant's conduct is wilful, malicious, or in utter disregard of another's constitutional rights. Hagerty & Tynan, *Evaluation of Damages in Civil Rights Litigation*, 25 FED'N INS. COUN. Q. 149, 158-159 (1975). *See* Comment, *Punitive Damages Under Federal Statutes: A Functional Analysis*, 60 CALIF. L. REV. 191, 221-22 n.203 (1972).

[120] At least one court has held that while a union may choose in good faith not to process an employee's grievance in favor of benefits to the union as a whole, the deliberate sacrifice of a meritorious grievance as consideration for some other supposed benefit is not permissible. Local 13, ILWU v. Pacific Maritime Ass'n, 441 F.2d 1061, 1067-68 & n.11 (9th Cir.), *cert. denied*, 404 U.S. 1016 (1971).

[121] As a practical matter, it would not seem realistic to distinguish between allowing punitive damages on a punishment theory from permitting such damages on the basis of a deterrent theory. Punitive damages would operate both to deter and punish union breaches regardless of the theory adopted. However, since federal labor law is essentially remedial in nature, a deterrent theory for awarding punitive damages would seem more in line with national labor policy. *Compare* Local 127 United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3d Cir. 1962) *with* Sidney Wanzer & Sons v. Milk Drivers Local 753, 249 F. Supp. 664 (N.D. Ill. 1966).

In any event, the award of punitive damages for a union's breach of its duty of fair representation should be limited to exceptional cases where the union acted intentionally, Richardson v. Communication Workers, 443 F.2d 974, 983-85 (8th Cir. 1971), *cert. denied*, 414 U.S. 818 (1973), in complete disregard for a union member's rights, or in concert with the employer to discriminate against an employee. *See* cases cited in note 111 *supra*.

[122] 530 F.2d at 564.

tractual authorization.[123] Exceptions exist, however, and attorneys' fees have been granted to successful plaintiffs in limited circumstances.[124] The Fourth Circuit adopted the "common benefit" exception to allow the award.[125] Under this theory, attorneys' fees are proper in cases where the successful plaintiff confers a substantial benefit on an identifiable class of which he is a member and when the award will spread the cost of litigation among the benefited class.[126] The common benefit upon which attorneys' fees may be based, however, need not be monetary.[127] The Supreme Court has held that the benefit conferred may include achieving a result which corrects or prevents an abuse prejudicial to the rights and interests of the common class or which protects an essential right of the class.[128] The award in

[123] Hall v. Cole, 412 U.S. 1, 4-5 (1973). *See generally* Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 MD. L. REV. 379 (1973); Mause, *Winner Takes All: A Re-examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969).

[124] Attorneys' fees have been awarded when the opposing litigant acted in bad faith, vexatiously for oppressive reasons, or for abusing the judicial process. *See* Hall v. Cole, 412 U.S. 1 (1973); First Nat'l Bank v. Dunham, 471 F.2d 712 (8th Cir. 1973). Attorneys' fees have also been permitted under the private attorney general exception. Under the private attorney general theory, courts have allowed recovery of attorneys' fees to successful plaintiffs when the suit furthered a congressional policy which required private enforcement. *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam) (civil rights). *Contra*, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) (court erroneously adopted private attorney general exception since only Congress can authorize such exception to American general rule). *But see* Civil Rights Attorneys' Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (amending 42 U.S.C. § 1988 (1970)) (allowing recovery of attorneys' fees, in discretion of court, to successful civil rights plaintiffs); Comment, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 34 WASH. & LEE L. REV. 205 (1977).

[125] 530 F.2d at 564. The Supreme Court extended to labor law suits the "common benefit" exception to the rule of not awarding attorneys' fees in Hall v. Cole, 412 U.S. 1 (1973). In that case, the Court affirmed the award of attorneys' fees in a suit brought under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(2) (1970), charging a violation of a union member's freedom of speech. *Id.* at 2-4. The Court reasoned that by vindicating his own right to free speech, the plaintiff rendered a service to his union and all of its members and that attorneys' fees are permissible when the award will spread the cost of litigation among the benefited class. *Id.* at 8-9. *See* Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 MD. L. REV. 379, 402-07 (1973).

[126] Hall v. Cole, 412 U.S. 1, 8-9 (1973).

[127] Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970).

[128] *Id.* at 396. *See* Local 92, Bridge Workers v. Norris, 383 F.2d 735 (5th Cir. 1967), where the court held that so long as the union realizes some substantial benefit as a result of litigation by the union member against union officials for breach of its fiduciary duty, the union is liable for attorneys' fees. *See also* Kerr v. Shanks, 466 F.2d 1271 (9th Cir. 1972); Note, *The Allocation of Attorney's Fees After* Mills v. Electric

Harrison falls within that form of the common benefit exception. The plaintiff's suit vindicated the right of fair representation of each individual's claims against the railroad and thus conferred a substantial benefit to all union members.[129]

Attorneys' fees should have been allowed in *Harrison* even absent a common benefit to the union members. Under the *Vaca* and *Czosek* scheme of allocation of damages, attorneys' fees would constitute the primary liability of the union.[130] Union liability for breach of its duty of fair representation generally is limited to compensating the employee-plaintiff for the additional expense which he incurs in pursuing his contract claim against the employer.[131] Absent the union's breach, Harrison's claim would have been adjusted through the grievance machinery rather than in the courts. The plaintiff-employee would not have been in federal court on the merits of his claim against his employer if the union had prosecuted Harrison's grievance fairly or had notified him of its decision not to do so.[132] The failure of the union to notify Harrison of its decision not to process his claim forced him to litigate it in federal court. Therefore, the union was properly held liable for the expense of that litigation.

In cases of wrongful discharge or suspension involving an independent breach by the union of its duty of fair representation, the rule of apportioning damages between the employer and the union is well established.[133] When the union has the sole power to initiate the higher stages of the grievance process but wrongfully fails to do so, it should be liable only for the additional expense caused the employee

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Auto-Lite Co., 38 U. CHI. L. REV. 316 (1971); Note, *Attorneys' Fees: What Constitutes a "Benefit" Sufficient to Award Fees From Third Party Beneficiaries*, 1972 WASH. U.L.Q. 271 (1972).

[129] 530 F.2d at 564. The benefit conferred upon the bargaining unit as a whole by Harrison's suit is analogous to the benefit secured by the plaintiff in Hall v. Cole, 412 U.S. 1 (1973). In *Hall*, the individual union member's suit insured that all members would enjoy the right to free speech. *Id.* at 8. *See* text accompanying note 125 *supra*. Similarly, Harrison's suit operated to insure that individual grievances would not be arbitrarily and unfairly traded away by the union for some other supposed benefit. *See* 530 F.2d at 564 and text accompanying notes 94-99 and 120 *supra*.

[130] *See* text accompanying notes 33-41 *supra*. Under the *Vaca* general rule of apportioning damages according to the fault of each party, the union is liable for the additional expense to the employee in pursuing his claim against the employer. The primary costs incurred in seeking to recover from an employer in federal court obviously stem from the expense of retained counsel.

[131] *See* text accompanying notes 33-41 and 54-61 *supra*.

[132] *Cf.* De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 293 (1st Cir. 1970) (normally attorneys' fees should be charged to the union for its failure to utilize the grievance procedure on employee's behalf).

[133] *See* text accompanying notes 33-41 and 60 *supra*.

in personally pursuing his contract claim against his employer. If the union's breach has prevented exhaustion of administrative remedies, the employer's defense of non-exhaustion fails. In *Harrison v. United Transportation Union*, the Fourth Circuit rejected the apportionment analysis because the employee had an independent right to pursue his grievance remedies. In that situation, the court held that the proper allocation of damages depends upon whether the employee justifiably relied upon his union to process his claim.[134] If so, according to the Fourth Circuit, the union will be liable for lost wages arising from the improper acts of the employer. However, policies underlying the approach of apportioning damages according to the damage caused by the independent breaches of the union and employer[135] would be better served by extending the *Vaca* exception to the non-exhaustion doctrine.[136] Where the union has prevented the exhaustion of administrative remedies, the employer should remain liable to the employee for breach of contract. Union liability for compensatory damages should be limited to the additional expense caused the employee in pursuing his claim against the employer. In cases of extreme arbitrary or bad faith conduct by the union, punitive damages are available to deter such conduct in the future. On the other hand, where the administrative remedies are barred by the employee's own inaction, neither the union nor the company should be responsible for damages. Under that approach, the union and the employer are held liable for the damage caused by each, while the employee is not allowed to benefit from his own inaction.

B. Federal Injunctions In Sympathy Strikes

Congress has accorded union members a statutory right to refuse to cross picket lines.[1] The Supreme Court has held, however, that a no-strike clause in a collective bargaining agreement eliminates that

[134] *See* text accompanying notes 62-71 *supra*.

[135] *See* text accompanying notes 33-41 and 56-61 *supra*.

[136] *See* text accompanying notes 80-84 *supra*.

[1] 29 U.S.C. § 158(b)(4) (1970), which protects a union member's right to refuse to cross lawful foreign picket lines, extends only to labor activity directed at the employer with whom the union has a bona fide labor dispute. NLRB v. District Council of Hod Carriers & Common Laborers, 389 F.2d 721, 725 (9th Cir. 1968). Stranger or foreign picketing is picketing by non-employees on behalf of a union with whom the employer does not have a bargaining agreement. Such foreign picketing is protected if its object is legal and the picketing is peaceful. AFL v. Swing, 312 U.S. 321 (1940).

right under certain circumstances.[2] When a union has agreed to a no-strike clause[3] in the collective bargaining agreement, but refuses to cross the picket lines of another union, the employer may sue the union which agreed to the no-strike clause for damages.[4] If the collective bargaining agreement also contains a mandatory arbitration clause, the employer also may seek to compel the union to arbitrate the validity of the refusal to cross the foreign picket line in light of the no-strike provision.[5] Problems have arisen, however, when employers have sought not only damages and arbitration, but also injunctive relief against the work stoppage.

Section 4 of the Norris-La Guardia Act prohibits federal injunctions in labor disputes,[6] but the Supreme Court has recognized a

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[2] NLRB v. Rockaway News Supply Co., 345 U.S. 71, 80 (1953); Island Creek Coal Co. v. UMW, 507 F.2d 650, 652 (3d Cir.), *cert. denied*, 423 U.S. 877 (1975) (union member's honoring of lawful stranger picket line is protected activity, but that right may be waived through collective bargaining agreement). *Contra*, NLRB v. Keller-Crescent, Inc., 92 L.R.R.M. 3591 (7th Cir. 1976). The Supreme Court even has implied a no-strike provision in a contract if the contract contained a provision for mandatory arbitration. Gateway Coal Co. v. UMW, 414 U.S. 368 (1974). *See* text accompanying notes 37 and 81 *infra*. *See generally* Keene, *The Supreme Court, Section 301(a), and No-Strike Clauses: From* Lincoln Mills *to* Avco *and Beyond*, 15 VILL. L. REV. 32 (1969) [hereinafter cited as Keene].

[3] Typical of a general no-strike clause was the provision included in the collective bargaining agreement in Buffalo Forge v. United Steelworkers, 96 S. Ct. 3141 (1976), which provided in part: "There shall be no strikes, work stoppages or interruption or impeding of work. No Officers or representatives of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activity." *Id.* at 3143 n.1.

[4] Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970), confers jurisdiction upon federal district courts for union or employer suits for breach of collective bargaining agreements. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). While conferring jurisdiction upon federal courts, the Supreme Court held that § 301 was not intended to divest state courts of jurisdiction over contracts by labor organizations, but to expand the available forums for enforcement of collective bargaining agreements. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 511 (1962). Thus, federal and state courts have concurrent jurisdiction to enforce provisions of labor-management contracts. *Id.* at 508-09.

The Supreme Court has recognized that a damage suit is not an adequate substitute for an immediate halt to what may be an "illegal" strike. Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 248 (1970). Moreover, a suit for damages against the union during or after a labor dispute may tend to aggravate further union-management tensions and delay resolution of the dispute. *Id.*

[5] Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141 (1976) (employer entitled to invoke arbitral process to determine legality of sympathy strike and to obtain court order requiring union to arbitrate); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (§ 301 of Labor Management Relations Act empowers federal courts to enforce arbitration clauses in collective bargaining agreements).

[6] 29 U.S.C. § 104 (1970), provides in pertinent part:

narrow exception to that prohibition. In *Boys Markets, Inc. v. Retail Clerks Local 770*,[7] the Court held that an employer may obtain federal injunctive relief against a strike where the collective bargaining agreement contains a no-strike clause and the underlying dispute is arbitrable under the contract,[8] notwithstanding the anti-injunction provisions of the Norris-La Guardia Act.

The Fourth Circuit recently decided two cases regarding the availability of *Boys Markets* injunctions where the dispute concerned the right to strike itself. In *Windsor Power House Coal Co. v. District 6 UMW*,[9] the Fourth Circuit held that when the collective bargaining agreement contained both no-strike and mandatory arbitration provisions, federal injunctive relief was available to halt the union's sympathy strike.[10] In *Consolidation Coal Co. v. UMW*,[11] the court refused to extend the *Boys Markets* exception to enjoin the foreign pickets themselves.[12] The precedential value of both cases, however, must be reconsidered in light of the Supreme Court's recent decision in *Buffalo Forge Co. v. United Steelworkers*,[13] which severely restricted the use of injunctive relief in sympathy strikes.[14]

Congress passed the Norris-La Guardia Act in 1932[15] to halt

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> No 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 a labor dispute to prohibit any person or persons participating or interested in such a dispute from . . .
>
> (e) Giving publicity to the existence of . . . any labor dispute by . . . speaking or patrolling . . . [or]
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

Section 13(c) of the Act defines a labor dispute as any controversy concerning terms or conditions of employment or concerning any association of persons in negotiating, changing, or arranging terms of employment. 29 U.S.C. § 113(c) (1970).

[7] 398 U.S. 235 (1970).

[8] *Id.* In general, arbitration is the procedure adopted by the contracting parties through which controversies are resolved by tribunals other than the courts. L. TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 178 (1948). A dispute or grievance is arbitrable if the subject matter of the dispute is one that the parties to a collective bargaining agreement have previously agreed to submit to a third party, the arbitrator, for decision. *See generally* A. GOLDMAN, THE SUPREME COURT AND LABOR-MANAGEMENT RELATIONS LAW, 105-07 (1976).

[9] 530 F.2d 312 (4th Cir. 1976), *cert. dismissed*, 97 S. Ct. 199 (1976).

[10] 530 F.2d at 315.

[11] 537 F.2d 1226 (4th Cir. 1976).

[12] *Id.* at 1231-32.

[13] 96 S. Ct. 3141 (1976).

[14] *See* text accompanying notes 71-88 *infra*.

[15] Norris-La Guardia Act, ch. 90, § 1, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 101 *et seq.* (1970)).

abuses by management-oriented federal district courts in issuing injunctions against unions in labor-management disputes.[16] Section 4 of the Act divests federal courts of authority to issue such injunctions in broadly defined labor disputes.[17] Its success in promoting union organization and growth in both numerical and bargaining strength[18] prompted Congress to equalize the bargaining positions of labor and management by passing the Labor Management Relations Act (LMRA).[19] Section 301(a) of the LMRA confers jurisdiction upon federal district courts to hear suits for violations of collective bargaining agreements.[20] Thereafter, the Supreme Court held that § 301 allows federal courts to fashion substantive labor law by enforcing arbitration clauses in collective bargaining agreements.[21] Underlying this substantive law is the policy of promoting arbitration as the means of handling labor disputes.[22]

Although promoting arbitration through judicial enforcement of collective bargaining agreements has become federal policy,[23] the anti-injunction provisions of the Norris-La Guardia Act have remained operative. On the basis of § 4, the Supreme Court in *Sinclair Refining Co. v. Atkinson*[24] refused an employer's request for an in-

[16] Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 250-51 (1970). *See generally* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930).

[17] 29 U.S.C. § 104 (1970). *See* text accompanying note 6 *supra*.

[18] It is estimated that in 1933 less than 3,000,000 workers belonged to trade unions. By the early 1940's over 12,000,000 workers were organized. In 1973, approximately 21,000,000 workers were represented by trade unions under 150,000 collective bargaining agreements. Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141, 3149 n.12 (1976); A. Cox & D. BOK, LABOR LAW, 92 (1969); U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S., 1976, 384.

[19] Labor Management Relations (Taft-Hartley) Act, ch. 120, § 1, 61 Stat. 136 (1947) (codified at 29 U.S.C. § 141 *et seq.* (1970)). *See* Allis-Chalmers Mfg. Co. v. NLRB, 358 F.2d 656 (7th Cir. 1966), *rev'd on other grounds*, 388 U.S. 175 (1967) (legislative history reveals clear congressional intent to balance national labor policy by placing limits on coercive union conduct similar to those previously prescribed for employers); Trinity Valley Iron & Steel Co. v. NLRB, 410 F.2d 1161 (5th Cir. 1969).

[20] Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1970), provides that suits for violations of collection bargaining agreements in an industry affecting commerce may be brought in federal district court without respect to the amount in controversy or citizenship of the parties.

[21] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957) (Court granted union's request for specific performance by employer of collective bargaining agreement provision compelling arbitration). *See generally* Vladeck, Boys Markets & *National Labor Policy*, 24 VAND. L. REV. 93 (1970); Keene, *supra* note 2.

[22] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957).

[23] Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 252-53 (1970) (Court has consistently emphasized promotion of peaceful settlement of labor disputes through arbitration).

[24] 370 U.S. 195 (1962).

junction against a union's strike over a dispute arbitrable under the contract. The *Sinclair Refining* decision subsequently produced a conflict between the policies favoring arbitration embodied in the Labor Management Relations Act and the anit-injunction provisions of the Norris-La Guardia Act. It created the anomalous situation in which a union could obtain specific performance of an arbitration clause against an employer,[25] but an employer could not obtain an injunction to enforce no-strike and compulsory arbitration clauses against the union.[26]

The Supreme Court confronted this conflict between the Norris-La Guardia and Labor Management Relations Acts in *Boys Markets, Inc. v. Retail Clerks Local 770.*[27] In *Boys Markets*, the collective bargaining agreement between the union and the employer provided for mandatory arbitration of all controversies concerning the interpretation or application of the agreement.[28] The contract also contained a no-strike clause.[29] The dispute arose when the union complained of non-union employees performing a union employee's job. When the employer refused union demands that the work be redone by union workers, the union struck and picketed the employer's store.[30] The employer sued in a California state court for a temporary restraining order, preliminary and permanent injunctions, and specific perform-

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[25] *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

[26] Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). The Court in *Boys Markets* noted that the practical effect of its decision in Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), taken together with its subsequent decisions in Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), and Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968), was to oust state courts of jurisdiction in § 301 suits where injunctive relief was sought for breach of mandatory arbitration and no-strike obligations. 398 U.S. at 244-45. Although an employer could bring suit in state court to compel arbitration and enjoin a strike allegedly violative of the bargaining agreement, Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 508, 513-14 (1962), the union could remove the case to federal court. Avco Corp. v. Aero Lodge 735, 390 U.S. 557, 560 (1968). Once in federal court, the *Sinclair Refining* case prohibited an injunction. Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 203 (1962). The Court in *Boys Markets* noted that such a result was wholly inconsistent with its holding in *Dowd Box* that the congressional purpose in enacting § 301 was that federal jurisdiction conferred by that section was intended to supplement, not encroach upon, pre-existing jurisdiction in state courts. Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 245 (1970).

[27] 398 U.S. 235 (1970).

[28] *Id.* at 238 n.3. The arbitration clause covered any and all matters of controversy, dispute or disagreement of any kind or character arising out of or in any way involving the interpretation or application of terms of the agreement.

[29] *Id.* at 239 n.4. The no-strike clause provided that there shall be no cessation or stoppage of work, lock-out, picketing or boycotts during term of agreement.

[30] *Id.* at 239.

ance by the union of its contractual agreement to arbitrate. The state court issued a temporary restraining order forbidding continuation of the strike.[31] The union then removed the case to federal district court and moved to quash the restraining order. The district court concluded that the dispute was subject to arbitration under the collective bargaining agreement, ordered arbitration, and enjoined the union's strike.[32] Relying upon *Sinclair Refining*, the Ninth Circuit Court of Appeals reversed.[33] The Supreme Court, however, sustained the decision of the district court.[34]

In *Boys Markets*, the Supreme Court reconsidered the limited availability of injunctive relief established by its prior decisions.[35] Overruling *Sinclair Refining*, the Court held that § 301 created a narrow exception to the anti-injunction provisions of the Norris-La Guardia Act.[36] That exception permits federal court injunctions against unions striking over arbitrable disputes in order to effect specific performance of arbitration agreements.[37] The Court established three prerequisites for such relief: (1) mandatory adjustment or arbitration procedures must exist in the collective bargaining agreement;[38] (2) the enjoined strike must be over a grievance which both parties are contractually bound to arbitrate;[39] and (3) ordinary principles of equity must authorize the injunction.[40] The Supreme

[31] *Id.* at 240. The state court had issued a temporary restraining order forbidding continuation of the strike and an order to show cause why a preliminary injunction should not issue. At that time the union removed the case to federal district court.

[32] *Id.*

[33] 416 F.2d 368 (9th Cir. 1968), *rev'd*, 398 U.S. 235 (1970).

[34] 398 U.S. 235 (1970).

[35] *Id.* at 241-42. The Court recognized that its decision in *Sinclair Refining* was a significant departure from its otherwise consistent emphasis upon promotion of arbitration for peaceful settlement of labor disputes. *See* text accompanying note 26 *supra*.

[36] 398 U.S. at 252-54. *See* note 6 *supra*.

[37] 398 U.S. at 252-54.

[38] *Id.* at 253. The mere existence of a mandatory arbitration clause is sufficient evidence for a court to infer an agreement not to strike and not to engage in a work-stoppage over arbitrable disputes. Gateway Coal Co. v. UMW, 414 U.S. 368, 382 (1974); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 105 (1962); Armco Steel Corp. v. UMW, 505 F.2d 1129, 1132 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975). In Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970), the Court explained that the union's no-strike obligation, express or implied, is the quid pro quo for the employer's commitment to submit disputes to arbitration. *Id.* at 248.

[39] 398 U.S. at 253-54.

[40] *Id.* Under ordinary principles of equity, the district court must consider whether breaches of the collective bargaining agreement are occurring and will continue to occur; whether the employer will suffer irreparable injury; and whether the employer will suffer more from the denial of an injunction than the union will if it is enjoined. *Id.*

Court found all three requirements met under the facts and affirmed the district court's injunction.[41] The Court, however, strongly emphasized the narrow bounds of its holding in that the injunction merely enforced the union's voluntary obligation to submit disputes to arbitration.[42]

In subsequent § 301 suits by employers to enjoin union strikes, the most litigated issue has related to the second *Boys Markets* requirement that the enjoined strike must be over an arbitrable grievance.[43] The controversy has focused upon sympathy strikes, where the validity of the strike itself is the arbitrable distpute.[44] The Fourth Circuit in *Windsor Power House Coal Co. v. District 6 UMW*[45] held that a refusal to cross foreign picket lines was itself an arbitrable dispute under the *Boys Markets* exception and granted the employer's request for an injunction against the union's sympathy strike. In *Windsor Power*, work at the company's plant stopped when local union members refused to cross foreign picket lines at the plant.[46] The collective bargaining agreement contained both no-strike and compulsory arbitration clauses.[47] Pursuant to § 301, Windsor Power sued the local and district unions, various officers of these unions, and the

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[41] *Id.* at 253-55. There was a mandatory adjustment procedure in the collective bargaining agreement, *see* note 28 *supra*, and the grievance in question was included within the scope of that clause. 398 U.S. at 253-55. The Court also found that the district court had concluded that the employer suffered, and would continue to suffer, irreparable injury by reason of the union's violation of the no-strike clause. *Id*

[42] *Id.*

[43] *See* cases cited in note 52 *infra*.

[44] The controversy surrounding the availability of injunctive relief to halt sympathy strikes has centered upon the language of Justice Brennan's dissent in *Sinclair Refining*. Justice Brennan stated that an injunction may issue only when the dispute is "over a grievance which both parties are bound to arbitrate" and only when the district court determines that the "contract *does* have that effect." Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 254, (1970), *quoting* Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 228 (Brennan, J., dissenting) (1962). *See generally* Abrams, *The Labor Injunction and the Refusal to Cross Another Union's Picket Line*, 26 CASE W. RES. L. REV. 178 (1975); Note, *The Applicability of* Boys Markets *Injunctions to Refusal to Cross a Picket Line*, 76 COLUM. L. REV. 113 (1976); Note, *Injunctions—Federal Court May Enjoin Work Stoppage When Its Legality is Arbitrable Issue*, 88 HARV. L. REV. 463 (1975).

[45] 530 F.2d 312 (4th Cir. 1976).

[46] *Id.* at 313-14. The picketing was occasioned by a labor dispute between another coal company and its local, and did not relate to the Windsor Power mine operation. *Id.* at 314 n.1. Although not identified, the pickets were clearly not members of the Windsor Power local union. *Id.* at 313.

[47] *Id.* at 315 n.6. The arbitration clause encompassed differences as to the meaning and application of provisions of the agreement, differences as to matters not specifically mentioned in the agreement or local trouble of any kind.

international union for damages and temporary and permanent injunctive relief.[48] The district court issued a preliminary injunction against the defendants and ordered arbitration.[49] The Fourth Circuit held that the failure to cross the stranger picket line was a dispute within the mandatory arbitration clause and therefore a *Boys Markets* injunction was proper.[50]

The court in *Windsor Power*, citing previous decisions,[51] summarily held that the sympathy strike was a strike over a grievance that both parties had contractually agreed to arbitrate, fulfilling the second requirement of *Boys Markets*.[52] The cases relied upon by the

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[48] *Id.* at 314.

[49] *Id.*

[50] *Id.* at 315. Prior to issuing the injunction, the district court had granted a temporary restraining order requiring the union to terminate the work stoppage and the employer to arbitrate any grievances submitted by the union. The work stoppage continued, however, and the district court entered a contempt order providing for substantial fines if it continued. *Id.* at 314. The union had argued that the conduct of its members came within the "Preservation of Individual Safety Rights" provision in the contract. The Fourth Circuit did not decide that issue, since the procedures for resolution of safety conditions were not invoked by any union members. *Id.* at 315-16.

[51] *Id.* at 315, *citing* Armco Steel Corp. v. UMW, 505 F.2d 1129 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975); Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209 (4th Cir. 1973); Island Creek Coal Co. v. UMW, 507 F.2d 650 (3d Cir.), *cert. denied*, 423 U.S. 877 (1975); NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974).

[52] *Id., citing* Armco Steel Corp. v. UMW, 505 F.2d 1129 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975) (where arbitrable dispute exists as to whether refusal to cross foreign picket line violated implied no-strike clause, injunction proper); Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209 (4th Cir. 1973) (same, express no-strike clause); NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974) (although union had contractual right to refuse to cross primary picket lines, where employer disputed whether picket line was primary, injunction permissible as dispute existed over an arbitrable grievance).

The conflict among the circuits, *see* text accompanying note 44 *supra*, has centered on the issue of whether a sympathy strike constitutes a dispute over an arbitrable grievance under the requirements of *Boys Markets*. *See* Valmac Indust., Inc. v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975), *vacated* 96 S. Ct. 3215 (1976) (injunction proper method to halt work stoppage precipitated by honoring of union picket line and not by independent dispute); Associated Gen. Contractors v. International Union of Operating Engineers Local 49, 519 F.2d 269 (8th Cir. 1975). *Contra*, Plain Dealers Publishing Co. v. Cleveland Typographical Local 53, 520 F.2d 1220 (6th Cir. 1975) (where no dispute between employer and union until union refused to cross picket line of another union, injunction may not issue); Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972) (where strike itself precipitated the dispute, strike was not over an arbitrable grievance and no injunction was permissible). The Seventh Circuit has taken an uncertain position on this issue. *Compare* Inland Steel Co. v. Local 1545, UMW, 505 F.2d 293 (7th Cir. 1974) (refusal to cross was arbitrable issue, therefore, union has obligation not to strike over the dispute and injunction may

Fourth Circuit in *Windsor Power* upheld injunctions when the contract included both no-strike and mandatory arbitration clauses. In permitting injunctions, the prior cases held that by agreeing to no-strike and mandatory arbitration provisions, the unions had relinquished their right to refuse to cross the picket line of another union.[53] Since the issue of the strike's validity in view of the no-strike clause is one of contract interpretation, these earlier courts held that the union must submit the matter to arbitration.[54] The courts typically reasoned that the union's decision that a sympathy strike was permissible usurped the arbitrator's decision and violated the contract, thereby permitting federal injunctive relief under *Boys Markets*.[55] Relying upon these prior decisions, the court in *Windsor Power* upheld the district court's injunction, implying that the requirements of *Boys Markets* were fulfilled.[56]

The factual situation in *Consolidation Coal Co. v. UMW*[57] was

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issue) *with* Gary Hobart Water Corp. v. NLRB, 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975) (union's refusals to cross another union's picket line were not disputes under agreement, not arbitrable, and not subject to no-strike clause). This conflict was resolved by the Supreme Court in Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141 (1976). *See* text accompanying notes 73-88 *infra*.

[53] *See, e.g.*, Armco Steel Corp. v. UMW, 505 F.2d 1129, 1133-34 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975) (union's agreement not to strike was quid pro quo for employer's agreement to submit disputes to arbitration); Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209 (4th Cir. 1973) (statutory right to refuse to cross picket line of another union was waived by agreeing to no-strike clause; therefore, injunction permisssible). *See* Note, *The Applicability of* Boys Markets *Injunctions to Refusal to Cross a Picket Line*, 76 COLUM. L. REV. 113, 129-40 (1976).

[54] *See, e.g.*, Valmac Indus., Inc. v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975), *vacated and remanded in light of* Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3215 (1976).

[55] *Cf.* Valmac Indus., Inc. v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975) (injunction proper to safeguard arbitration as method selected by parties for resolution of dispute); NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974) (arbitration does not nullify union's right to honor foreign picket lines, but only suspends its exercise until right is established by arbitrator's decision). *But cf.* NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 327 (3d Cir. 1974) (Hunter, J., dissenting) (injunction against sympathy strike would discourage arbitration in that enjoining the strike eliminates any motive for employer to arbitrate vigorously).

[56] 530 F.2d at 315. The Fourth Circuit in *Windsor Power* relied heavily upon its decision in Armco Steel Corp. v. UMW, 505 F.2d 1129 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975), which held an injunction was proper under similar facts. 530 F.2d at 315. Although the court in *Armco* construed the 1971 contract between coal mine operators and the United Mine Workers, the Fourth Circuit in *Windsor Power* found no material difference between the relevant provisions of the 1971 agreement and the 1974 agreement in force in *Windsor Power*, 530 F.2d at 315.

[57] 537 F.2d 1226 (4th Cir. 1976).

nearly identical to that of *Windsor Power*. The coal company employed members of the United Mine Workers. When union members of foreign locals established picket lines at the company's mines, the local employees refused to cross the lines.[58] The coal company sued in federal district court for injunctive relief against the international and district unions and several foreign locals.[59] However, the company did not sue its own employees or their local union.[60] The district court granted a preliminary injunction against both the international and district unions, and the picketing foreign locals, on the theory that the supervisory responsibility assumed by the district and international organizations in the collective bargaining agreement provided a necessary connection for an employer to reach the foreign locals.[61] The district court reasoned that the continuity of authority, control, and purpose emanating from the union's vertical organization provided a sufficiently expansive "bridge"[62] to local unions to support the injunction. The Fourth Circuit reversed,[63] holding that such an injunction would eliminate the foreign locals' right to picket.[64] The court characterized the foreign locals' right to picket as the right to symbolic free speech.[65] Finding no provision relinquishing that right in the collective bargaining agreement between the company and the United Mine Workers, the court was unwilling to imply its surrender.[66]

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[58] *Id.* at 1228. The picketing apparently was occasioned by a safety dispute between employees of other coal companies and their employers, and conducted by members of local unions other than Consolidation Coal's employees. *Id.* at 1228 n.2.

[59] 537 F.2d at 1228.

[60] *Id.* at 1230 & n.6.

[61] *Id.* at 1229.

[62] *Id.* at 1231 n.10.

[63] *Id.* at 1231-32. The district court also entered a contempt order against the international and district unions. The Fourth Circuit held that the injunction against the work stoppage was issued erroneously. The appellate court also held that because the international and district unions made good faith but ineffective efforts to comply with the order while appealing it, the district court's judgment of civil contempt was likewise improper. *Id.*

[64] *Id.* at 1230-32.

[65] *Id.* at 1230. The Fourth Circuit argued that the foreign pickets had a constitutional right of symbolic free speech under the first amendment. The court found no waiver of that right in the collective bargaining agreement between the mine operators and the United Mine Workers. While this reasoning has been severely restricted, if not rejected, by the Supreme court in Hudgens v. NLRB, 96 S. Ct. 1029, 1036-37 (1976), the Fourth Circuit's denial of injunctive relief was proper, since the *Boys Markets* requirement of a mandatory arbitration procedure was not met. *See* text accompanying notes 67-70 *infra*.

[66] 537 F.2d at 1230.

The Fourth Circuit held that the relief sought and granted went beyond the limits of *Boys Markets*.[67] While the *Boys Markets* exception requires a collective bargaining agreement which includes a mandatory arbitration procedure,[68] the procedure in the *Consolidation Coal* contract was established only to handle disputes between the employer and its own employees.[69] The picketing by foreign locals was not subject to the arbitration provisions of Consolidation Coal's collective bargaining agreement, and therefore the requirements for a *Boys Markets* injunction were not met.[70]

Subsequent to the Fourth Circuit's decisions in *Consolidation Coal* and *Windsor Power*, the Supreme Court resolved the conflict[71] over whether an employer can obtain federal injunctive relief against sympathy strikes by its employees.[72] In *Buffalo Forge Co. v. United Steelworkers*,[73] the Court held that federal courts are not empowered to enjoin sympathy strikes on the basis of a general no-strike clause, pending the arbitrator's decision that the strike is forbidden by the no-strike clause.

In *Buffalo Forge*, after clerical and technical employees struck and formed picket lines during negotiations for a collective bargaining agreement, the company's production and maintenance employees refused to cross the picket lines. The company then sued under § 301, claiming that the work stoppage violated its collective bargaining agreement with the production and maintenance employees.[74] The company sought a preliminary injunction and an order compelling arbitration of whether the work stoppage violated the no-strike and mandatory arbitration clauses of the contract. The district court concluded that the production and maintenance employees' strike was a sympathy strike in support of the office and technical employees.[75] Concluding that the strike was not over an arbitrable grievance and therefore not within the *Boys Markets* exception, the district court denied injunctive relief.[76] The Second Circuit affirmed, also

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[67] *Id.* at 1230-31.

[68] *Id. See* text accompanying note 38 *supra*.

[69] *Id.* at 1230-32.

[70] *Id.*

[71] *See* text accompanying note 52 *supra*.

[72] *See* text accompanying notes 44-56 *supra*.

[73] 96 S. Ct. 3141 (1976), *aff'g* 517 F.2d 1207 (2d Cir. 1975), *aff'g* 386 F. Supp. 405 (W.D.N.Y. 1974).

[74] 386 F. Supp. at 407.

[75] *Id.* at 409.

[76] *Id.* at 409-10. The district court reasoned that because the dispute concerned the striking clerical and technical employees, not the sympathy-striking production

holding the strike was not over an arbitrable grievance.[77] The Supreme Court upheld that decision.[78]

The Court in *Buffalo Forge* made clear that the employer was entitled to an order compelling arbitration of whether the sympathy strike violated the no-strike clause.[79] The issue of the validity of the sympathy strike was one which the parties had agreed to settle through the adjustment process.[80] The Court held, however, that injunctive relief was not proper, notwithstanding the arbitrability of an alleged violation of the no-strike provision.[81] The Court emphasized that a *Boys Markets* injunction is permissible only when the union is striking over disputes that it is bound to arbitrate. The sympathy strike, the Court reasoned, was not "*over* any dispute between the union and the employer that was even remotely subject to the arbitration provisions of the contract."[82] Neither the causes of the strike nor its underlying issues were subject to the contract arbitration provisions. Rather, the dispute underlying the strike related to the employer's contract negotiations with the clerical and technical employees and was not related to any dispute between the employer and the production and maintenance employees who were engaged in the sympathy strike.[83] Therefore, the Court held that *Boys Markets* was

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and maintenance workers, the sympathy strike was not over a grievance which the employer and production and maintenance employees were bound to arbitrate. Rather, the strike itself precipitated the dispute, and the court added that if an injunction could issue in such a case, no strike would be immune from injunction. The trial court concluded that such a ruling would undermine the vitality of the Norris-La Guardia Act and the narrow holding of *Boys Markets*. 386 F. Supp. at 409-10, *quoting* Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972).

[77] 517 F.2d 1207 (2d Cir. 1975). The appellate court tracked much of the district court's reasoning in denying an injunction. *See* note 76 *supra*. In addition, the Second Circuit stressed the narrowness of the *Boys Markets* holding and reasoned that the sympathy strike was not over a grievance with the employer but simply a manifestation of the strikers' deference to other employees' picket lines. As such, the sympathy strike in the court's view was not aimed at resolving a dispute by economic pressure rather than by arbitration, but was motivated only by respect for other picket lines. *Id.* at 1210-11.

[78] Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141, 3146 (1976).

[79] *Id* at 3143 n.1. The no-strike clause provided that there would be no strikes, work stoppages, interruption or impeding of work; the clause also provided that the union had a positive obligation to see that work stoppages were prevented.

[80] *Id.* at 3146. Whether the sympathy strike violated the no-strike clause is an issue subject to contractual dispute-settlement procedures and is ultimately an issue for the arbitrator.

[81] *Id.* The Court noted that if the arbitrator determined that the strike did violate the contract, an injunction could then issue to enforce the arbitrator's decision.

[82] *Id.* at 3147 (emphasis in original).

[83] *Id. See* text accompanying notes 74-78 *supra*.

not dispositive.[84] Moreover, the Court specifically rejected those cases which held that a mandatory arbitration clause implied a commitment by the union not to engage in sympathy strikes.[85]

The Court in *Buffalo Forge* emphasized that an injunction was not authorized merely because the employer alleged that the sympathy strike violated the no-strike clause.[86] Injunctions issued upon that basis would involve the courts in the merits of the actual dispute. The Court reasoned that if injunctions were permitted against sympathy strikes in such situations, courts could enjoin any other alleged breach of contract pending completion of grievance and arbitration procedures.[87] Thus, the Supreme Court in *Buffalo Forge* limited the availability of *Boys Markets* injunctions. Accordingly, the Court held that a sympathy strike, in which the underlying dispute is the validity of the strike in relation to a no-strike clause, is not a "strike over an arbitrable grievance" within the second requirement of *Boys Markets*.[88]

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[84] *Id.*

[85] *Id.* at 3147-48 & n.10. In rejecting those cases which have assumed that a mandatory arbitration clause implies a commitment not to engage in sympathy strikes, the Supreme Court in *Buffalo Forge* specifically cited the Fourth Circuit's decision in Armco Steel Corp. v. UMW, 505 F.2d 1129 (4th Cir. 1974), *cert. denied*, 423 U.S. 877 (1975). 96 S. Ct. at 3147-48 & n.10. In Gateway Coal Co. v. UMW, 414 U.S. 368 (1974), the Court implied a no-strike clause where none existed in the contract and permitted an injuncton against the strike. *Id.* at 380. The Court in *Buffalo Forge* distinguished *Gateway Coal* by noting that the obligation not to strike was implied in *Gateway Coal* only after it was determined that there was an arbitrable dispute. The Court noted that neither *Gateway Coal* nor *Boys Markets* was authority for such an implication solely because the company claimed that the strike breached the bargaining agreement. In *Buffalo Forge*, this claim itself was arbitrable. Buffalo Forge Co. v. United Steelworkers, 96 S. Ct. 3141, 3147-48 & n.10 (1976).

[86] 96 S. Ct. at 3148.

[87] *Id.* at 3148-49. The argument that granting injunctions to halt sympathy strikes would leave no strike immune to injunction ignores the fact that an injunction would be impermissible in cases where the agreement did not contain a no-strike clause. In such cases, the anti-injunction provisions of the Norris-La Guardia Act would control. NLRB v. Insurance Agents Int'l Union, 361 U.S. 447 (1960). *See* Standard Food Prods. Corp. v. Brandenburg, 436 F.2d 964 (2d Cir. 1970); Note, *Section 4 of the Norris-La Guardia Act Bars Federal Court Injunction Against Strike Not Over an Arbitrable Grievance*, 44 U. CIN. L. REV. 836, 841-43 (1975). Moreover, the Court in *Boys Markets* noted that the Norris-La Guardia Act was responsive to a situation totally different from that which exists today. Section 301 and *Boys Markets* were both directed toward peaceful settlement of labor disputes by means of a remedial device which merely enforced the obligation which the employer and the union freely undertook. 398 U.S. at 250.

[88] The *Buffalo Forge* limitation on the availability of federal injunctive relief appears to apply only where the no-strike clause does not explicitly refer to sympathy

In light of the Court's holding in *Buffalo Forge*, the *Windsor Power* and *Consolidation Coal* cases must be reconsidered. The facts in *Windsor Power* are essentially indistinguishable from those in *Buffalo Forge*.[89] The Fourth Circuit's holding in *Windsor Power* that the union employees' refusal to cross the foreign picket lines fell within the mandatory arbitration clause is consistent with *Buffalo Forge* in that the union had agreed to submit all disputes to arbitration.[90] However, the court's assumption in *Windsor Power* that the mandatory arbitration clause implied a union commitment not to engage in sympathy strikes was expressly rejected in *Buffalo Forge*.[91] Under the *Buffalo Forge* analysis, the strike in *Windsor Power* was not over a grievance which both parties were contractually bound to arbitrate. The cause of the dispute and the issue underlying the strike related to the foreign pickets' dispute with another coal company.[92] That dispute was not subject to the contract arbitration provisions established to handle disputes between Windsor Coal Company and its local unions. Under the *Buffalo Forge* reasoning, the sympathy strike had neither the purpose nor the effect of union evasion of its obligation to arbitrate with the employer.[93] Thus, in future cases

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strikes. *See* note 3 *supra*. In cases where a union specifically has agreed not to engage in sympathy strikes, federal injunctive relief seemingly would be available provided all other *Boys Markets* requirements are satisfied. In those cases, the sympathy strike would be a dispute over an arbitrable grievance. Without an injunction in those cases where sympathy strikes have been contractually prohibited—where the union has voluntarily undertaken a duty not to strike in sympathy to another union—the employer would be deprived of his bargain. *See* 96 S. Ct. at 3147-48 & n.10, and text accompanying notes 35-42 *supra*.

[89] In both *Windsor Power* and *Buffalo Forge*, the employer sought an injunction against its employees' sympathy strike which allegedly was in violation of the contract no-strike clause. *See* text accompanying notes 48, 74 and 75 *supra*. While the contracts in both cases included mandatory arbitration, the no-strike clauses in both bargaining agreements did not specifically include an agreement by the union not to engage in sympathy strikes. *See* text accompanying notes 3, 47, and 79 *supra*. Similarly, in both cases the primary issse was the validity of the sympathy strike in light of the no-strike clause and whether the strike was over a grievance which the union had agreed to arbitrate. *See* text accompanying notes 52-54 and 80-85 *supra*.

[90] 96 S. Ct. at 3146. The employer is entitled to invoke the arbitration process to determine the legality of a sympathy strike and to obtain a court order requiring the union to arbitrate.

[91] *Id.* at 3147-48 & n.10. *See* text accompanying note 85 *supra*.

[92] 530 F.2d at 313-14. *See* text accompanying note 46 *supra*.

[93] Under the Supreme Court's analysis in *Buffalo Forge*, the consideration for the employer's obligation to arbitrate all disputes was the union's agreement not to strike over arbitrable disputes. Striking over an arbitrable issue deprives the employer of his bargain and circumvents the arbitral process. However, a sympathy strike does not deprive the employer of his bargain since the causes of the strike are not subject to

factually similar to *Windsor Power, Buffalo Forge* mandates that an employer may only obtain an order compelling the union to arbitrate the validity of a sympathy strike in light of any no-strike provision. A *Boys Markets* injunction would be prohibited by the Norris-La Guardia Act pending the outcome of arbitration.[94]

In contrast, the denial of the injunction in *Consolidation Coal* was proper under the subsequent holding in *Buffalo Forge*. The coal company's request to enjoin the foreign pickets surpassed even what the Fourth Circuit allowed under *Windsor Power*.[95] Consolidation Coal chose not to compel its local union to arbitrate the dispute over the validity of the sympathy strike. Instead, the employer chose to pursue the international and district unions.[96] The requirements of a *Boys Markets* injunction had not been satisfied because no mandatory arbitration provision existed by which the dispute could be adjusted between the company and the international and district union offices.[97] However, that part of the Fourth Circuit's analysis in *Consolidation Coal* distinguishing it from prior cases which allowed injunctions against sympathy strikes is no longer necessary. Following *Buffalo Forge*,[98] federal courts are not permitted to enjoin sympathy strikes pending arbitration of the strike's validity and the distinctions drawn by the Fourth Circuit in *Consolidation Coal* are not required.[99]

In *Windsor Power*, the court granted an injunction to halt a sympathy strike by the employer's own local with whom he had contrac-

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the contractual arbitration procedures between the employer and his employees' union. Although the validity of a sympathy strike may be disputed in light of a no-strike clause, the sympathy strike itself is not over a dispute which the parties have agreed to arbitrate. While the employer can obtain an arbitration order compelling the union to arbitrate the validity of the strike, the underlying causes of the strike—another union's dispute—are not matters properly arbitrated between the employer and his sympathy-striking employees. Thus, the employer is not deprived of his bargain. *See* 96 S. Ct. at 3147.

[94] *See* text accompanying notes 79-88 *supra*.

[95] 537 F.2d at 1230-31.

[96] *Id.*

[97] *Id.* Since the contractual grievance machinery was established to arbitrate disputes between Consolidation Coal Company and its local employees and not disputes between the employer and the international and district unions, the *Boys Markets* requirement of mandatory arbitration was not satisfied. *See* text accompanying notes 67-70 *supra*.

[98] It is unlikely that the Supreme Court's decision in *Buffalo Forge* will end the debate over the advisability of injunctive relief to halt sympathy strikes, since the Court's decision added little to what had already been argued by the courts and commentators. *See* cases cited in notes 51-56 and materials cited in note 44 *supra*.

[99] *See* 96 S. Ct. at 3147-48.

tually agreed to arbitrate all disputes. Injunctive relief was denied to the employer in *Consolidation Coal* who sought to enjoin not his own employees' union with whom he had agreed to submit all disputes to arbitration, but to enjoin the foreign pickets themselves, with whom the employer had no collective bargaining agreement. The *Boys Markets* exception to the anti-injunction provisions of the Norris-La Guardia Act, however, has been limited by the Supreme Court's decision in *Buffalo Forge*. In the latter case, the Court held that a sympathy strike was not a dispute over an arbitrable grievance which both parties had contractually agreed to arbitrate, and therefore injunctive relief was not available pending the arbitrator's decision as to the validity of the strike. In future cases, the Fourth Circuit will have to consider that limitation in dealing with employers' requests for injunctions against sympathy strikes.

C. Union Responsibility for Campaign Misconduct on Theory of Apparent Authority.

The usual course in the designation of a collective bargaining representative is the representation election held under the National Labor Relations Act.[1] The National Labor Relations Board (NLRB) is authorized under the Act to oversee representation elections.[2] Occasionally, the NLRB has set aside the results of representation elections for improper conduct by the employer or the union which may have influenced the outcome.[3] However, if the Board finds that the

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[1] 29 U.S.C. § 141 *et seq.* (1970). *See* Getman, Goldberg & Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465 (1975). In the 1976 fiscal year, the NLRB conducted 8,642 representation elections in which the union won 4,160. In the final quarter (April-June 1976) alone, the NLRB conducted 2,179 elections involving 107,129 workers. 93 LAB. REL. REP. (BNA) 68 (1976).

[2] Section 9 of the National Labor Relations Act authorizes the NLRB to determine the appropriate bargaining unit, to conduct hearings on whether a question of representation exists, to conduct an election, and to certify the results. 29 U.S.C. § 159 (1970). The NLRB enjoys wide discretion in dealing with the necessary procedures and supervision of representation elections. Southern S.S. Co. v. NLRB, 316 U.S. 31, 37 (1942); La Crescent Constant Care Center, Inc. v. NLRB, 510 F.2d 1319, 1321 (8th Cir. 1975). Because of this wide discretion, courts have afforded the Board considerable deference in representation matters. NLRB v. Southern Paper Box Co., 506 F.2d 581, 584 (8th Cir. 1974); Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224, 1228 (2d Cir. 1974).

[3] Sewell Mfg. Co., 138 N.L.R.B. 66, 50 L.R.R.M. 1532 (1962) (Board set aside election based upon improper promises of benefits, threats of economic reprisals, deliberate misrepresentations of material facts, and deceptive campaign tactics). *See* Miami Newspaper Printing Pressmen's Local 46 v. McCulloch, 322 F.2d 993 (D.C. Cir.

1963) (National Labor Relations Act imposed duty and authority upon Board to set aside elections which have been unfairly conducted because of employer or union misconduct).

In addition to NLRB v. Georgetown Dress Corp., 537 F.2d 1239 (4th Cir. 1976), *see* text accompanying notes 7-16 *infra*, the Fourth Circuit recently denied enforcement of another Board bargaining order based upon improper conduct during a representation election campaign. In NLRB v. Santee River Wool Combing Co., 537 F.2d 1208 (4th Cir. 1976), the court held that certain misrepresentations by the union during the organizational campaign justified invalidating the representation election. The court also held that the misconduct of the union during the campaign could not be held harmless because of the antecedent misconduct of the company. The court applied a tripartite test in determining whether an election should be set aside for misstatements made during the organizational campaign. The test requires that an election be set aside when there was (1) a material misrepresentation of fact (2) by a party with special knowledge or in an authoritative position to know the truth and (3) insufficient opportunity before the election for the other party to correct the misrepresentation. 537 F.2d at 1210-11, *quoting* Celanese Corp. of Am. v. NLRB, 291 F.2d 224, 226 (7th Cir.), *cert. denied*, 368 U.S. 925 (1961), *quoted with approval in* Collins & Aikman Corp. v. NLRB, 383 F.2d 722, 727 (4th Cir. 1967). Other circuits have applied the same test. *See, e.g.*, Warner Press, Inc. v. NLRB, 525 F.2d 190 (7th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224 (2d Cir. 1974). A fourth requirement frequently applied is that the employees not have independent knowledge of the misrepresented facts so that they could effectively evaluate the propaganda. *See, e.g.*, United Steelworkers v. NLRB, 496 F.2d 1342, 1345-46 (5th Cir. 1974). While the Fourth Circuit stated its test in three parts, it specifically noted that the union's misrepresentations as to alleged employer misconduct were the only source of voter knowledge regarding the matter. 537 F.2d at 1211.

The court in *Santee River* held that the presence of those three elements created a presumption that the misrepresentations had a substantial impact upon the free choice of the employees. 537 F.2d at 1210-11. The standard of "substantial impact" upon the free choice of employee-voters has been variously stated by the courts, though no discernible difference exists among the formulations. *Compare* NLRB v. Southern Health Corp., 514 F.2d 1121, 1123 (7th Cir. 1975) (reasonably expected to have an impact) *and* NLRB v. Staub Cleaners, Inc., 418 F.2d 1086, 1088 (2d Cir. 1969), *cert. denied*, 397 U.S. 1038 (1970) (substantial likelihood) *with* Excelsior Laundry v. NLRB, 409 F.2d 70, 72 (10th Cir. 1968) (probably prejudicial affect) *and* Collins & Aikman Corp. v. NLRB, 383 F.2d 722 (4th Cir. 1967) (significant impact).

The *Santee River* decision is consistent with the approach of other courts and the NLRB in setting aside any election in which the successful party made material misstatements which might reasonably have had a significant impact upon the election. *See* Hollywood Ceramics, 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962). However, the entire approach to upsetting representation elections because of misrepresentations during the campaign has been criticized. *See* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 82-92 (1964); Getman, Goldberg & Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465 (1975); Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976); Samoff, *NLRB Elections: Uncertainty and Certainty*, 117 U. PA. L. REV. 228, 234 (1968) [hereinafter cited as Samoff].

election represented the voters' true choice, it enters an order certifying the union as the bargaining representative.[4] Certification orders are enforced by an NLRB petition to a federal court of appeals.[5] Notwithstanding a Board determination that a fair election had taken place, courts have refused to give effect to Board certification orders where campaign misconduct may have affected the outcome.[6]

The Fourth Circuit considered allegations of campaign misconduct in *NLRB v. Georgetown Dress Corp.*,[7] when the NLRB petitioned for enforcement of its order requiring the corporation to bargain with the union following a representation election.[8] Holding that improper acts by members of a pro-union organizing committee were attributable to the union under the common law principles of

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[4] Absent challenges or objections to the election proceedings, the NLRB Regional Director normally enters the certification order. 29 C.F.R. § 102.69(a)(b) (1976).

[5] 29 U.S.C. § 160(c) (1970). Certification orders are not directly reviewable by the courts of appeals. Boire v. Greyhound Corp., 376 U.S. 473, 476-77 (1964). Rather, judicial review of a certification order is possible only when the NLRB makes the certification order the basis for a final order with regard to an unfair labor practice. *Id.* at 478-79. Thus, an employer desiring to challenge the conduct or result of a representation election where the Board has certified the union need only refuse to bargain with the union to make judicial review available. The representation election is then properly reviewable incident to the unfair labor practice charge. *See, e.g.*, Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 154 (1941); Aircraft Radio Corp. v. NLRB, 519 F.2d 590 (3d Cir. 1975). The objecting party bears the burden of proving prejudice to the fairness of the election. NLRB v. Bancroft Mfg. Co., 516 F.2d 436, 439 (5th Cir. 1975).

[6] Courts have effectively set aside representation elections and NLRB certification orders based on a variety of employer and union misconduct, including predictions of inevitable strikes, NLRB v. Sanitary Laundry, Inc., 441 F.2d 1368 (10th Cir. 1971), appeals to racial prejudice, NLRB v. Schapiro & Whitehouse, Inc., 356 F.2d 675 (4th Cir. 1966), and misrepresentations of material facts, NLRB v. Santee River Wool Combing Co., 537 F.2d 1208 (4th Cir. 1976). Both the NLRB and the courts have also set aside representation elections for employer promises or grants of benefits to employees during campaigns, NLRB v. Exchange Parts Co., 375 U.S. 405 (1964), union agreements to waive initiation fees for employees joining union prior to election, NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973), employer interrogation of employees regarding union preference, Qualiton, 115 N.L.R.B. 65, 37 L.R.R.M. 1238 (1956), and misconduct by NLRB agents, NLRB v. Bata Shoe Corp., 377 F.2d 821 (4th Cir.), *cert. denied*, 389 U.S. 917 (1967). For a comprehensive discussion of campaign regulation, see WILLIAMS JANUS & HUHN, NLRB REGULATION OF ELECTION CONDUCT (Labor Relations and Public Policy Series, Report No. 8, 1974) [hereinafter cited as WILLIAMS].

[7] 537 F.2d 1239 (4th Cir. 1976).

[8] *Id.* at 1240. The Georgetown Dress Corporation admitted its refusal to bargain but challenged the validity of the NLRB's finding that a fair election had occurred. *Id.* at 1240-41. Judicial review of the elections was proper, therefore, as incident to the NLRB's bargaining order based on the NLRB's finding that the corporation had committed an unfair labor practice. *See* note 5 *supra*.

agency,[9] the court refused to enforce the NLRB's finding that a fair election had occurred.[10]

In *Georgetown Dress*, the election campaign was marred by threats of physical violence and coercive tactics by members of the union organizing committee.[11] After investigating the employer's complaints, the NLRB ruled that the misconduct of the organizing committee was not attributable to the union, that no violence had occurred, and that consequently the election was fair.[12] The Fourth Circuit refused to certify the union and characterized the crucial issue as one of agency.[13] Holding that the NLRB had applied an erroneous standard, the court stated that violence need not actually occur and that threats alone sufficiently justified overturning the representation election.[14] The court then held that if the conduct of the committee members was attributable to the union under principles of agency, the election could not stand.[15] Concluding that the union had been responsible for the committee members' acts, the court set aside the election.[16]

Agency principles have long been applied in labor law.[17] The cur-

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[9] 537 F.2d at 1244-45.

[10] *Id.* at 1242, 1244-45.

[11] *Id.* at 1241-43. Examples of improper conduct in *Georgetown Dress* included a committee member brandishing a knife and threatening violence at an organizational meeting, threats of putting sugar in employees' gas tanks, threats of job loss if employees did not support the union, promises of higher wages and benefits, and interrupting company meetings. The court also noted that other incidents attributable to persons not on the committee occurred: threats of job loss, violence if employees crossed hypothetical picket lines, and anonymous phone calls and notes threatening death to non-union employees. *Id.* at 1241-42. The court cited those acts by persons not on the committee as contributing to the coercive effect of committee members' action. Beyond that brief reference, the court did not state what significance, if any, it attached to the improper acts of non-committee parties. *Id.* at 1242. *See* text accompanying notes 46-57 and 65-66 *infra*. However, both the NLRB and the courts have set aside representation elections when such a general atmosphere of fear existed as to make a fair election impossible. *See, e.g.*, NLRB v. Tampa Crown Distrib., Inc., 272 F.2d 470 (5th Cir. 1959); Al Long, Inc., 173 N.L.R.B. 447, 69 L.R.R.M. 1366 (1968); P.D. Gwaltney & Co., 74 N.L.R.B. 371, 20 L.R.R.M. 1172 (1947).

[12] 537 F.2d at 1242.

[13] *Id.*

[14] *Id.* Both the NLRB and the courts have held that acts need not rise to the level of an unfair labor practice in order to be sufficiently improper to set aside an election. *See, e.g.*, NLRB v. Clearfield Cheese Co., 322 F.2d 89 (3d Cir. 1963); General Shoe Corp., 77 N.L.R.B. 124, 21 L.R.R.M. 1337 (1948). Unfair labor practices are set out in §§ 8(a), 8(b), and 8(e) of the National Labor Relations Act. 29 U.S.C. §§ 158(a), (b), (e) (1970).

[15] 537 F.2d at 1242.

[16] *Id.* at 1244-45.

[17] Evans, *The Law of Agency and the National Unions*, 49 KY. L.J. 295, 300 (1961)

rent approach had its inception following enactment of the Labor Management Relations Act.[18] Prior to its enactment, § 6 of the Norris-La Guardia Act[19] provided for union immunity from liability for the unlawful acts of union officers, members, and agents, unless clear proof of actual participation in or authorization of such acts existed.[20] The Supreme Court had interpreted § 6 strictly, holding that a union would be liable only for acts which it expressly or impliedly authorized, although union agents acting within the scope of their employment may have committed other acts for which a principal would normally be liable.[21] Congress responded to this broad immunity doctrine with § 2 of the Labor Management Relations Act.[22] This provision restored the common law doctrine of agency to union proceedings scrutinized by the NLRB.[23] These principles have been applied to both employers and unions in assessing responsibility for improper acts committed during organizational campaigns.[24]

[hereinafter cited as Evans]. *See generally* Affeldt, *The Independent Labor Union and the Good Life*, 35 GEO. WASH. L. REV. 869 (1967).

[18] Labor Management Relations (Taft-Hartley) Act, 61 Stat. 136 (1947) (codified at 29 U.S.C. § 141 *et seq.* (1970).

[19] 29 U.S.C. § 101 *et seq.* (1970).

[20] Norris-La Guardia Act § 6, 29 U.S.C. § 106 (1970), provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, *except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.*

(emphasis added).

[21] United Bhd. of Carpenters & Joiners v. United States, 330 U.S. 395, 406-07 (1947). In the context of § 6, authorization restricts the responsibility or liability for unlawful acts of employers or employee organizations to those who actually participate in the unlawful acts, except upon clear proof of express authorization or subsequent ratification.

[22] Labor Management Relations Act § 2, 29 U.S.C. § 152(13) (1970), provides: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, *the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.*" (emphasis added).

[23] H.R. REP. No. 510, 80th Cong., 1st Sess. 36, *reprinted* in [1947] U.S. CODE CONG. SERV. 1142.

[24] *E.g.*, NLRB v. Urban Tel. Corp., 499 F.2d 239 (7th Cir. 1974); NLRB v. Arkansas-Louisiana Gas Co., 333 F.2d 790 (8th Cir. 1964); NLRB v. Tampa Crown Distrib., 272 F.2d 470 (5th Cir. 1959). *See* note 17 *supra*. The Fourth Circuit played an early part in the application of common law principles to labor relations following passage of the Labor Management Relations Act. In 1954, the Fourth Circuit in UMW v. Patton, 211 F.2d 742 (4th Cir. 1954), held the district and international unions responsible in a labor dispute for acts of their agent on the principle of respondeat

The Fourth Circuit in *NLRB v. Georgetown Dress Corp.*[25] utilized the agency doctrine of apparent authority to hold the union responsible for the acts of the organizing committee members.[26] Apparent authority[27] arises from the principal's intentional or negligent manifestations to a third party that another is his agent.[28] To avoid responsibility for the acts of an apparent agent, a principal has a duty to disavow or repudiate the agent's conduct of which he has knowledge.[29] Holding that the committee members were apparent agents of the union, the court in *Georgetown Dress* stressed two factors. First, the committee was the union's *only* in-plant contact with the workers.[30]

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superior, finding that a union field representative had implied authority from the union to call strikes during an organizational campaign. *Id.* at 746-48. In *Patton*, the operators of a coal mine sued the union for damages resulting from organizational strikes called by a union field representative. The court found that neither the international nor the district unions authorized or ratified the strikes. Nevertheless, the court held both the international and district unions liable under principles of agency. The court found that the representative was engaged in the business of the union and was acting within the scope of his employment. *Id.* at 746.

Unions have been held responsible for the unlawful conduct of their members and subordinate officers under agency principles of consent and respondeat superior. The doctrine of consent provides that a union will be liable for the consequences of a relationship it expressly or impliedly intended to create. Sunset Line & Twine Co., 79 N.L.R.B. 1487, 1508, 23 L.R.R.M. 1001, 1005 (1948). *See, e.g.*, NLRB v. Urban Tel. Corp., 499 F.2d 239 (7th Cir. 1974); NLRB v. ILWU Local 12, 378 F.2d 125 (9th Cir. 1967). Under consent doctrine, an agency relationship can be proved by express authorization, participation in the conduct, or subsequent ratification. The doctrine of respondeat superior is generally applicable to hold a master liable for the acts of his servant acting within the scope of his employment. Evans, *supra* note 17, at 300-02. *See* RESTATEMENT (SECOND) OF AGENCY §§ 8, 27, 49, 216, 219, 228 (1958).

[25] 537 F.2d 1239 (4th Cir. 1976).

[26] *Id.* at 1244.

[27] Strictly speaking, the doctrines of apparent authority and ostensible authority are distinct. *See* RESTATEMENT (SECOND) OF AGENCY §§ 8B, 31 (1958). However, in the context of assessing responsibility for misconduct by union or employer agents in representation elections, the distinctions are unimportant. *See* WILLIAMS, *supra* note 6, at 220.

[28] Apparent authority exists only with regard to third persons who believe and have reason to believe that the agent has authority and exists only to the extent that it is reasonable for the third person to believe that the agent is authorized. RESTATEMENT (SECOND) OF AGENCY § 8, Comments a, c (1958).

[29] Apparent authority continues until the third person who reasonably believes that the agent is authorized receives notice that the agent's authority has terminated. RESTATEMENT (SECOND) OF AGENCY §§ 125, 135, 136 (1958). *See* H.I. Siegal, Inc., 165 N.L.R.B. 493, 494, 65 L.R.R.M. 1505, 1506 (1967) (election set aside upon basis of third party misconduct where no disavowal by employer); WILLIAMS, *supra* note 6, at 218-235.

[30] 537 F.2d at 1243-44. Since the professional union organizers did not enter the plant, committee volunteers were the only in-plant contact with workers, and few of

Second, the committee members had very broad duties in the organizational campaign.[31] Based upon these factors, the Fourth Circuit denied the NLRB's petition.

In so holding, the court distinguished its enforcement of an order in *Owens-Corning Fiberglas Corp.*[32] In *Owens-Corning*, members of the union's in-plant committee made numerous threats of physical violence and economic harm to those who opposed unionization. [33] The NLRB held that unlawful conduct by employees prominent in the union's organizational campaign was insufficient to establish agency.[34] Finding no evidence that the union had authorized or condoned any questionable conduct,[35] the Board concluded that the conduct of the rank-and-file employees did not create a coercive atmosphere sufficient to render employee free choice improbable.[36] While the Board opinion addressed the question of agency, it did not mention the duties of the in-plant committee or whether the committee was the union's only contact with the workers. The Fourth Circuit enforced the Board's decision without discussing the matter of economic or physical threats, the issue of agency, the duties of the in-plant committee or its capacity as the union's sole representative in the plant.[37]

Because *Owens-Corning* had not discussed those factors stressed in *Georgetown Dress*, the Fourth Circuit held that *Owens-Corning* was not dispositive. The court reasoned that the committee's broad duties and status as sole in-plant union contact were sufficient to justify a different result.[38] In *Georgetown Dress*, the Fourth Circuit held that the committee was performing essentially all of the duties

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the expenses of the campaign were paid by the union. The court viewed these facts as evidence that the organizing committee had apparent authority to act as agents of the union.

[31] *Id.* Committee members performed virtually all of the tasks in the campaign to organize the plant including: soliciting employees to sign authorization cards, to attend union meetings, and to support and vote for the union, and distributing handbills.

[32] 179 N.L.R.B. 219, 72 L.R.R.M. 1289 (1969), 181 N.L.R.B. 575, 73 L.R.R.M. 1447 (1970), *enforced*, 435 F.2d 960 (4th Cir. 1970).

[33] 179 N.L.R.B. at 222-23, 72 L.R.R.M. at 1292-93. Examples of misconduct included threats of throwing acid in anti-union adherents' faces, anti-union female employees being accosted by pro-union males, anonymous phone threats, and numerous threats of job loss and physical violence.

[34] 179 N.L.R.B. at 223, 72 L.R.R.M. at 1293.

[35] *Id.*

[36] 179 N.L.R.B. at 223-24, 72 L.R.R.M. at 1293-94.

[37] Owens-Corning Fiberglas Corp. v. NLRB, 435 F.2d 960 (4th Cir. 1970).

[38] 537 F.2d at 1244.

of the organizational campaign.[39] The union's total campaign to organize the plant was conducted by "unsophisticated, untrained employee volunteers" in a hard-fought campaign.[40] The court reasoned that as sole union representative in the plant, the committee *was* the union in the eyes of other workers;[41] the union had authorized the committee to occupy that position.[42] Moreover, the union neither disavowed the authority of the committee nor repudiated its misdeeds.[43] Further, the court held that the acts did not sufficiently exceed that apparent authority so as to make it obvious to the persons coerced and intimidated that the union would not ratify what was done.[44] The Fourth Circuit therefore concluded that the union was responsible for the acts of the members of the committee on the basis of apparent authority.[45]

Courts have consistently applied agency principles to representation elections.[46] Elections have been set aside not only for improper conduct by union officials but also for unlawful tactics by union agents.[47] However, courts have accorded less significance to improper conduct by non-agent third persons[48] in determining whether an election was influenced by unlawful acts.[49] Courts have reasoned that

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[39] *Id.* at 1243.

[40] *Id.* at 1244. The court in *Georgetown Dress* reasoned that in the hard-fought organizational campaign, the coercive acts of the committee volunteers should have been foreseen by the union. While clearly illegal, the conduct of committee members was directed toward the authorized result of organizing the plant. In general, a principal is liable for illegal acts of his agent if such acts are not clearly inappropriate to or unforeseeable in the accomplishment of the authorized result. RESTATEMENT (SECOND) OF AGENCY § 231, Comment a (1958); 537 F.2d at 1244.

[41] 537 F.2d at 1244. The court in *Georgetown Dress* reasoned that as the union's only in-plant contact performing all the tasks of the campaign, the committee had been vested by the union with apparent authority. The committee represented the union to other workers. *Id. See* note 28 *supra*.

[42] 537 F.2d at 1244.

[43] *Id. See* text accompanying note 29 *supra*.

[44] 537 F.2d at 1244.

[45] *See* text accompanying notes 28-29 and 39-42 *supra*.

[46] *See* Evans, *supra* note 17, at 295-300.

[47] *E.g.*, NLRB v. Urban Tel. Corp., 499 F.2d 239 (7th Cir. 1974); NLRB v. G.K. Turner Assoc., 457 F.2d 484 (9th Cir. 1972).

[48] Non-agent third persons refers to any person or group other than the union or employer and their agents. Typically, the Board has categorized mere union adherents as non-agents and has accorded their acts less weight than unions agents. *See, e.g.*, Diamond State Poultry Co., Inc., 107 N.L.R.B. 3, 33 L.R.R.M. 1043 (1953).

[49] *See* NLRB v. Monroe Auto Equip. Co., 470 F.2d 1329 (5th Cir. 1972), *cert. denied*, 412 U.S. 928 (1973); Intertype Co. v. NLRB, 401 F.2d 41 (4th Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969); Manning, Maxwell & Moore, Inc. v. NLRB, 324 F.2d 857 (5th Cir. 1963). *See also* Orleans Mfg. Co., 120 N.L.R.B. 630, 42 L.R.R.M. 1016 (1958).

voter selection would be more susceptible to improper influence if the ostensible source of economic or physical threats was the union or the employer which have the power to carry them out.[50] Based upon this assumption that employees are less likely to take seriously threats or misstatements from persons unrelated to the union or employer, a less strict standard has been applied to acts of non-agents.[51] Where simple misrepresentations of fact are concerned, the status of the speaker may be most indicative of probable impact on voters.[52] Threats of violence, however, demand a different approach. The coercive effect of threats of violence would be no less influential if the wrongdoers were not deemed agents of the union or employer.[53] Consequently, the infringement on free voter selection would be present notwithstanding the source.[54]

Courts advocating that less weight be given to misconduct by third parties note the absence of the deterrents that can be applied to union and employer misconduct in reviewing NLRB enforcement petitions.[55] The lack of direct sanctions against third parties should not dictate ignoring misconduct that may have influenced the election. A new election is expensive and troublesome to both parties. Ordering a new election because of third party misconduct would seem sufficient inducement to both the employer and the union to insure that unlawful acts by third parties do not again prejudice the

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[50] *See* NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941); Amalgamated Clothing Workers v. NLRB, 371 F.2d 740 (D.C. Cir. 1966); Cornelius Am., Inc., 194 N.L.R.B. 909, 79 L.R.R.M. 1206 (1972); Thomas Prod. Co., 167 N.L.R.B. 732, 66 L.R.R.M. 1147 (1967).

[51] *See, e.g.*, NLRB v. Sayers Printing Co., 453 F.2d 810 (8th Cir. 1971); Colecraft Mfg. Co. v. NLRB, 385 F.2d 998 (2d Cir. 1967).

[52] *See* NLRB v. Santee River Wool Combing Co., 537 F.2d 1208 (4th Cir. 1976) and note 3 *supra*. Courts have given considerable weight to the status of the speaker of misrepresentations of material facts during organizational campaigns. Indeed, an election will be set aside on the basis of misrepresentations only when the speaker has special knowledge or is in a position to know the facts. *See* NLRB v. A.G. Pollard Co., 393 F.2d 239 (1st Cir. 1968). Both the courts and the NLRB have realized, however, that elections should be set aside based upon the employees' beliefs in the truth of statements, even when the speaker is not an agent of the employer or the union. *See, e.g.*, NLRB v. Tampa Crown Distrib., Inc., 272 F.2d 470 (5th Cir. 1959); Star Baby Co., 140 N.L.R.B. 678, 52 L.R.R.M. 1094 (1963).

[53] *See* WILLIAMS, *supra* note 6, at 161, 166; cases cited in notes 60, 61, and 64 *infra*.

[54] *See* P.D. Gwaltney & Co., 74 N.L.R.B. 371, 379, 20 L.R.R.M. 1172, 1174 (1947); text accompanying notes 64-65 *infra*.

[55] *See* NLRB v. Urban Tel. Corp., 499 F.2d 239, 242 (7th Cir. 1974), *quoting* Orleans Mfg. Co., 120 N.L.R.B. 630, 633-34, 42 L.R.R.M. 1016, 1017 (1958); Intertype Co. v. NLRB, 401 F.2d 41, 46 (4th Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969).

outcome.[56] To the extent that employers and unions cannot control third parties, renunciations and disavowals by both sides of any third party misconduct would at least put any fear of reprisals on the part of employees beyond the immediate working environment.[57]

While the application of agency doctrines and the outcome in *Georgetown Dress* seem proper, the court's analysis glossed over the goal of maintaining the purity of representation elections. The NLRB has long stated that the ultimate objective of representation elections is to provide bias-free laboratory conditions to insure the uninhibited free choice of employees in selecting whether they are to be represented by a particular union or no union at all.[58] Courts have repeatedly emphasized that the goal of the National Labor Relations Act in representation elections is to insure the fair and free choice of employees in selecting a bargaining representative.[59]

In determining whether the objective of free voter selection has been achieved, any question of agency is secondary. The primary question is whether employees were free to make their personal choices unhampered by threats or coercion from any source.[60] In the

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[56] Comment, *The Outsider and the Unfair Labor Practice*, 41 S. CAL. L. REV. 876, 879 (1967-68).

[57] Upsetting the validity of an election for third party misconduct in a sense punishes the successful party for acts beyond his control. *See* Intertype Co. v. NLRB, 401 F.2d 41, 46 (4th Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969), where the Fourth Circuit reasoned that to hold that improper conduct by one not subject to control of either party must invalidate elections would constitute an unreasonably strict standard that might prevent holding of valid election. However, NLRB orders provided by the National Labor Relations Act are remedial and preventive rather than punitive, taking the form of cease and desist orders, temporary injunctions, or orders for affirmative actions. *See* 29 U.S.C. § 160(c) (1970); NLRB v. Thompson Prod., 130 F.2d 363 (6th Cir. 1942).

[58] The Fifth Circuit cited the often-quoted statement of the NLRB:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of employees. . . . When . . . the standard drops too low, because of our fault [citation omitted] or that of others, the requisite laboratory conditions are not present and the experiments must be conducted over again.

Marriott In-Flite Servs. Div. of Marriott Corp. v. NLRB, 417 F.2d 563, 567 (5th Cir. 1969), *quoting* General Shoe Corp., 77 N.L.R.B. 124, 127, 21 L.R.R.M. 1337, 1341 (1948). *See generally* WILLIAMS, *supra* note 6, at 19-25, 56-61; Samoff, *supra* note 3, at 234-38.

[59] *See, e.g.*, United States Steel v. NLRB, 457 F.2d 660 (3d Cir. 1972); Sonoco Prod. Co. v. NLRB, 443 F.2d 1334 (9th Cir. 1971); Empire State Sugar Co. v. NLRB, 401 F.2d 559 (2d Cir. 1968).

[60] Cross Baking Co. v. NLRB, 453 F.2d 1346 (1st Cir. 1971) (important question

event that improper occurrences during the campaign had the probable effect of swaying votes, the election cannot stand. The validity of the election should not turn upon whether concepts of agency can be stretched or distorted to tie together the offender and either the union or the employer.[61]

The Fourth Circuit in *Georgetown Dress* overemphasized the issue of agency. It first concluded that the threats of violence and coercive tactics were sufficiently serious to have affected the election outcome.[62] The court then noted that because of those acts, the election would be set aside, but only if the acts were attributable to the union.[63] The threats, however, were no less coercive and voter preference no less influenced than if they had not been attributable to the union under the guise of apparent authority.[64] Indeed, the NLRB and the courts have set aside elections where the necessary laboratory conditions were destroyed, absent any agency relationship.[65] More often, however, the courts and the Board appear willing to stretch or distort the concepts of agency to fit the particular factual situation.[66] While this is not necessarily counterproductive, courts must

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not whether union advocate was union agent, but whether free choice prevented by atmosphere of fear and coercion). *Cf.* Home Town Foods, Inc. v. NLRB, 416 F.2d 392 (5th Cir. 1969) (test of campaign conduct must allow for interference by outside parties).

[61] International Ass'n of Machinists v. NLRB, 311 U.S. 72 (1940) (court not dealing with technical concepts of employer's legal responsibility for acts of his servants, but with legislative policy to free election process from taint of compulsion, duress, or improper influence). *Cf.* Home Town Foods, Inc. v. NLRB, 416 F.2d 392 (5th Cir. 1969) (NLRB should adopt single standard to measure campaign conduct of all parties who might have interfered with employees' free choice). Even courts that give less weight to third party misconduct recongize an exception and will set aside an election because of third party interference which renders free choice impossible. *See, e.g.*, NLRB v. Southern Paper Box Co., 473 F.2d 208 (8th Cir. 1973); Bush Hog, Inc. v. NLRB, 420 F.2d 1266 (5th Cir. 1969); NLRB v. Smith Indus., Inc., 403 F.2d 889 (5th Cir. 1968).

[62] 537 F.2d at 1243.

[63] *Id.* at 1244.

[64] Cross Baking Co. v. NLRB, 453 F.2d 1346 (1st Cir. 1971) (although misconduct by person not an agent of union, fear would not be less effective if from an unofficial source).

[65] *See, e.g.*, Cross Baking Co. v. NLRB, 453 F.2d 1346 (1st Cir. 1971); NLRB v. Golden Age Beverage Co., 415 F.2d 26 (5th Cir. 1969); Al Long, Inc., 173 N.L.R.B. 447, 69 L.R.R.M. 1366 (1968); Diamond State Poultry Co., 107 N.L.R.B. 3, 33 L.R.R.M. 1043 (1953).

[66] *See* NLRB v. Tampa Crown Distrib., Inc., 272 F.2d 470 (5th Cir. 1959) (union responsible on basis of agency for anonymous telephone threats); Amalgamated Clothing Workers v. NLRB, 371 F.2d 740 (D.C. Cir. 1966) (company responsible for acts of local businessmen). *Compare* Henry I. Siegel Co. v. NLRB, 417 F.2d 1206 (6th Cir. 1969), *cert. denied*, 398 U.S. 959 (1970) (company liable for acts of local mayor) *and*