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Xi. Labor Law

XI. LABOR LAW

A. *Arbitrator's Authority and the Common Law of the Shop*

The Congress and the National Labor Relations Board favor grievance arbitration as a means of settling industrial disputes.[1] Impartial arbitration during the term of a contract permits continuous bargaining to proceed without interruption of business operations.[2] A collective bargaining agreement often incorporates the arbitration process to allow for the final resolution of unforeseen disputes without resorting to judicial arbitration.[3] In the *Steelworkers*

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[1] In 1947, Congress amended the National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-69 (1976 & Supp. IV 1980)), by adding provisions known collectively as the Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-187 (1976 & Supp. IV 1980)). Section 203(d) of the Taft-Hartley amendments expressly recognizes Congress' preference for arbitration as the method for settlement of grievances resulting from application or interpretation of an existing collective bargaining agreement. 29 U.S.C. § 173(d) (1976). The congressional policy supporting arbitration is explicit or implicit in several other of the Act's provisions. *See, e.g.*, 29 U.S.C. § 141(b) (1976) (policy favoring peaceful resolution of labor disputes); 29 U.S.C. § 151 (1976) (strikes undesirable as burden on economy and interstate commerce); 29 U.S.C. § 171 (1976) (governmental resources should promote arbitration and peaceful collective bargaining).

The National Labor Relations Board's policy of encouraging arbitration reflects the congressional mandate supporting the use of arbitration procedures. *See generally* Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, 34 U. CHI. L. REV. 545 (1967); Christensen, *Private Judges—Public Rights: The Role of Arbitration in the Enforcement of the National Labor Relations Act*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA 49-82 (American Arbitration Association 1976).

The Third Circuit in Avco Corp. v. Local 787, 459 F.2d 968 (3d Cir. 1972), stated the fundamental reasons supporting the federal policy favoring arbitration. *Id.* at 973. First, arbitrators are more competent than the courts to interpret labor contracts and resolve the problems of labor management relations. *Id.* Second, the process of arbitration contributes to the maintenance of industrial peace. *Id.* Third, arbitration is essential to effectuate the parties' contractual intent to settle disputes through an internal dispute resolution process. *Id.* Fourth, a suit for damages rather than an injunction ordering arbitration might not repair the harm done by a strike, and might exacerbate strife between labor and management. *Id.*; *accord* M. DOMKE, LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 1.01 (1968).

[2] *See* Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1490 (1959). Professor Cox argues that continuous bargaining is critical when the contracting parties share an ongoing and interdependent rationship. *Id.* at 1490-91.

[3] *See* Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 252 (1970) (arbitration is central institution in voluntary settlement of labor disputes); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) (federal policy favors settlement of labor disputes by arbitrators at plant level). The Supreme Court, describing the importance of arbitration in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), stated that the grievance process contained in a collective bargaining agreement is at the "very heart of the system of industrial self-government." *Id.* at 581. The vast majority of major collective bargaining agreements provide for arbitration of grievances. R. SMITH, L. MERRIFIELD & D. RORTHSCHILD, COLLECTIVE BARGAINING AND LABOR ARBITRATION 103 (1980). In 1974, a survey disclosed that only 5% of the major collective bargaining agreements failed

Trilogy[4] the Supreme Court of the United States acknowledged the contribution of grievance arbitration to the relative stability of American labor relations.[5] The Court limited the scope of judicial review of arbitration decisions by holding that an award is not reviewable on the merits.[6] The Supreme Court also found that an arbitrator's award is not enforceable only upon a showing that the arbitrator failed to act within the scope of his authority.[7] The

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to provide for grievance arbitration. *See* Cohen, *The Search for Innovative Procedures in Labor Arbitration*, 29 ARB. J. 104 (1974).

At common law, courts refused specific enforcement of agreements to arbitrate disputes arising in the future. Agar v. Machlew, 2 Sim. & St. 5,418, 423, 57 Eng. Rep. 405, 407 (ch. 1825). The Congress and a number of states subsequently abolished the common-law rule with respect to commercial disputes when the agreement provided for arbitration by an impartial third party. *See, e.g.*, United States Arbitration Act, Ch. 392, 61 Stat. 671, 9 U.S.C. § 4 (1976) (creating federal right to enforcement of arbitration agreements in written contracts concerning commerce and maritime transactions); ARK. STAT. ANN. § 34-511 (1981) (agreement to arbitrate enforceable at law); CAL. CIV. PROC. CODE § 1281 (West 1982) (arbitration agreement is valid under state law).

In Textile Workers Union v. Lincoln Mills, 352 U.S. 448 (1965), the Supreme Court addressed the proper role of the judiciary in the arbitration process. *Id.* at 450. The *Lincoln Mills* Court held that an agreement recognizing arbitration as the final step in the grievance arbitration procedure was specifically enforceable as a matter of federal law under § 301 of the Labor Management Relations Act of 1947. *Id.* at 459. *See generally*, Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Feinsinger, *Enforcement of Labor Agreements—A New Era in Collective Bargaining*, 43 VA. L. REV. 1261 (1957). Before the passage of § 301(a), federal courts decided actions seeking to compel arbitration in accordance with state law. Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 600-601 (1954).

[4] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). In the *Steelworkers Trilogy*, the Supreme Court developed the contours of the federal common law of collective bargaining agreements and enforcement. In *Enterprise Wheel*, the Court addressed the standard or review appropriate for federal courts examining a decision by an arbitrator. 363 U.S. at 596; *see infra* note 7 (discussing *Enterprise Wheel*). In *Warrior & Gulf Navigation*, the Court considered the sources an arbitrator may look to in determining whether an issue is appropriate for arbitration. 363 U.S. at 578-82; *see infra* note 12 (discussing *Warrior & Gulf*). In *American Manufacturing*, the Court examined the standard that federal courts should apply in determining whether a grievance is arbitrable under the collective bargaining contract. 363 U.S. at 566. *See generally* Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy*, 9 U.C.L.A. L. REV. 360 (1962); Hays, *The Supreme Court and Labor Law, October Term 1959*, 60 COLUM. L. REV. 901, 919-35 (1960).

[5] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) (federal policy of arbitration promotes industrial stabilization).

[6] United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960) (judiciary should not weigh merits).

[7] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). In *Enterprise Wheel*, the Supreme Court announced the finality doctrine covering judicial review of arbitration awards. *Id.* at 596. The union in *Enterprise Wheel* sought reinstatement of certain employees who left their jobs protesting the firing of another employee. *Id.* at 595. The arbitrator altered the discharges of the employees to suspensions with backpay.

Steelworkers Trilogy effectively established the Supreme Court's recognition of the importance of the finality of an arbitrator's award.[8]

The terms of the collective bargaining agreement provide the boundaries for an arbirator resolving a dispute between a company and a union.[9] Though the arbitrator may look for guidance from other sources, the award is legitimate only when the decision draws its essence from the contract.[10] In the *Steelworkers Trilogy*,[11] the Supreme Court held that an integral part of a collective bargaining agreement is the common

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Id. The arbitrator's decision came five days following expiration of the collective bargaining agreement. *Id.* The company refused to comply with the decision, arguing that the arbitrator lacked the authority to order reinstatement with backpay. *Id.* at 595-96. In upholding the arbitrator's authority, the Supreme Court ruled that reviewing courts are not to set aside an arbitrator's decision except in carefully defined circumstances. *Id.* at 596. The Court found that an arbitrator's decision is final on the merits, noting that plenary review by a court on the merits would make meaningless the doctrine that an arbitrator's decision is final. *Id.* at 599. The Court reasoned that a reviewing court's inquiry is limited to whether the arbitrator's award draws its essence from the contract. *Id.* at 598.

The "essence" test recognizes that an arbitrator derives his authority from the contract between the two parties. *Id.* at 597. Lower courts have attempted to articulate a clearer standard for judicial review with varying success. *See, e.g.*, International Union of Electrical Workers v. Peerless Pressed Metal Corp., 489 F.2d 768, 769 (1st Cir. 1973) (award set aside if found faulty); *accord* Safeway Stores v. Bakery Workers Int'l, Local 111, 390 F.2d 79, 82 (5th Cir. 1968); International Ass'n of Machinists, Dist. No. 145 v. Modern Air Transp., Inc., 495 F.2d 1241, 1244 (5th Cir.) (decision reversible if lacking in foundation or fact), *cert. denied*, 419 U.S. 1050 (1974); Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969) (decision reviewable if arbitrator shows manifest disregard of the agreement); Holly Sugar Corp. v. Distillery Workers Int'l Union, 412 F.2d 899, 903 (9th Cir. 1959) (award reversed if not plausible); International Ass'n of Machinists v. Hayes Corp., 296 F.2d 238, 243 (5th Cir. 1961) (arbitrator violates authority if decision arbitrary, capricious, or not adequately grounded in contract); Newspaper Guild v. Tribune Pub. Co., 407 F.2d 1327, 1328 (9th Cir. 1969) (award set aside if decision discloses interpretation not possible for honest intellect to reach).

[8] Commentators view the *Steelworkers Trilogy* as indicating a strong federal policy supporting arbitration to settle disputes relating to the interpretation or application of collective bargaining agreements, and as limiting the role of the courts. *E.g.*, Davey, *The Supreme Court and Arbitration: the Musings of an Arbitrator*, 36 NOTRE DAME LAW. 138, 142 (1960); Gregory, *Enforcement of Collective Agreements by Arbitration*, 48 VA. L. REV. 883, 886-88 (1962); Meltzer, *The Supreme Court, Arbitrability, and Collective Bargaining*, 28 U. CHI. L. REV. 464, 485-87 (1961); Wallen, *Recent Supreme Court Decisions on Arbitration: An Arbitrator's View*, 63 W. VA. L. REV. 295, 299 (1961); Wellington, *Judicial Review of the Promise to Arbitrate*, 37 N.Y.U. L. REV. 471, 483 (1962).

[9] *See, e.g.*, Detroit Coil Co. v. International Ass'n of Machinists & Aerospace Workers, Lodge No. 82, 594 F.2d 575, 579 (6th Cir.) (arbitrator confined to application of bargaining agreement), *cert. denied*, 444 U.S. 840 (1979); Mistletoe Express Serv. v. Motor Expressmen's Union, 566 F.2d 692, 694 (10th Cir. 1977) (arbitrator's award upheld unless contrary to provisions of contract); Torrington Co. v. Metal Prod. Workers Union, Local 1645, 362 F.2d 677, 679-80 (2d Cir. 1966) (arbitrator's authority limited to powers conferred in contract).

[10] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-97; *see supra* note 7 (courts review limited).

[11] *See supra* text accompanying notes 4-7 (discussing *Steelworkers Trilogy*).

law of the particular plant.[12] An arbitrator thus may consider the past practices of the parties to supplement and furnish the specific provisions of the labor agreement.[13] In *Norfolk Shipbuilding & Drydock Corp. v. Local No. 684, International Brotherhood of Boilermakers*,[14] the Fourth Circuit considered whether a court must admit evidence of the common law of the shop in determining whether an arbitrator exceeded the authority granted by a collective bargaining agreement.[15]

In *Norfolk Shipbuilding*, Local No. 684 of the International Brotherhood of Boilermakers (the union) filed a grievance for arbitration after Norfolk Shipbuilding & Drydock Corp. (Norfolk Shipbuilding or the company) fired a union member for twice refusing to work overtime.[16] The arbitrator found that the employee unjustifiably refused the com-

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[12] *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960); *see supra* note 4 (*Steelworkers Trilogy* outlined contours of federal law governing arbitration). In *Warrior & Gulf*, the union objected to the contracting out of certain maintenance work. 363 U.S. at 575-76. The labor agreement did not address the subject of contracting out but excluded from arbitration matters which were strictly functions of management. *Id.* at 576. The union filed suit to compel arbitration. *Id.* at 577. The district court granted the company's motion to dismiss, ruling that the agreement did not allow the arbitrator the right to review the defendant's business judgment and that contracting out was strictly a function of management within the meaning of the exclusionary language of the arbitration clause. 168 F. Supp. 702 (S.D. Ala. 1958). The Fifth Circuit affirmed the district court's decision. 269 F.2d 633 (5th Cir. 1959). The Supreme Court reversed and held that the company must submit the issue to arbitration. 363 U.S. at 585. The Court noted that the collective bargaining agreement covers the whole employment relationship. 363 U.S. at 578-79. The Court found, however, that the contract is a generalized code covering many situations unanticipated by the drafters. *Id.* The Court reasoned that in construing the agreement, the express terms of the contract are not the arbitrator's only source of law. 363 U.S. at 581-82. The Court held that the industrial common law, composed of the practices of the industry and the shop, is equally a part of the contract. *Id.*

Due to the nature and scope of the collective bargaining agreement, a number of unwritten understandings and informal arrangements develop as responses to environmental pressures and changes. Nurse, *Custom and Practice in Labour Relations in the United States: A Review of the Evidence*, 30 LAB. L.J. 38, 39 (1979). Over time, such responses are likely to give rise to a body of customs, representing the accepted norms of the workplace. *Id.* Arbitrators have found a variety of established practices by employers to constitute the common law of a shop. *See, e.g.*, Ruralist Press, Inc., 51 Lab. Arb. (BNA) 549, 551 (1968) (Holly, Arb.) (washup period); Sherwin Williams Co., 51 Lab. Arb. (BNA) 490, 493-94 (1968) (Kates, Arb.) (lunch period arrangements); Chesapeake & Potomac Telephone Co., 50 Lab. Arb. (BNA) 417, 421 (1968) (Duff, Arb.) (meal and taxi allowance); Formica Corp., 44 Lab. Arb. (BNA) 467, 468 (1965) (Schmidt, Arb.) (paid work breaks); Northland Greyhound Lines, Inc., 23 Lab. Arb. (BNA) 277, 280 (1954) (Levinson and Sigal, Arb.) (maternity leaves of absence); Coca-Cola Bottling Co., 9 Lab. Arb. (BNA) 197, 198 (1947) (Jacobs, Arb.) (notice to union required before employee's discharge for dishonesty).

[13] *See generally* Edwards, *Labor Arbitration at the Crossroads: "The Common Law of the Shop" v. External Law*, 32 ARB. J. 65 (1977).

[14] 671 F.2d 797 (4th Cir. 1982).

[15] *Id.* at 798.

[16] *Id.* The employee received a written warning in August 1979 when he refused to work overtime. *Id.* The company discharged the employee when he again refused to work overtime in October 1979. *Id.* The discharge notice stated that the reason for termination

pany's request to work additional time and was therefore subject to disciplinary action.[17] The arbitrator, however, found mitigating circumstances and changed the discharge to a suspension and ordered the company to reinstate the employee without backpay.[18]

Norfolk Shipbuilding brought suit in district court seeking modification of the arbitrator's decision and a declaration that the award exceeded the arbitrator's authority as defined by the collective bargaining agreement.[19] The district court held that since the arbitrator determined the company had cause to terminate the employee the arbitrator did not have the authority to alter the discharge.[20] The district court found that the language of the collective bargaining agreement preserved the company's right to discharge an employee for violation of a company rule.[21]

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was the employee's violation of the company rule forbidding willful failure to observe instructions, or neglecting of duty with a belligerent attitude. *Id.* at 798-99.

[17] *Id.* at 799. The collective bargaining agreement provided that the company retained the right to discharge any employee for cause, and such right of discharge included the right to suspend or otherwise discipline an employee in lieu of discharge. 671 F.2d at 799. The agreement also stated that violation of company rules not inconsistent with the terms of the collective bargaining agreement constituted just cause for discharge. *Id.* In addition to the provisions concerning the company's right to discharge or discipline an employee, the agreement between Norfolk Shipbuilding and the union also withheld from the arbitrator the power to change, alter or amend the language of the contract. Appendix at 33, Norfolk Shipbuilding & Drydock Corp. v. Local No. 684, Int'l Bhd. of Boilermakers, 671 F.2d 797 (4th Cir. 1982).

At common law, employees were subject to discharge without notice at any time. Summers v. Phenix Ins. Co., 50 Misc. 181, 182, 98 N.Y.S. 226, 227 (Sup. Ct. 1906). With the passage of the National Labor Relations Act in 1935, Congress prohibited employer discharge of employees for the purpose of encouraging or discouraging union membership. 29 U.S.C. § 158(a)(3) (1976). The Act also encourages the collective bargaining process by requiring that the parties bargain in good faith. *Id.* § 158(a)(5). The National Labor Relations Board's policy favoring grievance arbitration promoted the inclusion of grievance arbitration procedures in collective bargaining agreements; *see supra* note 1 (NLRB favors grievance arbitration process). The grievance procedure further circumscribed the employer's freedom to discharge by requiring that the parties resolve the differences resulting in discharge. *See* Wilder, *Discharge in the "Law" of Arbitration*, 20 VAND. L. REV. 81, 82 (1966).

[18] Appendix at 13, Norfolk Shipbuilding & Drydock Corp. v. Local No. 684, Int'l Bhd. of Boilermakers, 671 F.2d 797 (1982). In reducing the disciplinary sanction from discharge to suspension, the arbitrator noted that the employee's attendance record was excellent. *Id.* The arbitrator also found the employee generally cooperative concerning overtime work, except for the two incidents. *Id.* at 14. The arbitrator thus concluded that these mitigating circumstances required a lesser penalty. *Id.*

[19] 671 F.2d at 799. Section 301(a) of the Labor Management Relations Act permits either party to bring suit in district court for violation of a collective bargaining agreement. 29 U.S.C. § 185(a) (1976).

[20] Norfolk Shipbuilding & Drydock Corp. v. Local No. 684, Int'l Bhd. of Boilermakers, No. 30-621-N (E.D. Va. Feb. 4, 1981).

[21] *Id.* The district court found that in light of the restrictive clause limiting the arbitrator's authority and the clear language of the contract, no evidence relating to the common law of the shop would preclude the company from discharging the employee for violation of company rules. *Id.*

In reaching its decision, the district court refused to admit evidence offered by the union of the company's past practices in disciplining employees.[22] The union sought admission of evidence indicating that the company did not discharge consistently employees violating work rules to demonstrate that the arbitrator did not exceed his authority in modifying the discipline imposed by Norfolk Shipbuilding.[23]

On appeal, the Fourth Circuit reversed the district court's ruling excluding admission of evidence of the common law of the shop.[24] The *Norfolk Shipbuilding* majority recognized that the doctrine of finality limits the court's review of an arbitrator's award.[25] The Fourth Circuit noted that the court's inquiry only concerned whether the arbitrator's decision drew its essence from the agreement between the company and the union.[26] The majority in *Norfolk Shipbuilding* found that the Supreme Court's decision in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*[27] required admission of evidence concerning the company's past practices in disciplining employees.[28] The Fourth Circuit explained that the common law of the shop is an integral part of the collective bargaining agreement between the union and the company.[29] The

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[22] *Id.* The union offered evidence to show that discharge was not the usual disciplinary sanction for employees violating company rules, including refusal to work overtime. *Id.* The union attempted to prove that Norfolk Shipbuilding traditionally followed a policy of progressive discipline by administering more severe penalties for successive violations of company rules. *Id.* The union also sought to introduce evidence that Norfolk Shipbuilding accepted three previous arbitration decisions in which the arbitrator reduced the penalty of discharge to a period of suspension without pay. 671 F.2d at 799.

[23] *Id.*

[24] 671 F.2d at 800.

[25] *Id.* at 799; *see supra* note 7 (plenary review by court makes meaningless doctrine that arbitrator's decision is final).

[26] *Id.* at 799; *see supra* text accompanying notes 6-7 (*Steelworkers Trilogy* found arbitrator's award must draw essence from contract); *see also* Chambers v. Beaunit Corp., 404 F.2d 128, 130-31 (6th Cir. 1968) (encouragement of good industrial relations makes imperative that courts give effect to bargained for and agreed upon methods of settling grievances); Western Iowa Pork Co. v. National Bhd. Packinghouse & Dairy Workers, Local No. 525, 366 F.2d 275, 277 (8th Cir. 1966) (decision of arbitrator will not be questioned by courts as long as arbitrator acted within scope of authority); United Steelworkers v. Caster Mold & Mach. Co., 345 F.2d 429, 431 (6th Cir. 1965) (per curiam) (arbitrator may broadly construe agreement with all doubts being resolved in favor of arbitrator's authority).

[27] 363 U.S. 574 (1960); *see supra* note 12 (discussion of *Warrior & Gulf Navigation*).

[28] 671 F.2d at 799-800.

[29] *Id.* In *Warrior & Gulf*, Mr. Justice Douglas, writing for the majority, asserted that too many problems and too many unforeseen contingencies arise to make the words of the collective bargaining agreement the exclusive source of rights and duties. 363 U.S. at 579-80 (quoting Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-99 (1959)). Due to the institutional characteristics and nature of the bargaining process, a common law of the shop is needed to implement and furnish the content of the agreement. 363 U.S. at 579-80 (quoting Cox, *supra* at 1499). Mr. Justice Douglas also drew from the late Dean Shulman of the Yale Law School, who points out that the contract resulting from negotiations is a compilation of diverse provisions providing more or less specific standards which

Norfolk Shipbuilding court concluded that absent consideration of the commmon law of the shop, the district court could not determine whether the arbitrator breached the authority granted under the contract in reducing the employee's disciplinary sanction from a discharge to a suspension.[30] The majority, therefore, remanded the case to the district court to determine whether the collective bargaining agreement incorporated any past practices by Norfolk Shipbuilding giving the arbitrator authority to modify the penalty imposed by the company.[31]

The dissent in *Norfolk Shipbuilding* rejected the majority's holding that a court must consider evidence relating to the common law of the shop in deciding whether an arbitrator's decision exceeded the authority conferred by an agreement.[32] The dissent pointed out that the express terms of the contract between Norfolk Shipbuilding and the union granted the company discretion to discharge or suspend an employee violating company work rules.[33] The dissent argued that the arbitrator's reduction of the disciplinary sanction from discharge to suspension effectively inserted into the collective bargaining agreement a system of progressive discipline.[34] The dissent noted that the union sought such a disciplinary system during the prior contract negotiations, but Norfolk Shipbuilding specifically rejected the proposal.[35] The dissent contended

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require reason and judgment in their application. *Id.* at 580; *see* Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1005 (1955)); Shulman argues that some agreements do little more than leave problems to future consideration with an expression of hope and faith. 363 U.S. at 580; Shulman, *supra* at 1006. *See generally* Aaron, *Arbitration Decisions and the Law of the Shop*, 29 LAB. L.J. 536 (1978); Strong, *Industrial Common Law*, 12 LAB. L.J. 308 (1961).

[30] 671 F.2d at 800.

[31] *Id.*

[32] *Id.* at 800-801; *see also* Detroit Coil Co. v. International Ass'n of Machinists & Aerospace Workers, Lodge No. 82, 594 F.2d 575, 579 (6th Cir. 1979) (past practices of shop cannot act as waiver of plain and unambiguous contractual provision).

[33] 671 F.2d at 800; *see supra* note 17 (discussing contract provision preserving company's flexibility to impose disciplinary penalties).

[34] 671 F.2d at 800. Progressive discipline usually provides that the employer must give a warning for the first offense, a layoff for the second offense, and a discharge for the third offense, or some other procedure allowing an increase in the severity of the punishment for each additional violation. *See* Wilder, *supra* note 17 at 87. The progressive discipline impresses upon the employee at the time of each offense the necessity of correcting the violation, thus providing additional opportunity and incentive to comply with the company's rules. Commercial Steel Casting Co., 39 Lab. Arb. (BNA) 286, 290 (1962) (Kates, Arb.). If the contract provides for a system of progressive discipline, the arbitrator usually will not allow the company to vary the graduated disciplinary sanctions. *Id.*

[35] 671 F.2d at 800. The dissent noted that the Second Circuit in Torrington Co. v. Metal Prod. Workers Union Local 1645, 362 F.2d 677 (2d Cir. 1966), found that while an arbitrator may resolve a question never raised during negotiations on the basis of prior practice, the arbitrator should not assume the contract confers a benefit which the parties discussed during negotiations but omitted from the final agreement. *Id.* at 681. An arbitrator may look to the negotiating history to determine the intent of the parties in applying the substantive provisions of the bargaining agreement. *See, e.g.*, Francesco's B., Inc. v.

that the majority's decision essentially allowed the union the opportunity to achieve through arbitration a gain denied at the bargaining table.[36]

The dissent also asserted that the majority's conclusion in *Norfolk Shipbuilding* contradicted previous Fourth Circuit decisions concerning an arbitrator's authority to vary a disciplinary action imposed by an employer.[37] In *Monongahela Power Co. v. Local No. 2332*,[38] the collective bargaining agreement prohibited strikes and work stoppages and provided the employer with an unqualified right to discharge or discipline any employee engaged in an illegal work stoppage.[39] The Fouth Circuit in *Monongahela Power* found that under the collective bargaining agreement, the right to discipline employees engaged in an illegal strike rested solely with the employer and that the arbitrator had no right to review, amend, or alter the discipline imposed by the employer.[40] Similarly, in *Textile Workers Union, Local 1386 v. American Thread Co.*,[41] the Fourth Circuit denied enforcement of an arbitrator's decision altering a company's displinary penalty against an employee for misconduct involving the improper operation of a machine.[42] The collective bargaining agreement in *American Thread* granted the company the right to discipline or discharge employees for just cause.[43] The *American*

Hotel & Restaurant Employees & Bartenders Union, Local 28, 659 F.2d 1383, 1388-89 (9th Cir. 1981) (arbitrator may consider parties' intention in drafting agreement); United Auto. Workers v. White Motor Corp., 505 F.2d 1193, 1193 (8th Cir. 1974) (arbitrator may examine agreement history), *cert. denied*, 421 U.S. 921 (1975); *see also* Kagel, *Arbitration and Public Policy* 10, 12 n.4 (Proceeding of the Fourteenth Annual Meeting National Academy of Arbitrators (1961)) (parties not subject to questions omitted from agreement).

[36] 671 F.2d at 800.

[37] *Id.* at 800-801.

[38] 566 F.2d 1196 (4th Cir. 1976). In *Monongahela Power*, the employer imposed suspensions on all employees participating in an illegal strike. *Id.* at 1197-98. To minimize interruption to business, the company staggered the affected employees' suspension over a period of several months. *Id.* at 1198. The arbitrator upheld the company's right to discipline the employees but ordered the company to conclude all suspensions within 60 days. *Id.*

[39] *Id.* at 1199-1200.

[40] *Id.* at 1200. The *Monongahela Power* court reasoned that the reservation of a right to either discipline or discharge for cause is ineffective if the arbitrator reviews the company's disciplinary action on the basis of appropriateness. *Id.* The Fourth Circuit in *Monongahela Power* concluded that to allow the arbitrator to review the appropriateness of the penalty in light of the contract language would violate the specific provisions of the collective bargaining agreement. *Id.* at 1200-1201; *see also* City Elec., Inc. v. Local Union 77, Int'l Bhd. of Elec. Workers, 517 F.2d 616, 619 (9th Cir.) (arbitrator may give his own construction to ambiguous language but is without authority to disregard or modify plain and unambiguous contract provisions), *cert. denied*, 423 U.S. 894 (1975).

[41] 291 F.2d 894 (4th Cir. 1961). In *American Thread*, the company discharged an employee for a third offense in permitting a lap to run through a carding machine. *Id.* at 895. The arbitrator found that no question existed concerning employee's guilt but found that the offense did not amount to just cause for discharge. *Id.*

[42] *Id.* at 901.

[43] *Id.* at 897-98. In *American Thread*, the agreement stated that just cause for termination existed when an employee failed to perform his job properly in accordance with company standards. *Id.* at 898.

Thread court ruled that the arbitrator exceeded his authority by distinguishing the just cause required for discharge and the just cause needed to impose a lesser penalty.[44] The *Norfolk Shipbuilding* dissent argued that in light of the clear and unambiguous language contained in the contract between Norfolk Shipbuilding and the union, the *Monongahela Power* and *American Thread* decisions precluded consideration by the arbitrator of evidence outside the collective bargaining agreement.[45]

The divergence between the majority and the dissent in *Norfolk Shipbuilding* reflects the continuing inconsistency by the federal courts in determining the finality of arbitration awards.[46] The *Norfolk Shipbuilding* majority's decision illustrates a broad application of the Supreme Court's finding in *Warrior & Gulf Navigation* that the express provisions of the collective bargaining agreement are not the sole repository of the requirements of the contract.[47] Other courts also support the proposition that contract language restricting interpretation of the labor agreement to the express provisions of the document will not constrain significantly the authority of the arbitrator.[48] In *Holly Sugar Corp. v. Distillery Workers International Union*,[49] the Ninth Circuit held

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[44] *Id.* at 899-901. The agreement in *American Thread* provided that the arbitrator should make no award affecting a change, modification, or addition to the agreement. *Id.* at 898. The agreement also limited the arbitrator strictly to the facts submitted in the hearing, the evidence before him, and the terms of the contract. *Id.* The Fourth Circuit in *American Thread* concluded that the Supreme Court's decision in the *Steelworkers Trilogy* did not intend that the courts allow an arbitrator to violate the clear and unambiguous terms of the collective bargaining agreement. *Id.* at 899.

[45] 671 F.2d at 800.

[46] *See generally* Aaron, *Judicial Intervention in Labor Arbitration*, 20 STAN. L. REV. 41 (1967); Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427 (1969).

[47] 363 U.S. at 578. In implementing the *Warrior & Gulf Navigation* Court's finding that the common law of the shop is an integral part of the collective bargaining agreement, courts rely upon several aids in addition to past practices and the negotiation history to ascertain the intent of the parties. *See, e.g.*, Marble Prod. Co. v. Local 155, United Stone Workers, 335 F.2d 468, 472 (5th Cir. 1964) (courts may consider relevant legislation if probative of the sense of the agreement); Truck Drivers Local Union No. 100 v. Quick-Freeze Cold Storage, Inc., 375 F. Supp. 725, 730 (S.D. Ohio 1974) (industrial efficiency considerations relevant to extent collective bargaining agreement permits).

[48] *See* Lodge No. 12, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc., 292 F.2d 112, 118 (5th Cir.) (no-modification clause does not prevent arbitrator from implying rights not expressed in collective bargaining agreement), *cert. denied*, 368 U.S. 926 (1961); *see also* R. GORMAN, BASIC TEXT ON LABOR LAW 593 (1976) (doubtful that award violates modification clause if arbitrator considers only contract, negotiations, and plant practices).

[49] 412 F.2d 899 (9th Cir. 1969). In *Holly Sugar*, the controversy pertained to the time period covered by two successive collective bargaining agreements and concerned a disagreement about the proper wage and job classification of an employee. *Id.* at 901. The arbitrator found that the company created a new job classification in violation of the agreement and excused the union's delay in the filing of the grievance. *Id.* at 904. The Ninth Circuit deferred to the arbitrator's award, holding that the arbitrator was free to find the union's delay justified by the employer's failure to notify the union of the challenged action. *Id.*

that an arbitrator had implied authority to excuse a union's failure to file a grievance within the requisite time, even in the face of a no-modification provision in the collective bargaining agreement.[50] The *Holly Sugar* court found that an arbitrator's consideration of prior practices, the history of the contract negotiations, and provisions of the current collective bargaining agreement met the requirement that the award must draw its essence from the contract.[51] The Ninth Circuit in *Holly Sugar* concluded that once the essence test is satisfied, the court's permissible scope of judicial review ends.[52]

The Second Circuit's decision in *Torrington v. Metal Products Workers Union, Local 1645*[53] is representative of a contrary approach which emphasizes closer judicial scrutiny of the arbitrator's authority.[54] In *Torrington*, the collective bargaining agreement contained an express limitation on the arbitrator's authority.[55] The arbitrator, however, looked to the common law of the shop to determine whether the contract pro-

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[50] *Id.* at 904-905.

[51] *Id.* at 905. The *Holly Sugar* court relied on the dissent in Torrington Co. v. Metal Prod. Workers Union, Local 1645, 362 F.2d 677, 683-84 (2d Cir. 1966) (Feinberg, J., dissenting), for the correct statement of the law. 412 F.2d at 905. *See infra* text accompanying notes 52-56 (discussing majority opinion in *Torrington*). The Ninth Circuit in *Holly Sugar* agreed with the *Torrington* dissent that an arbitrator may consider extrinsic evidence even in light of a contract's no-modification clause. 412 F.2d at 905.

[52] *Id.*

[53] 362 F.2d 677 (2d Cir. 1966). In *Torrington*, the Second Circuit affirmed the district court's ruling, which refused enforcement of an arbitrator's award. *Id.* at 682. After examining past practices and the negotiation history of the parties, the arbitrator held that the collective bargaining agreement contained an implied provision that the employer would allow employees one hour off with pay to vote on election day. *Id.* at 679.

[54] *See also* Local 342, UAW v. T.R.W., Inc., 402 F.2d 727 (6th Cir. 1968), *cert. denied*, 395 U.S. 910 (1969); Amanda Bent Bolt Co. v. Local 1549, UAW, 451 F.2d 1277 (6th Cir. 1971). In *T.R.W.*, the arbitrator found that the employees in question violated the strike provision of their agreement. 402 F.2d at 728-29. the agreement provided that the employer could take disciplinary action, including discharging any employee violating the strike provision. *Id.* at 728. The arbitrator subsequently altered the discharge, ordering reinstatement of the employees. *Id.* at 729. In reversing the arbitrator's modification, the court held that the language of the contract gave the company the right to discharge the employee. *Id.* at 731-32. The court noted the language of the contract was not ambiguous and did not require interpretation by the arbitrator. *Id.* at 731.

Similarly, in *Amanda Bent Bolt*, twenty-eight employees violated the no-strike clause included in the collective bargaining agreement and were therefore subject to discharge. 451 F.2d at 1278. The Sixth Circuit concluded that the contract reserved determination of the severity of the penalty to the company and was not the prerogative of the arbitrator. *Id.* at 1280. The Sixth Circuit therefore vacated the arbitrator's decision reinstating the discharged employees, holding that the collective bargaining agreements no-modification clause precluded the arbitrator from altering the employees discipline. *Id.*

[55] 362 F.2d at 681. In *Torrington*, the contract contained a standard no-modification clause limiting the arbitrator's authority to the provisions of the collective bargaining agreement. 362 F.2d at 678 n.2. The *Torrington* court concluded that the clause indicated the parties did not intend to confer upon the arbitrator unreviewable power to determine the scope of his authority with respect to a particular grievance. *Id.* at 681 n.7.

hibited the company's unilateral decision to discontinue its policy of giving employees time off with pay to vote on election day.[56] The Second Circuit found the award reviewable and reversed the arbitrator's decision to interpret the express terms of the agreement in light of the parties' prior practices.[57] The *Torrington* court concluded that the arbitrator's award implied into the collective bargaining agreement a benefit which the union did not insist upon in contract negotiations.[58]

The *Norfolk Shipbuilding* decision represents a retreat from previous Fourth Circuit decisions which strictly upheld the Supreme Court's admonition that an arbitrator may not dispense his own brand of industrial justice.[59] The Second Circuit's decision in *Torrington* reflects a sounder application of the Supreme Court's decisions in the *Steelworkers Trilogy*.[60] The *Torrington* rationale correctly recognizes the proper role of past practices in interpreting a collective bargaining agreement.[61] The Second Circuit noted that an arbitrator appropriately utilizes the common law of the shop to supplement or interpret an ambiguity in the agreement, but not to alter an express and unambiguous provision of the contract.[62] The *Torrington* decision upholds the sanctity

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[56] *Id.* at 681.

[57] *Id.* at 682. The *Torrington* court concluded that the arbitrator's decision on the merits is final concerning questions of fact. *Id.* at 680. However, noting that the agreement limited the arbitrator's authority, the court found that the standard of review established by the Supreme Court in *Enterprise Wheel* authorized judicial examination of an award when the arbitrator exceeded the limits of his contractual authority. *Id.* at 680.

[58] *Id.* at 682; *see* Truck Drivers Union Local 784 v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964). In *Ulry-Talbert*, the arbitrator held that the company justifiably disciplined the employee but altered the penalty from discharge to reinstatement without backpay. *Id.* at 563. The collective bargaining agreement in *Ulry-Talbert* precluded the arbitrator from substituting his judgment for that of the employer except when management acted arbitrarily and in bad faith or in violation of the contract's terms. *Id.* at 564. Noting that the parties had drawn the contract narrowly, the Eighth Circuit found the arbitrator's award contradicted the clear and unambiguous language of the collective bargaining agreement. *Id.* at 566.

[59] *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); *see supra* text accompanying notes 4-7 (*Steelworkers Trilogy* limited court's scope of review unless arbitrator's award fails to draw essence from agreement); *see* text accompanying notes 37-44 (discussing *Mononghela Power* and *American Thread*).

[60] *See* Torrington Co. v. Metal Prod. Workers Union, Local 1645, 362 F.2d 677 (2d Cir. 1966). The *Torrington* court stated that the question of an arbitrator's authority is a jurisdictional problem. *Id.* at 680 n.6. The Second Circuit reasoned that judicial review is appropriate after the arbitrator's decision since the court receives the arbitrator's interpretive skills concerning the matter of contractual authority. *Id.* The *Torrington* court concluded that to limit judicial review contradicted the Supreme Court's rationale in *Enterprise Wheel*. *Id.*; *see supra* note 7 (*Enterprise Wheel*).

[61] *See supra* text accompanying notes 56-58 (arbitrator may not alter express provisions of collective bargaining agreement).

[62] 362 F.2d at 682; *see* Syufy Enter. v. Northern Cal. State Ass'n of IATSE Locals, 631 F.2d 124, 126 n.1 (9th Cir.) (distinguishes cases in which contract contained no modification clause and therefore arbitrator obliged to discover ambiguity), *cert. denied*, 451 U.S. 983 (1981); *see also* Boise Cascade Corp. v. United Steelworkers, Local 7001, 588 F.2d 127, 129

of the contract and properly enforces the rights and responsibilities negotiated by the parties under the collective bargaining agreement.[63] The Second Circuit's approach also promotes industrial stability by allowing the parties to negotiate an element of certainty into the agreement by assuring that the parties must adhere to the contract's clear and unambiguous language.[64]

The Fourth Circuit's decision in *Norfolk Shipbuilding* allows an arbitrator to expand significantly the terms of a collective bargaining agreement by going beyond the express provisions of the contract.[65] An arbitrator thus may imply rights not expressed in the agreement, even in the face of a clause expressly forbidding the arbitrator from modifying the terms of the contract.[66] Applying the finality doctrine accorded to arbitration awards, the Fourth Circuit's decision in *Norfolk Shipbuilding* allows an arbitrator to alter subjectively the express terms of the written agreement and remain immune from judicial review.[67] By allowing the common law of the shop to dictate despite the explicit terms of the contract, the *Norfolk Shipbuilding* decision forces a party involuntarily to abandon any flexibility which the party bargained for under the agreement.[68]

The *Norfolk Shipbuilding* court's decision permitting an arbitrator

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(5th Cir.) (arbitrator may consider extrinsic evidence when contract provision arguably ambiguous), *cert. denied*, 444 U.S. 830 (1979); Local 342, UAW v. T.R.W., 402 F.2d 727, 729 (6th Cir. 1968) (no interpretation needed where contract language unambiguous); Aeronautical Machinists Lodge 709 v. Lockheed-Georgia Co., 521 F. Supp. 1327, 1330 (N.D. Ga. 1981) (examination of common law of shop inappropriate when no finding of ambiguous language).

[63] *See* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 363 (3d ed. 1973) (general denial of power to add to, subtract from, or modify agreement provides special justification for observance of parol evidence rule by arbitrators); *see also supra* note 40 (*Monongahela Power* court noted contract's reservation of rights to discipline is ineffective if arbitrator alters disciplinary penalty).

[64] *See* Torrington Co. v. Metal Prod. Workers Union, Local 1645, 362 F.2d 677 (2d Cir. 1966). In *Torrington*, the Second Circuit noted that limiting the arbitrator to the confines of the collective bargaining agreement would stimulate voluntary resort to labor arbitration and strengthen the labor-management process. *Id.* at 682. *See supra* note 1-3 (grievance arbitration preferred means of settling industrial disputes).

[65] *See supra* note 48 (court may imply rights not expressed in agreement).

[66] *See* Lodge No. 12 Int'l Ass'n of Machinists v. Cameron Iron Works, Inc., 292 F.2d 112, 118 (5th Cir. 1961) (standard no-modification clause not major constraint on authority of arbitrator).

[67] *See* Textile Workers Union, Local 1386 v. American Thread Co., 291 F.2d 894, 901 (4th Cir. 1961) (arbitrator manifested disregard for contract and exceeded limits of authority); *see also* Smith & Jones, *Management and Labor Appraisals and Criticisms of Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115, 1119-26 (1964) (management fears arbitrator authority without meaningful review).

[68] *See supra* text accompanying notes 34-36 (*Norfolk Shipbuilding* dissent argues majority's decision grants union benefit denied by company); *see also* Note, *The Supreme Court Speaks on Labor Arbitration—Exeunt the Courts*, 13 STAN. L. REV. 635, 644-45 (1961) (allowing arbitrator to infringe on management functions limits flexibility essential to efficient business operations).

to rely on past practices to vary the contract terms demonstrates the importance of companies imposing consistent penalties in employee disciplinary actions.[69] The Fourth Circuit's decision also suggests that a company desiring to retain flexibility in discipline matters should include a provision in the labor agreement specifically precluding an arbitrator from altering a disciplinary sanction.[70] In light of the *Norfolk Shipbuilding* court's broad language, however, an arbitrator still may alter clear and unambiguous contract language limiting the authority granted by the collective bargaining agreement.[71]

BENTON J. MATHIS, JR.

B. *Assessment of Civil Contempt Fines Under Section 301 of Labor Management Relations Act of 1947*

Congress intended passage of the Labor Management Relations Act of 1947 (LMRA)[1] to encourage employers and unions to settle labor disputes peacefully through collective bargaining agreements.[2] Under the terms of a collective bargaining agreement, the employer frequently bargains for the union's waiver of the right to strike to ensure the

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[69] *See supra* text accompanying notes 30-31 (on remand district court to decide whether agreement incorporated past practices allowing arbitrator to alter disciplinary penalty).

[70] *See* Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751, 802 (1965) (judicial review appropriate when arbitrator exceeded authority under clear and specific provision of agreement); *see also supra* note 58 (award violative of narrowly drawn clause limiting arbitrators authority).

[71] *See supra* text accompanying notes 24-31 (*Norfolk Shipbuilding* majority requires consideration by court of past practices in determining arbitrator's authority).

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[1] Labor Management Relations Act, 1947 (Taft-Hartley), Pub. L. No. 101, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1976 & Supp. III 1979).

[2] 29 U.S.C. § 171(a) (1976); *see* H.R. 3020, 80th Cong., 1st Sess. 1 (1947), *reprinted in* 1947 U.S. CODE CONG. & AD. NEWS 135, 135 (purpose of Taft-Hartley Act is to provide orderly and peaceful procedures for preventing employers and employees from interfering with each other's legitimate rights); S. REP. NO. 105, 80th Cong., 1st Sess. 14 (1947), *reprinted in* I N.L.R.B. LEGISLATIVE HISTORY OF LABOR MANAGEMENT RELATIONS ACT OF 1947, 420 (1948) (microfiche) (through Taft-Hartley Act Congress advanced collective bargaining agreements as most effective method of solving industrial relations strife) [hereinafter cited as LEGISLATIVE HISTORY].

Prior to Congress' enactment of the Labor Management Relations Act (LMRA), the Norris-LaGuardia and the Wagner Acts were the bases of national labor policy. Comment, *Labor Law: Individual Liability for Wildcat Strikes Under Section 301 of the Labor Management Relations Act*, 21 WASHBURN L.J. 434, 434 (1982) [hereinafter cited as *Wildcat Strikes*]; *see* Norris-LaGuardia Act of 1932, Pub. L. No. 65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1976 & Supp. III 1979); National Labor Relations Act of

employer's uninterrupted business operation.[3] The consideration for the union's promise not to strike is the employer's promise to submit the union's grievances to binding arbitration.[4] To make the provisions of a

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1935 (Wagner Act), Pub. L. No. 198, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1976 & Supp. III 1979). The Norris-LaGuardia Act (Norris-LaGuardia) declared the existence of a national labor policy designed to promote the rights of employees to organize without employer interference and to promote collective bargaining agreements. Norris-LaGuardia Act, § 2, 29 U.S.C. § 102 (1976). In addition, Norris-LaGuardia prohibited federal courts from issuing injunctions against labor unions in labor disputes. *Id.* § 1, 29 U.S.C. § 101 (1976). Section 101 provides, in part, that no federal court has jurisdiction to issue a restraining order or an injunction in a case involving a labor dispute except in strict conformity with the provisions of the Act. *Id.* A general interpretation of the congressional purpose in enacting Norris-LaGuardia suggests that Congress intended to curtail judicial abuse of the injunctive power while facilitating unions' freedom to organize and bargain collectively. *See* Louden and Flaherty, *Sympathy Strikes, Arbitration Policy, and the Enforceability of No-Strike Agreements—An Analysis of* Buffalo Forge, 45 GEO. WASH. L. REV. 633, 636-37 (1977) (Norris-LaGuardia intended to curb federal courts' abuse of injunctive power while leaving unions free to pursue organizational and bargaining efforts); *see also* Boys Mkts. v. Retail Clerks Local 770, 398 U.S. 235, 253 n.22 (1970) (citing Report of Special *Atkinson-Sinclair* Committee, A.B.A. Labor Relations Law Section—Proceedings 226 (1963)). The *Boys Markets* Court also recognized that Congress enacted Norris-LaGuardia primarily because of widespread public disapproval of the judicial tendency to enjoin strikes in accordance with judicial views of social and economic policy. *Id.* The Wagner Act also protected employees' rights of self-organization and categorized an employer's refusal to bargain collectively as an unfair labor practice. *See* 29 U.S.C. § 151, 157-158 (1976). The Norris-LaGuardia and Wagner Acts encouraged a substantial increase of union membership in the United States, which in turn precipitated an increase in the number of strikes nation-wide. Note, *Labor Law—§ 301 of the Labor Management Relations Act—Individual Liability of Wildcat Strikers*, 49 TENN. L. REV. 179, 181-82 (1981) [hereinafter cited as *Individual Liability*]. Congress perceived a need to curtail strike activity and responded by passing the Taft-Hartley Act of 1947. *See Individual Liability, supra*, at 181-82 (Taft-Hartley Act was congressional response to perceived need for legislation designed to decrease the number of strikes in the United States); S. REP. NO. 105, *supra*, at 2, LEGISLATIVE HISTORY, *supra*, at 408 (need for congressional action acute as a result of increased industrial strife); 29 U.S.C. §§ 141-187 (1976).

While the Taft-Hartley Act reinforced the national policy in favor of collective bargaining and prevention of employer interference with employee rights, the Act also stressed the responsibility of labor organizations to help prevent industrial strife and to promote the free flow of commerce. *See* 29 U.S.C. § 141(b) (1976). In section 141(b), Congress encouraged labor and management to avoid industrial strife and promote the free flow of commerce by recognizing each other's legitimate rights. *Id.* Congress also identified a national policy mandating that both labor and management decide that neither has the right to engage in practices that jeopardize the public interest. *Id.* The Taft-Hartley Act specifically extended the definition of unfair labor practice to encompass unfair labor practices by labor organizations, including union refusal to bargain collectively with an employer and unions' inducement of individual employees to strike. *See* 29 U.S.C. § 158(b)(3)-(4)(i) (1976).

[3] *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1956) (collective bargaining contracts frequently include no-strike clauses to aid employer in maintenance of regular production schedules); S. REP. NO. 105, *supra* note 2, at 16, LEGISLATIVE HISTORY, *supra* note 2, at 422 (chief advantage employer can expect from collective bargaining agreement is assurance of uninterrupted operation during term of agreement).

[4] *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957) (employer's agreement to arbitrate grievance disputes is in exchange for union's agreement not to

collective bargaining agreement enforceable, Congress enacted section 301 of the LMRA (section 301).[5] Section 301 confers jurisdiction on the federal courts to resolve lawsuits brought by or against labor organizations for violations of collective bargaining agreements.[6] Thus, when a union subject to a no-strike provision in a collective bargaining agreement engages in a work stoppage despite the provision, the employer may sue the union for breach of the collective bargaining agreement under section 301.[7]

The principle remedies available to the employer if a union breaches the no-strike provision are damages actions or injunctive relief.[8] The

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strike). "Grievances" are disputes concerning the proper interpretation or application of the collective bargaining agreement. S. CABOT, LABOR MANAGEMENT RELATIONS ACT MANUAL—A GUIDE TO EFFECTIVE LABOR RELATIONS ¶ 17.1[1][a] at 17-2 (1978). Arbitration is a procedure voluntarily selected by the parties to a collective bargaining agreement that permits the parties to submit grievances to a fair and impartial third person for resolution. *Id.* ¶ 18.1 at 18-2; *see infra* note 20 (arbitration is favored method for promoting industrial peace).

[5] *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 453 (1957). The Supreme Court in *Lincoln Mills* held that the primary purpose for Congress' enactment of section 301 was to provide a procedure for labor and management to enforce collective bargaining agreements. *Id.*

[6] 29 U.S.C. § 185(a) (1976). The Senate report on the LMRA stated that § 301 would redress the inequality of bargaining power between employers and unions caused by the Wagner Act. *See* S. REP. NO. 105, *supra* note 2, at 1-2, LEGISLATIVE HISTORY, *supra* note 2, at 407-08. The report noted that the Wagner Act granted relief to employees and unions for management's undesirable labor practices while denying management any redress for the union's undesirable actions. *Id.* By authorizing actions against labor unions, § 301 grants employers a remedy for union activity that violates the collective bargaining agreement and promotes the mutual responsibility necessary to vitalize the agreement. *Id.* at 16-17, LEGISLATIVE HISTORY, *supra* note 2, at 422-23. The Supreme Court has held that § 301(a) is more than jurisdictional because § 301(a) empowers federal courts to devise a body of federal law allowing management and labor to enforce collective bargaining agreements. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 450-51 (1957).

In addition to providing a procedure to enforce collective bargaining agreements, § 301 shields individual union members from liability for damages assessed against the union. *See* 29 U.S.C. § 185(b) (1976) (courts may not enforce money judgments entered against individual union members). The problem underlying congressional passage of § 301 evolved in the *Danbury Hatters* case. *See infra* text accompanying notes 101-03 (*Danbury Hatters* case).

[7] *See* Sinclair Oil Corp. v. Oil Chemical & Atomic Workers Int'l Union, 452 F.2d 49, 51 (7th Cir. 1971) (no strike clauses in collective bargaining agreements bind unions). While § 301 contemplates suits by employers against unions, the Supreme Court has held that § 301 also allows individual employees to sue employers to enforce collective bargaining agreements. *See also* Smith v. Evening News Ass'n, 371 U.S. 195, 200 (1962) (§ 301 covers suits to vindicate individual employee rights arising from collective bargaining contracts). The Supreme Court also has held that employees may sue a union under § 301 for breaching the duty of fair representation. *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564-65 (1976) (proof of breach of union's duty of fair representation entitles employees to appropriate remedy under § 301); Vaca v. Sipes, 386 U.S. 171, 187-88 (1967) (employee suit against union for breach of duty of fair representation states cause of action under § 301).

[8] *See Wildcat Strikes*, *supra* note 2, at 439 (damages action is alternative to injunctive relief under § 301).

Supreme Court in *Atkinson v. Sinclair Refining Co.*[9] stated that an employer's damages action is permissible under Section 301.[10] The Court held, however, that section 301 did not authorize a damages award against individual union members when the union authorized or caused an unlawful strike.[11] The *Atkinson* Court did not address the question of whether union members would be liable individually for a wildcat strike that occurred without union authorization.[12] In *Complete Auto Transit, Inc. v. Reis*,[13] the Supreme Court resolved the issue by holding that section 301 does not permit damages actions against union members who engage in wildcat strikes.[14] The *Reis* Court emphasized the legislative

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[9] 370 U.S. 238 (1962).

[10] *Id.* at 239-41. The *Atkinson* Court held that the plaintiff employer stated a cause of action under § 301 by alleging that the union caused a work stoppage despite a clause in the collective bargaining agreement in which the union promised not to strike over arbitrable issues. *Id.* at 240-41. The Court rejected the defendant union's argument that the collective bargaining agreement bound the employer to arbitrate his claim for damages. *Id.* The Court noted that the issue of whether an employer must arbitrate a claim is a matter for the courts to decide. *Id.* at 241.

[11] *Id.* at 247-49. The *Atkinson* Court stated that national policy requires that union liability for damages arising from violations of a no-strike clause not extend to the union's officers and members. *Id.* at 249. The Court emphasized that Congress intended to avoid another *Danbury Hatters* situation. *Id.* at 248; *see supra* note 6 (purpose of passage of § 301); *infra* text accompanying notes 101-03 (*Danbury Hatters* case).

[12] 370 U.S. at 249 n.7.

[13] 451 U.S. 401 (1981).

[14] *Id.* at 405. In *Reis*, employees of Complete Auto Transit, Inc., a transporter of motor vehicles, engaged in a wildcat strike. *Id.* at 402. The employees complained that their union, Teamster Local 332, did not represent the union membership properly in current collective bargaining negotiations. *Id.* at 403. The strike violated the no-strike clause in the existing collective bargaining agreement between the union and Complete Auto Transit, Inc., part of a national collective bargaining agreement between the Teamsters Union and numerous other trucking companies. *Id.* at 402-03. After employees at two other trucking companies joined in the wildcat strike, the employers brought a § 301 action in district court seeking injunctive relief and damages against the wildcat strikers individually for losses incurred because of the unlawful work stoppage. *Id.* at 402-03. The employers sought no damages from the union, alleging that the union neither authorized nor approved the strike. *Id.* at 403.

The district court initially held that the grievance causing the work stoppage was not subject to arbitration, and therefore that a *Boys Market* injunction was not permissible. *Id.*; *see infra* note 22 (*Boys Markets* injunction proper only when underlying labor dispute is arbitrable under collective bargaining agreement). The district court later concluded that the dispute involved an arbitrable grievance and issued a preliminary injunction enjoining the strike. 451 U.S. at 404. Nine months later, the employees moved to dissolve the preliminary injunction and to dismiss the complaint for damages. *Id.* The district court granted the motion to dismiss the injunction because of the Supreme Court's decision in *Buffalo Forge v. United Steelworkers*, holding that injunctive relief is improper unless a strike is over an arbitrable issue. *Id.*; *see* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 407 (1976) (union sympathy strike not arbitrable dispute subject to injunctive relief); *infra* note 22 (discussion of *Buffalo Forge*). The district court in *Reis* also dismissed the employer's claim for damages, holding that an employer may not sue employees seeking monetary relief for breach of the collective bargaining agreement. 451 U.S. at 404. The Sixth Circuit reversed the district court's dissolution of the injunction, holding that an in-

history of section 301 and Congress' intent to shield individual union members from liability for breach of a no-strike clause in a collective bargaining agreement.[15]

As an alternative to the damages remedy for the union's breach of a no-strike clause, section 301 authorizes district courts to issue an injunction.[16] Under the Norris-LaGuardia Act of 1932,[17] Congress prohibited federal courts from issuing injunctive relief in labor disputes, primarily to curtail judicial abuses of injunctive power.[18] The Supreme Court recognized an exception to the anti-injunction policy of the Norris-LaGuardia Act in *Boys Markets, Inc. v. Retail Clerks Union Local 770*.[19]

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junction may be granted even when the cause of the strike is a nonarbitrable issue if an arbitrable issue caused the continuation of the strike. Complete Auto Transit, Inc. v. Reis, 614 F.2d 1110, 1114 (6th Cir. 1980), *aff'd*, 451 U.S. 401 (1981). The Sixth Circuit affirmed the district court's dismissal of the employers' claim for damages against the individual union members. *Id.* at 1116. Relying on the legislative history of § 301, the Sixth Circuit concluded that Congress did not intend to create a cause of action for damages against individual union members for breach of a no-strike clause. *Id.* The Supreme Court affirmed the circuit court's holding. 451 U.S. at 405; *see infra* note 15 (*Reis* discussion of § 301 legislative history).

[15] 451 U.S. at 408-16. The *Reis* Court's analysis of the legislative history of § 301 began with a review of the legislative history of the Case bill, a congressional attempt to provide additional facilities for the mediation and settlement of labor disputes. *Id.* at 408-10; *see* H.R. 4908, 79th Cong., 2d Sess. (1946) (Case bill). The *Reis* Court asserted that § 10 of the Case bill was highly relevant in ascertaining the congressional intent underlying § 301. 451 U.S. at 408; *see* H.R. 4908, 79th Cong., 2d Sess. (1946), 92 CONG. REC. 765 (1946) (§ 10 of Case bill). Section 10 authorized either party to a collective bargaining contract to maintain a suit for damages for breach of the contract in federal district court. *Id.* The Senate version of § 10 provided that an employer could discharge an employee who participated in a strike that the union did not authorize. 92 CONG. REC. 5705-06 (1946) (remarks of Sen. Taft). The *Reis* court emphasized that the Senate version stopped short of proposing that individual employees be held liable in damages for engaging in authorized strikes. 451 U.S. at 409-10; 92 CONG. REC. 5705-06 (1946) (remarks of Sen. Taft) (individual union members not responsible for union violations of collective bargaining agreements). President Truman subsequently vetoed the Case bill. *See* Case Bill Veto on H.R. 4908, 79th Cong., 2d Sess. (1946), 92 CONG. REC. 6798 (1946).

In analyzing the events leading to congressional passage of § 301, the *Reis* Court noted that House members proposed a bill that allowed a damages action against individual union members engaging in certain types of unlawful concerted activity. 451 U.S. at 412. The *Reis* Court emphasized, however, that the Senate altered the language of the proposed legislation, limiting damages actions to claims against unions, primarily to avoid a repetition of the *Danbury Hatters* situation. *Id.* at 412-13; *see infra* text accompanying notes 101-03 (*Danbury Hatters* case).

[16] *See* Cabot, *supra* note 4, ¶ 17.2[4] at 17-10 (employer's principle remedy for union violation of no-strike clause is injunction).

[17] Norris-LaGuardia Act of 1932, Pub. L. No. 65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1976)).

[18] *See supra* note 2 (Norris-LaGuardia intended to curtail judicial abuse of injunctive power).

[19] 398 U.S. 235, 253 (1969). In *Boys Markets* the plaintiff employer and defendant union were parties to a collective bargaining agreement that contained a no-strike clause and provided that all labor disputes were subject to arbitration. *Id.* at 238-39. The union engaged in

In *Boys Markets*, the Court noted that arbitration of labor grievances is preferable to work stoppages[20] and that no-strike clauses must be enforceable to be effective consideration for the employer's promise to arbitrate union complaints.[21] The Court therefore held that when the grievance underlying a labor dispute is arbitrable under a collective bargaining agreement,[22] a court may issue an injunction under section 301 to prohibit a union-authorized strike.[23]

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a work stoppage when a supervisor refused to use union labor to rearrange certain merchandise. *Id.* at 239. The employer filed a petition in state court seeking a temporary restraining order (TRO), a preliminary and permanent injunction, and specific performance of the arbitration provision. *Id.* at 239-40. The state court issued a TRO forbidding the continuation of the strike. *Id.* at 240. The union then removed the case to a federal district court. *Id.* Concluding that the dispute was arbitrable under the labor agreement and that the strike violated the agreement, the district court enjoined the strike. *Id.*

[20] *See id.* at 241 (congressional policy sought to promote peaceful settlement of labor disputes through arbitration). The Supreme Court, in a series of decisions commonly referred to as the *Steelworkers Trilogy*, emphasized the importance of the arbitration process to the federal policy of promoting industrial peace through the collective bargaining process. 6 T. KHEEL, LABOR LAW ¶ 27.01[3] at 27-11 (4th ed. 1982); *see* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960) (courts must uphold arbitrator's interpretation of collective bargaining agreement); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) (arbitration process is vehicle that gives meaning and content to collective bargaining agreement); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566-67 (1960) (courts must uphold congressional decisions that arbitration is preferred method for settling grievance disputes).

[21] 398 U.S. at 247-48. The *Boys Markets* Court noted that an injunction is the employer's most expeditious method of enforcing the union's no-strike obligation. *Id.* at 248. To deprive the employer of injunctive relief could result, the Court reasoned, in a loss of employer incentive to enter into arbitration agreements. *Id.*

[22] *See* CABOT, *supra* note 4, ¶ 17.2[4][c] at 17-12. The determination of whether a labor dispute is arbitrable so that a *Boys Markets* injunction is proper depends on certain prerequisites. *Id.* The collective bargaining agreement must contain an arbitration provision. *Id.* Furthermore, the strike must be over an issue the parties are bound to arbitrate. *Id.* An injunction is not proper when the arbitration obligation has expired, terminated, or when the existing arbitration clause does not cover the particular dispute. *Id.* When an agreement contains a grievance procedure, but arbitration is not binding or mandatory, injunctive relief is not appropriate. *Id.*

The Supreme Court recently clarified the *Boys Markets* arbitration requirement. *See* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 406-07 (1976). In *Buffalo Forge*, the Court held that a federal court had no jurisdiction to enjoin a union from honoring another union's picket line. *Id.* at 412-13. The Court reasoned that because the sympathy strike did not involve a dispute subject to the arbitration provisions of the contract, the case did not fall within the *Boys Markets* exception. *Id.* at 407-08.

[23] *See* 398 U.S. at 253-54 (injunction appropriate when collective bargaining contract contains arbitration procedure). The *Boys Markets* Court, in providing for injunctive relief under section 301, reasoned that significant changes in labor policy occurred in the period between the Norris-LaGuardia Act and the *Boys Markets* case. *Id.* at 251. The Court noted that the policy underlying Norris-LaGuardia, protecting weak unions against judicial abuses of the injunction power, was no longer an urgent labor concern. *Id.*; *see supra* note 2 (Congress intended passage of Norris-LaGuardia to curb judicial abuses of injunctive power). Rather, the Court determined, labor organizations grew in strength and size and congressional emphasis shifted from protection of labor unions to the encouragement of collective

Once a court properly issues a *Boys Market* injunction, the union's failure to honor the injunction and end the strike could result in either a civil or criminal contempt citation.[24] In distinguishing between civil and criminal contempt, courts traditionally examine the ultimate purpose of the contempt sanction.[25] If the purpose of the court-imposed sanction is to compel obedience to the court's order or to provide compensation to the opposing party for losses suffered as a result of a party's non-compliance, then the courts consider the contempt civil.[26] If the purpose of the contempt sanction is punitive and vindicates the authority of the court and the party cannot remove the sanction by compliance with the

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bargaining for the peaceful resolution of industrial disputes. 398 U.S. at 251. The Court therefore concluded that injunctions issued to enjoin breaches of no-strike and arbitration agreements would foster the arbitration process without undermining the purpose of Norris-LaGuardia. *Id.* at 251-53.

[24] *See, e.g.*, United States v. UMW, 330 U.S. 258, 261 (1947) (employer may secure relief for union's failure to obey TRO through contempt order); *In re* Chiles, 89 U.S. (22 Wall.) 157, 168 (1874) (disobedience of injunction is contempt of court); United States v. Brotherhood of R.R. Trainmen, 96 F. Supp. 428, 436 (N.D. Ill. 1951) (when union members conduct work stoppage despite TRO, union is guilty of contempt); *see also* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 126 (1930) (violation of injunction whether injunction is temporary, restraining or final, is contempt of court); 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 65.02[4] (2d ed. 1982) (court may use injunction power to punish contempt of court order).

Generally, a contempt of court is an act or omission that substantially disrupts the judicial process in a particular case. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 185 (1971) [hereinafter cited as *Dobbs*]; *see* United States v. Ross, 243 F. Supp. 496, 499 (S.D.N.Y. 1965) (any act calculated to embarrass, hinder, or obstruct court in administration of justice is contempt). Contempt of court may include disruptive behavior during trial or the disobedience of judicial orders. *Dobbs, supra*, at 185-86; *see, e.g., In re* DuBoyce, 241 F.2d 855, 855 (3d Cir. 1957) (per curiam) (defendant's argumentative and arrogant manner in open defiance of trial judge was contempt of court); Jones v. United States, 151 F.2d 289, 290 (D.C. Cir. 1945) (per curiam) (refusal to obey lawful court order is contempt of court). Congress has specified the situations in which a federal court may issue a contempt citation and punish the contempt by fine or imprisonment. *See* 18 U.S.C. § 401 (1976). Section 401 defines contempt of court as misbehavior by a person in the court's presence that obstructs the administration of justice; misbehavior of any court officers in official transactions; or disobedience to the court's lawful writ, process, order, rule, decree, or command issued in a proceeding pending before the court. *Id.*

[25] *See, e.g.*, Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911) (character and purpose of punishment ordered by court distinguishes civil from criminal contempt); United States v. Powers, 629 F.2d 619, 626-27 (9th Cir. 1980) (difference between criminal and civil contempt is intended effect of court-ordered punishment).

[26] *See, e.g.*, United States v. UMW, 330 U.S. 258, 303-04 (1947) (civil contempt proceedings designed either to coerce compliance with court's order or to compensate wronged party); United States v. Rizzo, 539 F.2d 458, 463 (5th Cir. 1976) (purpose of civil contempt is to enforce compliance with court order or to compensate aggrieved party); *see* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2690 (1973) (courts employ civil contempt sanctions to coerce compliance with court's order or to compensate aggrieved party).

When a court imposes a fine in a civil contempt order to compensate the aggrieved party, the violator may pay the fine to the aggrieved party, or to the clerk of the court. *See, e.g.*, United States v. UMW, 330 U.S. 258, 304 (1947) (compensation in civil contempt imposes fine

court order, then courts consider the contempt criminal.[27] The distinction between civil and criminal contempt is important because a party may appeal immediately a criminal contempt citation as a final court order, while civil contempt orders generally are appealable only once the primary court action producing the injunction becomes final.[28] The courts recognize an exception to the rule that a party may not appeal a civil contempt order when the party is no longer a party to the primary court action.[29] In *Consolidation Coal Co. v. Local 1702, UMW*[30] the Fourth

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payable to complainant, but evidence must show that complainant suffered actual loss); *In re* Dinnan, 625 F.2d 1146, 1149 (5th Cir. 1980) (coercive nonpunitive fine payable to clerk of court is appropriate tool in civil contempt case).

Civil contempt is coercive in the sense that the court lifts the sanction immediately upon the violator's compliance with the court order. *See, e.g.*, Pabst Brewing Co. v. Brewery Workers Local Union No. 77, 555 F.2d 146, 149 (7th Cir. 1977) (civil contempt primarily intended to coerce prospective compliance); Douglas v. First Nat'l Realty Corp., 543 F.2d 894, 898 (D.C. Cir. 1976) (penalty is civil when purpose of contempt citation is to coerce compliance).

[27] *See, e.g.*, United States v. Hilbum, 625 F.2d 1177, 1179 (5th Cir. 1980) (punishment is criminal contempt when purpose is to vindicate authority of court by punishing wrongdoer); Smith v. Sullivan, 611 F.2d 1050, 1053 (5th Cir. 1980) (punishment is criminal when purpose is punitive, vindicates court's authority, and does not terminate on compliance with court order); Douglass v. First Nat'l Realty Corp., 543 F.2d 894, 898 (D.C. Cir. 1976) (penalty for criminal contempt is solely punitive, to punish for past disobedience). Courts consider a criminal contempt sanction punitive when the court imposes a fine payable to the state or when the court imprisons the violator for a fixed term. *See* Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 790 (1943) (imprisonment for fixed term or fines payable to state are punitive criminal contempt sanctions).

One consequence of a criminal contempt order is that the order entitles the violator to the protection of criminal procedural safeguards. *See Dobbs*, *supra* note 24, at 241-43 (criminal contempt order brings almost entire panoply of criminal safeguards into play). The opposing party has the burden of proving the violator's disobedience beyond a reasonable doubt. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911) (presumption that person charged with criminal contempt is innocent unless proven guilty beyond a reasonable doubt). A court cannot order the violator to testify against himself. *See* Parker v. United States, 153 F.2d 66, 70 (1st Cir. 1946); *see also In re* Bradley, 318 U.S. 50, 52 (1943) (court cannot amend criminal contempt sentence by returning fine paid and imposing new sentence of imprisonment).

[28] *See* Carbon Fuel Co. v. UMW, 517 F.2d 1348, 1349 (4th Cir. 1975). In *Carbon Fuel*, the Fourth Circuit emphasized that a civil contempt proceeding is a continuation of the main action and therefore not appealable immediately, while a criminal contempt proceeding is independent of the main action and therefore appealable immediately. *Id.*; *see also* Fox v. Capital Co., 299 U.S. 105, 107 (1936) (except in connection with appeal from final judgment, party may not appeal order for civil contempt); Doyle v. London Guar. & Accident Co., 204 U.S. 599, 603 (1907) (contempt order that is not criminal is interlocutory and not reviewable until appeal from final decree in case); Southern Ry. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968) (civil contempt order is reviewable only upon appeal taken from final judgment or decree). The violator may not appeal a criminal contempt adjudication until the court imposes a sentence rendering the contempt final. WRIGHT & MILLER, *supra* note 26, at § 2962.

[29] *See* Bessette v. W.B. Conkey Co., 194 U.S. 324, 329-30 (1904) (civil contempt citation is appealable when person held in contempt is no longer party to underlying claim).

[30] Consolidation Coal Co. v. Local 1702, 683 F.2d 827 (4th Cir. 1982).

Circuit reviewed the contempt order the United States District Court for the Northern District of West Virginia issued against a union, its officers, and its members for failing to comply with a *Boys Markets* injunction.[31] In deciding whether the district court properly issued the injunction, the Fourth Circuit considered the nature of civil contempt fines and whether *Reis* is applicable in cases in which a court has fined individual union members for contempt of court orders.[32]

The dispute in *Consolidation* began when the plaintiff Consolidation Coal Company (Company) suspended a member of Local 1702 for stealing property from the Company's mine.[33] To protest the suspension, the midnight shift began a wildcat strike.[34] The strike continued through all shifts, causing a work stoppage that lasted five days.[35] In the district court, the Company sought to enjoin the union and its members from continuing the strike.[36] The district court issued a temporary restraining order (TRO) prohibiting the union, its officers, and its members from continuing the strike.[37] When the union members ignored the TRO, the district court ordered the union and its members to show cause why the court should not adjudge the defendants in civil contempt of the court's order.[38] At the show-cause hearing, the district court held the union, its officials, and its members in civil contempt for willfully violating the TRO and for failing to use reasonable efforts to end the strike.[39] The district court also applied the mass action theory to find Local 1702 in civil contempt.[40] The mass action theory states that a union, as the recognized representative of its members, is responsible for the collective actions of its members, even when the action is not union-authorized.[41] As a result

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[31] *Id.* at 829-30; *see supra* note 22 (requirements of *Boys Markets* injunction).

[32] 683 F.2d at 829-30; *see supra* text accompanying notes 13-15 (*Reis* holding).

[33] 683 F.2d at 828.

[34] *Id.*; *see supra* text accompanying note 12 (wildcat strike is strike not authorized by union).

[35] 683 F.2d at 828-29.

[36] *Id.* at 828; *see* Brief for Appellee at 5, Consolidation Coal Co. v. Local 1702, 683 F.2d 827 (4th Cir. 1982) (plaintiff's motion for TRO) [hereinafter cited as Brief for Appellee].

[37] 683 F.2d at 828-29. The district court served notice of the TRO by mailing certified copies to the union and its members. *Id.* at 829.

[38] *Id.*

[39] *Id.* The evidence adduced at the show-cause hearing in *Consolidated Coal* established that the union members failed to return to work, that union officials failed to urge the membership to return to work except at one meeting and between shifts, and that the officials failed to threaten the membership with disciplinary measures for ignoring the back-to-work order. *Id.*

[40] *Id.*

[41] *See* United States v. International Union, UMW, 77 F. Supp. 563, 566 (D.C. Cir. 1948) (union that functions in representative capacity must be held responsible for mass action of its members) *affd*, 177 F.2d 29 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 871 (1949). The premise underlying the mass action theory is that large groups of men do not act collectively without leadership and that the union in its representative position is thereby responsible for the mass action of union members. *See* Eazor Express Inc. v. International Bhd. of

of the civil contempt finding, the district court levied fines against the union, its officials, and its members.[42]

The district court granted the plaintiff's motion for a TRO on the theory that the wildcat strike violated the terms of the collective bargaining agreement between the union and the company.[43] The labor contract provided that all local disputes between the union and the company were subject to settlement by grievance and arbitration procedures.[44] The district court noted that the contract bound the defendant union to submit the dispute that caused the strike in *Consolidation* to the arbitration procedures prescribed in the collective bargaining agreement.[45] Therefore, the district court ordered the defendants to submit the dispute to arbitration under the provisions of the contract.[46]

In addition to requesting injunctive relief in district court, the Company brought a separate action requesting monetary damages from the union and its officers for losses sustained as a result of the work stoppage.[47] The Company subsequently decided not to pursue the damages claim against the union officers, and the district court ordered that por-

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Teamsters, 520 F.2d 951, 963 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976), *reh'g denied*, 425 U.S. 908 (1976). The *Eazor* court stated that courts upholding union liability under the mass action theory also may hold the union liable for a failure to use all reasonable means to end the strike. *Id.* at 964. A separate theory for union liability is the agency theory. Consolidation Coal Co. v. International Union, UMW, 500 F. Supp. 72, 75 (D. Utah 1980); *see infra* note 50 (discussion of agency theory).

[42] 683 F.2d at 829. The *Consolidation Coal* district court levied fines against the union assessed as $3,000 per shift and against each union officer, committeeman, and local member assessed as $25.00 per shift. *Id.* Pursuant to the defendants' motion to remit the fines and Consolidation Coal Company's (the Company) motion to reduce the fines to judgment, the district court reduced the fines against the union and its officers to $500.00 and $10.00 per shift and entirely eliminated the fines against each member of the union. Brief for Appellee, *supra* note 36, at 8-9. The district court reasoned that a partial reduction of the civil contempt fines was proper because the union members returned to work at the next shift after the contempt order issued. Joint Appendix at 93-94, Consolidation Coal Co. v. Local 1702, 683 F.2d 827 (4th Cir. 1982) [hereinafter cited as Joint Appendix]. The district court cited the Supreme Court case *Complete Auto Transit, Inc. v. Reis* when the court eliminated the fines against the individual union members. *Id.* at 94; *see* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 417 (1981) (Supreme Court prohibited damages actions against individual wildcat strikers).

[43] 683 F.2d at 828; *see* Joint Appendix, *supra* note 42, at 36 (strike at plaintiff's mine was direct violation of collective bargaining agreement). The union and the Company were parties to a collective bargaining agreement called the National Bituminous Coal Wage Agreement of 1978. 683 F.2d at 829, Joint Appendix, *supra*, at 35.

[44] 683 F.2d at 828.

[45] *Id.* at 829.

[46] Joint Appendix, *supra* note 42, at 37. In addition to requiring the union to submit the dispute to arbitration, the district court ordered the Company to cooperate with the union in the peaceful settlement of the dispute through the arbitration procedure. *Id.*

[47] 683 F.2d at 829; *see* Consolidation Coal Co. v. Local 1702, 110 L.R.R.M. (BNA) 2907, 2910 (N.D. W. Va. 1982) (district court opinion on Consolidation Coal Company's damages claim).

tion of the damages action dismissed.[48] The district court applied the common-law rule of agency to hold that the union was not liable in damages.[49] Under the common-law rule of agency, a union is liable for damage resulting from a wildcat strike upon a showing that the union made itself a party to the strike.[50]

On appeal to the Fourth Circuit, the union raised four major issues.[51] First, the union argued that the district court lacked jurisdiction under section 301 to issue a TRO against the individual members and officers of Local 1702.[52] The union took the position that the LMRA limited the scope of section 301 to actions against labor unions and does not authorize actions against individual union officers or members.[53] Second, the union contended that the district court violated section 301 by assessing civil contempt fines against individual officers of Local 1702.[54] Under the union's theory, the district court's assessment of fines against individual union officers engaged in a wildcat strike constituted a damages award prohibited by the Supreme Court in *Reis*.[55] Third, the union claimed that the district court erred in relying exclusively on the mass action theory to find Local 1702 in civil contempt of court.[56] The union relied upon a Supreme Court decision interpreting section 301 to limit the responsibility of international unions for local wildcat strikes to the common-law rule of agency.[57] Fourth, the union argued that the union

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[48] Consolidation Coal Co. v. Local 1702, 110 L.R.R.M. (BNA), at 2907.

[49] *Id.* at 2908-10.

[50] United States Steel Corp. v. UMW, 598 F.2d 363, 365 (5th Cir. 1979); *see supra* note 41 (mass action theory is separate theory for determining union liability). To show union involvement under the agency theory, an employer must prove that the agents of the union participated in, ratified, instigated, encouraged, condoned, or in any manner directed the unauthorized strike. North River Energy Corp. v. UMW, 664 F.2d 1184, 1192 (11th Cir. 1981). The acts of the union agents must be within the scope of the agents' authority and on behalf of the union. Central Appalachian Coal Co. v. UMW, 376 F. Supp. 914, 923 (S.D. W. Va. 1974). An agent's acts within the scope of his authority bind the union, regardless of whether the union specifically authorized or ratified the acts. Vulcan Materials Co. v. United Steelworkers, 430 F.2d 446, 457 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971).

[51] 683 F.2d at 829-31.

[52] 683 F.2d at 829; *see supra* note 6 (discussion of § 301 of LMRA).

[53] Brief for Appellant at 10, Consolidation Coal Co. v. Local 1702, 683 F.2d 827 (4th Cir. 1982) [hereinafter cited as Brief for Appellant]; *see* 29 U.S.C. § 185(b) (1976) (courts may not enforce money judgments against individual union member).

[54] 683 F.2d at 829; *see supra* note 6 (§ 301 discussion).

[55] Brief for Appellant, *supra* note 53, at 6 (construing Complete Auto Transit, Inc. v. Reis, 451 U.S. 401 (1981)); *see supra* note 14 (discussion of *Reis*).

[56] 683 F.2d at 831; *see supra* note 41 (discussion of mass action theory).

[57] Brief for Appellant, *supra* note 53, at 6 (construing Carbon Fuel Co. v. UMW, 444 U.S. 212 (1979)). In *Carbon Fuel*, the Supreme Court rejected the theory of union liability suggesting that a union is liable under a no-strike clause for failing to use all reasonable means to end an unauthorized strike. *Id.* at 215; *see supra* note 41 (union liable for failure to use best efforts to end wildcat strikes); *supra* note 50 (discussion of agency theory).

officials' good faith efforts to comply with the district court's back to work order established a defense to the civil contempt charge.[58]

The Company urged the dismissal of the union's appeal, contending that the civil contempt order was not appealable until the Company's breach of contract suit became final.[59] The Company also contended that the district court's civil contempt order was proper because the union officials failed to take reasonable steps to end the strike or, alternatively, because the union was liable under the mass action theory.[60] In response to the union's argument that the district court did not have the jurisdiction to issue the TRO, the Company's position was that section 301 did not limit the district court's power to issue injunctive relief.[61] Because the district court had jurisdiction to issue the TRO, the Company claimed that the district court also had the power to hold the defendants in civil contempt of court.[62] Finally, the Company asserted that the district

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[58] 683 F.2d at 832. The officers of Local 1702 took the position that they made good faith efforts to comply with the district court's back-to-work order by calling a special meeting during which the officers directed the union members to go back to work, and by appearing at the beginning of each work shift to urge the members to return to work. *Id.* The union officers argued that they were unable to comply fully with the court's order because of the pressures involved in negotiating with company management in the arbitration hearing over the strike dispute. *Id.* The courts have recognized the substantial compliance and good faith defenses. *See* Consolidation Coal Co. v. International Union, UMW, 537 F.2d 1226, 1232 (4th Cir. 1976) (mine workers good faith efforts at compliance made judgment of civil contempt inappropriate); Washington Metropolitan Area Transit Auth. v. Amalgamated Transit Union, 531 F.2d 617, 621 (D.C. Cir. 1976) (either substantial compliance or inability to comply is defense in coercive court proceedings arising out of labor disputes).

[59] 683 F.2d at 830; *see supra* note 28 (civil contempt citations generally not appealable until final judgment in main action).

[60] Brief for Appellee, *supra* note 36, at 12-27. The Company argued that the district court's evidence clearly adduced that the officers failed to use available means in a genuine effort to end the strike. *Id.* at 13; *see supra* note 39 (district court findings that the union and union officers failed to take reasonable measures to end strike). The Company also argued that the Supreme Court's decision in *Carbon Fuel* to uphold the agency theory of union liability applied only to international unions and not local unions. Brief for Appellee, *supra* note 36, at 22-23; *see supra* note 57 (discussion of *Carbon Fuel*). Therefore, the plaintiff asserted that the mass action theory remained viable against local unions whose members engaged in an illegal strike. Brief for Appellee, *supra* note 36, at 26.

[61] Brief for Appellant, *supra* note 53, at 28 (construing Boys Markets v. Retail Clerks Union Local 770, 398 U.S. 235 (1969)); *see supra* note 19 (discussion of *Boys Markets*). Consolidation Coal Company contended that the district court properly issued a *Boys Markets* injunction because the labor dispute was over the arbitrable issue of suspension of employees. Brief for Appellant, *supra* note 53, at 29; *see* text accompanying note 22 (*Boys Market* requirement that labor dispute be arbitrable under the collective bargaining agreement).

[62] Brief for Appellant, *supra* note 53, at 29 (construing Windsor Power House Coal Co. v. District 6, UMW, 530 F.2d 312 (4th Cir. 1976), *cert. denied*, 429 U.S. 876 (1977)). In *Windsor*, the Fourth Circuit affirmed the district court's issuance of a civil contempt citation pursuant to the union's failure to obey a *Boys Markets* injunction. 530 F.2d at 315-17.

court, in assessing fines against the union and its officials, was following a standard procedure used to coerce compliance with court orders.[63]

Addressing the union's jurisdictional argument, the Fourth Circuit held that the *Boys Markets* decision authorized the district court's issuance of the TRO against the local union officials for violation of the collective bargaining agreement.[64] The Fourth Circuit rejected the union's argument that the *Reis* decision precluded the district court's assessment of fines for civil contempt of court.[65] The *Consolidation* court held that a fine for civil contempt is not a damages action within the scope of the *Reis* analysis but rather serves to coerce compliance with court orders.[66] The Fourth Circuit noted that the district court's power to issue injunctive relief must include the power to fine individuals who disobey a court order.[67]

The *Consolidation* court next considered the Company's argument that the Fourth Circuit should dismiss the union's appeal because the district court's contempt order was civil and therefore not appealable until final resolution of the Company's underlying contract claim.[68] To determine whether the contempt order was civil or criminal in nature, the Fourth Circuit applied the two-part test established in *Windsor Power House Coal Co. v. District 6, UMW*.[69] The first prong of the *Windsor* test examines whether the contempt order is forward looking so that

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[63] Brief for Appellant, *supra* note 53, at 29 (construing Carbon Fuel Co. v. UMW, 517 F.2d 1348, 1349 (4th Cir. 1976)). In *Carbon Fuel*, the Fourth Circuit distinguished civil contempt from criminal contempt by noting that the purpose of civil contempt is to coerce compliance with an order of the court. 517 F.2d at 1349; *see supra* note 26 (civil contempt traditionally served to coerce compliance with court orders).

[64] 683 F.2d at 829 (construing Boys Mkts. Inc. v. Retail Clerk Local 770, 398 U.S. 235 (1970)); *see supra* text accompanying notes 19-23 (Supreme Court held injunctive relief permissible under § 301).

[65] 683 F.2d at 829-30. In *Consolidation Coal*, the Fourth Circuit stated that the *Reis* decision is not authority for the proposition that a court cannot fine individuals for violation of a back-to-work order. *Id.* at 830; *see supra* text accompanying notes 13-15 (*Reis* decision).

[66] 683 F.2d at 829. In *Consolidation Coal*, the Fourth Circuit stated that a fine for civil contempt is a means to enforce a court order of injunctive relief and is not an action for damages. *Id.* Although the Fourth Circuit acknowledged that civil contempt fines may serve to compensate the aggrieved party, the court emphasized that the fines primarily serve to coerce behavior. *Id.*; *see supra* note 26 (civil contempt proceedings traditionally serve to compensate wronged party and to coerce compliance with court order).

[67] 683 F.2d at 829-30. The Fourth Circuit emphasized that to deny a court the power to fine individuals for disobeying an injunction would deprive the court of an effective means to enforce the injunction. *Id.*

[68] *Id.* at 830-31.

[69] *Id.*; *see supra* text accompanying note 28 (contempt orders not appealable until final judgment of underlying claim); *see also* Windsor Power House Coal Co. v. District 6, UMW, 530 F.2d 312, 316 (4th Cir. 1976), *cert. denied*, 429 U.S. 876 (1977). In *Windsor*, the Fourth Circuit considered the appealability of a district court contempt order against a union for failing to obey a TRO. 530 F.2d at 316-17. The Fourth Circuit's analysis focused on the determination of whether the contempt order was civil or criminal. *Id.*

the sanction terminates when the party complies with the court order.[70] The second prong of the test requires the court to determine whether the order compensates the injured party for losses sustained as a result of the contempt.[71] The Fourth Circuit held that for the most part the contempt order operated prospectively on a per-shift-missed basis and that the fines were compensatory to offset the Company's losses resulting from the strike.[72] The Fourth Circuit concluded, therefore, that Local 1702, its officers, and its members were guilty of civil contempt.[73]

The Fourth Circuit next considered the appealability of the civil contempt order.[74] At the outset, the Fourth Circuit recognized the traditional rule that a civil contempt order is unappealable until a court makes a final judgment on the underlying claim.[75] The *Consolidation* court also noted an exception to the traditional rule that applies when a person held in contempt is no longer a party to the underlying claim.[76] Applying the exception in *Consolidation*, the Fourth Circuit held that the district court's dismissal of the Company's damages claim against the union officers effectively precluded any other opportunity the officers might have for review of their contempt convictions.[77] Therefore, the Fourth Circuit concluded that the civil contempt citation was appealable.[78]

Finally, the *Consolidation* court addressed the union's argument that the district court had erroneously relied on the mass action theory to hold the union in civil contempt of court.[79] The Fourth Circuit considered

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[70] 530 F.2d at 316.

[71] *Id.* The *Windsor* court relied on the traditional definition of civil contempt expressed in *Carbon Fuel Co. v. UMW*. *Id.*; *see* Carbon Fuel Co. v. UMW, 517 F.2d 1348, 1349 (4th Cir. 1975). In *Carbon Fuel*, the Fourth Circuit viewed civil contempt as a process to coerce compliance with an order of the court that terminates once the violator obeys the court order. *Id.* at 1349-50. Civil contempt also may compensate the injured party for losses sustained as a result of the party's noncompliance. *Id.*; *see supra* note 26 (traditional definition of civil contempt).

[72] 683 F.2d at 830-31. The Fourth Circuit held that a portion of the contempt order assessed fines effective immediately upon issuance of the order. *Id.* at 830. Therefore, that part of the contempt order was not forward looking because the court fined the union without allowing the union the opportunity to purge itself of the contempt by returning to work. *Id.* The Fourth Circuit noted, however, that the essential purpose of the contempt order was to coerce compliance. *Id.*

[73] *Id.*

[74] *Id.* at 830-31.

[75] *Id.*; *see supra* note 28 (traditional rule that civil contempt order is not immediately appealable).

[76] 683 F.2d at 831 (construing Southern Ry. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968)) (person made party to underlying claims may appeal civil contempt citation immediately); *see supra* note 29 (person held in civil contempt of court may appeal contempt citation immediately if person is no longer party to underlying claim).

[77] 683 F.2d at 831.

[78] *Id.*

[79] *Id.*; *see supra* note 41 (mass action theory).

it unnecessary to decide whether the Supreme Court's decision to limit an international union's liability to the rule of agency also applied to local union actions.[80] The *Consolidation* court held instead that the district court properly found the union in contempt because the union officials failed to take reasonable steps to end the strike.[81] The Fourth Circuit also held that the union officers' failure to use reasonable efforts to end the wildcat strike precluded a determination that the officials had established a good faith defense to the civil contempt order.[82]

The Fourth Circuit's conclusion that the district court properly issued a *Boys Markets* injunction against wildcat strikers extends the scope of the *Boys Markets* decision.[83] The *Boys Markets* Court, in holding that courts may enjoin strikes based on arbitrable grievances, did not reach the question of whether injunctive relief will lie against the individual officers and members of unions engaged in wildcat strikes.[84] In *Reis*, the Supreme Court specifically declined to decide the issue.[85] The *Consolidation* court's approval of the application of the *Boys Markets* injunction to the wildcat strikers settles, in the Fourth Circuit, the question left open in *Boys Markets* and *Reis* and is consistent with a number of other courts.[86]

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[80] 683 F.2d at 831-32 n.6; *see* text accompanying note 57 (Supreme Court limited international union's liability for breach of no-strike clause to agency rule). The Fourth Circuit noted that the *Carbon Fuel* court addressed the issue of the liability of international unions as opposed to local unions. 683 F.2d at 832 n.6.

[81] 683 F.2d at 831. The Fourth Circuit ruled that union officials failed to take adequate measures to induce the strikers to return to work. *Id.* The officials neither returned to work nor issued an official union return-to-work order. *Id.* Nor did the officers threaten or take disciplinary action against the wildcat strikers. *Id.*

[82] *Id.* at 832; *see supra* note 58 (court recognition of good faith defense).

[83] *See* 683 F.2d at 829 (Fourth Circuit upheld district court's issuance of *Boys Markets* injunction); *supra* text accompanying notes 19-23 (*Boys Markets* decision).

[84] *See* 398 U.S. 235, 239 (1970) (*Boys Markets* Court addressed issue of injunctive relief against union).

[85] *See* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 416-17 n.18 (1981). The *Reis* Court stated that the issue of whether the district court could have issued a *Boys Markets* injunction was not before the court. *Id.* The *Reis* Court speculated, however, that the district court might not issue an injunction in the case because the strike commenced over a nonarbitrable labor dispute. *Id.*

[86] *See* Stein Printing Co. v. Atlanta Typographical Union, 329 F. Supp. 754, 757-58 (N.D. Ga. 1971). In *Stein*, employees of the plaintiff company engaged in a work stoppage because their foreman was not a union member. *Id.* at 756. The state court enjoined the union and its members from continuing the strike. *Id.* at 757. The district court affirmed the injunction against the union members as proper under the *Boys Markets* rationale because the dispute was arbitrable under the collective bargaining agreement between the employer and the union. *Id.* at 757-58; *see* Hilton Int'l Co. v. Asociacion de Empleados de Casino de Puerto Rico, 324 F. Supp. 492, 494 (D.P.R. 1971). In *Hilton*, employees of the plaintiff corporation refused to work because of a salary dispute with the corporation. *Id.* at 493. The district court found that the union, its agents, and its members engaged in a strike in violation of a no-strike clause in the collective bargaining agreement. *Id.* at 494. Asserting that *Boys Markets* controlled the case, the *Hilton* district court issued an injunction against the union and its members. *Id.*

In *United States v. Cunningham*,[87] the Sixth Circuit held that the district court properly issued a TRO against individual union members engaged in an unauthorized work stoppage in response to the plaintiff corporation's discharge of union officers.[88] The Sixth Circuit ruled that a *Boys Markets* injunction was appropriate because the labor dispute was arbitrable under the collective bargaining agreement.[89] Similarly, in *National Rejectors Industries v. United Steelworkers*,[90] the Eighth Circuit upheld a *Boys Markets* injunction against union employees engaged in work slowdowns over the enforcement of company work rules.[91] As in *Cunningham*, the Eighth Circuit emphasized that injunctive relief against union members is proper when the underlying dispute is arbitrable.[92] Thus, the Sixth and Eighth Circuits' decisions support the Fourth Circuit's decision to permit injunctive relief in *Consolidation* because of the arbitrability of the underlying dispute.[93]

The Fourth Circuit's decision that the district court properly assessed fines against individual union members is consistent with the policies underlying injunctive relief under section 301.[94] The Supreme Court has held that enforcement of injunctive relief is proper under section 301 to promote the arbitration process and to ensure the effectiveness of collective bargaining agreements.[95] To enforce injunctive relief, courts can

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[87] 599 F.2d 120 (6th Cir. 1979).

[88] *Id.* at 122. In *Cunningham*, employees of the plaintiff corporation engaged in a work stoppage over the corporation's discharge of six union officials. *Id.* at 122. The district court issued a TRO against the union members because the cause of the strike was an arbitrable issue. *Id.* at 127.

[89] *Id.* at 126-27. The Sixth Circuit held that the strike arose out of a labor dispute subject to the grievance and arbitration provisions of the labor contract and therefore violated the contract's no-strike clause. *Id.* at 127.

[90] 562 F.2d 1069 (8th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978).

[91] *Id.* at 1074. In *National Rejectors*, the dispute arose over employee discharges for violating company work rules. *Id.* at 1073. The district court noted that, by violating the work rules, the union employees engaged in activity calculated to slow up production at the company's plant. *Id.* The district court held that the employee activity violated the no-strike clause in the collective bargaining agreement and, therefore, issued an injunction against the union and its officials. *Id.* On appeal, the Eighth Circuit affirmed the district court's issuance of the injunction, reasoning that the Supreme Court's decision in *Boys Markets* authorized injunctive relief despite the anti-injunction provisions of the Norris-LaGuardia Act. *Id.* at 1374; *see supra* note 2 (Norris-LaGuardia Act).

[92] *Id.* at 1075. In *National Rejectors* the Eighth Circuit emphasized that a *Boys Markets* injunction is appropriate only when injunctive relief is necessary to compel specific performance of the arbitration provisions of the labor contract. *Id.* at 1075.

[93] *See* 683 F.2d at 828-29 (district court held labor dispute subject to arbitration provisions of collective bargaining agreement); *supra* text accompanying note 64 (Fourth Circuit upheld district court's issuance of injunctive relief) and 87-90 (Sixth and Eighth Circuits' decisions).

[94] *See* 683 F.2d at 829-30 (Fourth Circuit upheld civil contempt fines); *supra* note 15 (legislative history of § 301).

[95] *See* Boys Mkts. Inc. v. Retail Clerks Union, 398 U.S. 235, 252-53 (1970) (injunction enforced obligation that union freely undertook under collective bargaining agreement to submit disputes to arbitration).

specifically design contempt fines to achieve worker compliance.[96] The concurrence in *Reis* recognized that courts have the power under section 301 to impose contempt penalties on individual workers when the workers refuse to comply with an injunction.[97]

The Fourth Circuit's conclusion that the *Reis* decision did not preclude the fines assessed in *Consolidation* is consistent with section 301 policy.[98] In *Reis*, the Supreme Court stressed that section 301's legislative history demonstrated a congressional intent to allow a damages remedy against unions but not against individual union members for a breach of collective bargaining agreements.[99] The Court's decision in *Reis*, however, did not conclusively establish that section 301 bars the imposition of money judgments against individual union members.[100] Congressional concern in drafting section 301 focused on the prevention of a recurrence of the *Danbury Hatters* situation.[101] In *Danbury Hatters*, the Supreme Court affirmed the district court's issuance of a large money judgment against individual union members for participating in a union boycott of the plaintiff employer's goods.[102] The Court affirmed the lower court's order attaching many of the union members'

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[96] *See* Note, *Labor Law—Strike—Individual Union Members Not Liable for Breach of Contractual No-Strike Clause Even When Strike Unauthorized by Union*, 86 HARV. L. REV. 447, 454 (1972) [hereinafter cited as *Strike*]. The author noted that the *Boys Markets* injunctive remedy against wildcat strikers is consistent with the labor policy promoting peaceful resolution of disputes through compliance with collective bargaining agreements. *Id.* 454-55; *see supra* note 2 (labor policy). In the analysis of judicial enforcement of injunctions, the author asserted that court fines often are more reasonable in amount than damages for employee's losses. *Strike*, *supra*, at 454-55. In addition, courts could design the contempt fines to coerce worker compliance. *Id.* A court could coerce compliance with the injunction by issuing a conditional decree that imposes a fine for each strike day, but allows the strikers to avoid the liability by returning to work. *Id.* at 455 n.42.

[97] Strike, *supra* note 96, at 450; *see* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 420 (1981) (Powell, J., concurring) (contempt penalties imposed on individual workers are difficult to enforce).

[98] *See* 683 F.2d at 829-30 (Fourth Circuit decision that *Reis* does not bar district court issuance of fines); *supra* note 15 (legislative history of § 301).

[99] *See* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 406-18 (1981) (*Reis* court analysis of § 301); *supra* note 15 (*Reis* discussion of § 301's legislative history).

[100] *See* Note, *Unleashing the Wildcats: The Supreme Court Immunizes Wildcat Strikes from Individual Damage Liability for Employer Losses Resulting from the Wildcat Strike*, 59 DENVER L.J. 577, 584 (1982). In analyzing the *Reis* decision, the commentator concluded that the *Reis* court could have decided that individual union members were liable for money judgments under § 301 and remained consistent with both congressional intent and judicial precedent. *Id.*

[101] *See* Atkinson v. Sinclair Refining Co., 370 U.S. 238, 248 (1962) (legislative history of § 301 reveals that section was congressional reaction against *Danbury Hatters* case); *supra* note 15 (§ 301 legislative history).

[102] Lawlor v. Loewe, 235 U.S. 522, 536-37 (1915). In the first Supreme Court decision on the *Danbury Hatters* case, the Court held that the union's boycott of the goods produced by the plaintiff's hat manufacturing business was a restraint of trade in violation of the Antitrust Act of 1891. Loewe v. Lawlor, 208 U.S. 274, 285-92 (1908).

homes to satisfy the judgment.[103] Significant factual differences exist, however, between situations like *Danbury Hatters* involving union-authorized action and *Reis*-type cases that involve independent unauthorized action.[104] Moreover, the language of section 301 does not state that employers have no recourse against union members for individually breaching the collective bargaining agreement.[105]

The Fourth Circuit's determination that the union was guilty of civil contempt for failing to use reasonable steps to end the wildcat strike is consistent with Fifth Circuit precedent.[106] In *United Steel Corp. v. UMW*,[107] the Fifth Circuit affirmed the district court's finding that a local union and its officers were guilty of civil contempt for failing to take reasonable steps to end a wildcat strike.[108] In upholding the contempt order, the Fifth Circuit, like the *Consolidation* court, noted especially the union officers' failure to return to work, to reach the workers by phone, or to take disciplinary action against the wildcat strikers.[109]

The Fourth Circuit's conclusion that the contempt order in *Consolidation* was civil under the two-part test developed in *Windsor* is consist-

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[103] Loewe v. Savings Bank, 242 U.S. 357, 358 (1917). The district court could not impose a money judgment against the union because at that time unions could not be sued as entities. *See* LEGISLATIVE HISTORY, *supra* note 2, at 422 (initial obstacle in enforcing collective bargaining agreement was impossibility of suing labor unions as entities). Congress prevented a repetition of *Danbury Hatters* by providing in § 301 that unions may be sued as legal entitles. *See* 29 U.S.C. § 185(b) (1976) (labor organization may sue or be sued as entity).

[104] *See* Note, *Labor Relations—No-Strike Provision*, 6 GA. L. REV. 797, 801 n.24 (1972) (*Danbury Hatters* involved individual liability for collective action and not individual liability for individual action); Note, *An Employer's Recourse to Wildcat Strikes Includes Fashioning His Own Remedy: Section 301 Does Not Sanction an Individual Damage Suit*, 57 NOTRE DAME L. 598, 606 (1982) (factual difference between union-authorized action in *Danbury Hatters* and individual unauthorized action in *Reis*) [hereinafter cited as *Remedy*]; Note, *Labor Law—Section 301 of the Labor-Management Relations Act*, 18 WAYNE L. REV. 1657, 1664-65 (1972) (legislative history of § 301 supports conclusion that Congress intended to prohibit union membership liability only when union is responsible for breach of labor contract) [hereinafter cited as *Labor Law*].

[105] *See Labor Law*, *supra* note 104, at 1664 (nothing in section 301 expressly prohibits damage suits against individuals); *see also* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 424-27 (1981) (Burger, C.J., dissenting). In the *Reis* dissent, Chief Justice Burger, joined by Justice Rehnquist, asserted that the majority placed too much emphasis on § 301(b) of the LMRA. *Id.* at 426 (Burger, C.J., dissenting); *see* 29 U.S.C. § 185(b) (1976) (money judgments are enforceable against labor organizations only and not against individual members or their assets). The dissent acknowledged that Congress enacted the provision to prevent a recurrence of the *Danbury Hatters* situation. 451 U.S. at 426 (Burger, C.J., dissenting); *see supra* text accompanying notes 101-03 (*Danbury Hatters* case). The *Reis* dissent maintained, however, that § 301(b) only insulated union members from personal liability for union breaches of the contract. 451 U.S. at 426 (Burger, C.J., dissenting).

[106] *See* 683 F.2d at 831 (Fourth Circuit held that union failed to use reasonable steps to end strike); *see also* note 81 (evidence that officers failed to use reasonable efforts); *infra* text accompanying notes 107-09 (Fifth Circuit precedent).

[107] 598 F.2d 363, 366 (5th Cir. 1979).

[108] *Id.* at 367-68.

[109] *Id.* at 368.

ent with Fourth Circuit precedent.[110] In *Carbon Fuel Co. v. UMW*,[111] the Fourth Circuit determined that a contempt order is civil when the contempt sanction intends to coerce prospective compliance with a court order and when the contempt sanction compensates the aggrieved party for losses caused by the opposing party's noncompliance.[112] The *Consolidation* decision also is consistent with Supreme Court precedent which holds that civil contempt coerces a party into complying with a court order or compensates the wronged party for losses sustained.[113] In permitting an immediate appeal of the civil contempt citation, the Fourth Circuit is consistent with the Fifth Circuit.[114] In *Southern Railroad Co. v. Lanham*,[115] the Fifth Circuit recognized that a civil contempt order is final and appealable when a person held in contempt is not a party to the underlying claim.[116] The Fourth Circuit's *Consolidation* decision also is consistent with Supreme Court precedent which holds a civil contempt order appealable when a person is no longer a party to the underlying claim.[117]

The Fourth Circuit's decision in *Consolidation* is most significant for the court's refusal to extend the *Reis* holding to the district court's imposition of civil contempt fines against wildcat strikers.[118] Because *Reis* prohibited employers' damages actions against union members engaged in unauthorized strikes, employers were left with few effective measures to combat such strikes.[119] The Fourth Circuit's decision upholds the use of the injunction as employers' most expeditious method of enforcing the unions' no-strike obligations under collective bargaining agreements.[120]

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[110] *See* 683 F.2d at 830-31 (Fourth Circuit determined contempt order was civil); *see also* Windsor Power House Coal Co. v. District 6, UMW, 530 F.2d 312, 316 (4th Cir.) (*Windsor* two-part test), *cert. denied*, 429 U.S. 876 (1976).

[111] 517 F.2d 1348 (4th Cir. 1975).

[112] *Id.* at 1349.

[113] *See* United States v. UMW, 330 U.S. 258, 303 (1947) (civil contempt proceedings either coerce compliance with court's order or compensate aggrieved party).

[114] *See* 683 F.2d at 830-31 (Fourth Circuit allowed immediate appeal of civil contempt citation); *infra* text accompanying notes 115-17 (Fifth Circuit precedent).

[115] 403 F.2d 119 (5th Cir. 1968).

[116] *Id.* at 125.

[117] *See* Bessette v. W.B. Conkey Co., 194 U.S. 324, 329-30 (1904) (person no longer party to underlying claim immediately may appeal civil contempt order).

[118] *See* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 417 (1981) (*Reis* Court holding).

[119] *See Remedy*, *supra* note 104, at 610 (employer has few effective remedies for responding to wildcat strike); *see also* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 419-20 (1981) (Powell, J., concurring). The concurrence noted that an employer realistically has few effective alternatives to a damages action against wildcat strikers. *Id.* (Powell, J., concurring).

[120] *See* Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235, 239-40 (1970) (injunction is effective weapon for combatting wildcat strikes).

C. *Union Interference with Representation Elections*

Section 7 of the National Labor Relations Act[1] (NLRA or the Act) permits employees to form labor organizations for collective bargaining purposes.[2] Employees[3] voice their preferences for self-organization at representation elections[4] conducted by the National Labor Relations

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[1] 29 U.S.C. §§ 151-69 (1976 & Supp. V 1981). Congress passed the National Labor Relations Act (NLRA or the Act) in 1935. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-69 (1976 & Supp. III 1979)); *see* B. SCHWARTZ & R. KORETZ, STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION 260-47 (1970) (discussion of development of NLRA). The Act's purpose is to promote stability in the economy by providing a fair and equitable method of establishing representation for collective bargaining purposes. *See* 29 U.S.C. § 151 (1976) (policies of Act); *see also* NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 401-03 (1952) (NLRA designed to promote industrial peace); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938) (NLRA promotes formation of contracts between employees and unions for collective bargaining purposes). The Act, therefore, establishes employees' right to organize and bargain collectively. *See* 29 U.S.C. § 157 (1976 & Supp. III 1979) (rights of employees under Act); *accord* NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 265-66 (1938). The Supreme Court upheld the constitutionality of the Act in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). In *Jones* the Supreme Court held that congressional power to regulate commerce and enact all necessary and proper legislation for the protection of commerce included the authority to protect and insure employees' rights to organize and bargain collectively. 301 U.S. at 43; *see* U.S. CONST. art. I § 8, cls. 3, 18.

[2] *See* 29 U.S.C. § 157 (1976 & Supp. III 1979). Section 7 of the NLRA, as amended by the Labor Management Relations Act of 1947 (LMRA), permits employees to organize and bargain collectively through representatives of their choosing. Labor Management Relations Act of 1947, ch. 120, § 7, 61 Stat. 136, 140 (1947) (current version at 29 U.S.C. § 157 (1976 & Supp. III 1979)). Section 7 of the NLRA, however, did not establish employees' right to self-organization. Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261, 263 (1940); *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33-34 (1937) (employees' right to self-organization is fundamental).

[3] *See* 29 U.S.C. § 152 (1976 & Supp. III 1979). The term "employees" under the NLRA applies to all employees except supervisors, agricultural laborers, domestic servants employed at a person's residence, workers employed by his parent or spouse, independent contractors, or workers employed under the Railway Labor Act, 45 U.S.C. §§ 151-88 (1976 & Supp. V 1981). 29 U.S.C. § 152(3) (1976). In addition, managerial employees are not employees under the Act. NLRB v. Bell Aerospace Co., 416 U.S. 267, 288 (1974); *see also* Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947) (managerial employees defined as employees who implement managerial policies into work place).

[4] *See* 29 U.S.C. § 159 (1976) (representatives and elections). Representation elections consist of the process by which employees express their preferences for or against union representation for collective bargaining purposes. NLRB v. A.J. Tower Co., 329 U.S. 324, 330-31 (1946); Zeiglers Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000, 1004 (3d Cir. 1981). For a comprehensive discussion of campaign regulation, *see* R. WILLIAMS, D. JANUS & K. HUAN, NLRB REGULATION OF ELECTION CONDUCT (Labor Relations and Public Policy Series, Report No. 8, 1974). *See generally* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 38-42 (1964) (analysis and recommendations for reform of NLRA representation elections); Samoff, *NLRB Elections: Uncertainty and Certainty*, 117 U. PA. L. REV. 228 (1968) (functional aspects of NLRB elections).

Section 9(c)(1) of the NLRA permits employers, unions, or employees to file a petition for a representation election whenever a question concerning representation of employees exists. 29 U.S.C. § 159(c)(1) (1976). The National Labor Relations Board (NLRB or the Board)

Board[5] (NLRB or the Board). Any interference by employer,[6] union,[7]

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receives all representation election petitions. *Id.*; *see infra* note 5 (NLRB's function and purpose in representation election process). The NLRB, after receiving an election representation petition, investigates the underlying facts and conducts a hearing, if necessary, to determine whether the Board has reasonable cause to believe that a question of representation "affecting commerce" exists. 29 U.S.C. § 159(c)(1) (1976); *see id.* § 152(7) (definition of "affecting commerce"). If the NLRB concludes that a representation "affecting commerce" exists, the Board will direct a secret ballot election and certify the results of that election. *Id.* § 159(c)(1).

[5] *See* 29 U.S.C. § 153 (1976) (National Labor Relations Board). Section 3 of the NLRA authorizes creation of the NLRB. *Id.* § 153(a). The Board consists of five members appointed by the President and confirmed by the Senate. *Id.* Board members serve five year terms. *Id.* The NLRB's responsibilities include establishing and policing reasonable and proper standards for the conduct of representation elections. Collins & Aikman Corp. v. NLRB, 383 F.2d 722, 729 (4th Cir. 1967). The Board normally delegates the initial tasks of investigating and conducting representation proceedings to the regional director of the region where the proceeding is pending. 29 C.F.R. § 102.69(a) (1981); *see also id.* 102.67(a) (regional directors rule on objections to representation elections); *id.* 102.77(a) (regional directors investigate representation petitions). The Board, however, maintains power of review over the decisions of the various regional directors. *Id.* § 101.19(6)(b).

The Board possesses the power to set aside a representation election and direct another election. NLRB v. Urban Tel. Corp., 499 F.2d 239, 242 (7th Cir. 1974); Sewell Mfg. Co., 138 N.L.R.B. 66, 69-70 (1962). In addition to the power to set aside an election, Congress entrusted the NLRB with the power to determine the steps necessary to conduct a fair election. NLRB v. P.A.F. Equip. Co., 528 F.2d 286, 287 (10th Cir. 1976). The Board, therefore, possesses broad discretion in conducting and supervising representation elections. Coronet-Western v. NLRB, 518 F.2d 31, 32 (9th Cir. 1975); *see also* LaCrescent Constant Care Center, Inc. v. NLRB, 510 F.2d 1319, 1321 (8th Cir. 1975) (Board possesses wide discretion in representation election questions); NLRB v. Shirlington Supermarket, Inc., 224 F.2d 649, 651 (4th Cir.) (Congress entrusted control of representation elections to Board), *cert. denied*, 350 U.S. 914 (1955). NLRB orders are subject to review by the federal courts of appeals. Collins & Aikman Corp. v. NLRB, 383 F.2d 722, 726 (4th Cir. 1967). On appeal, NLRB's factual findings are conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(f) (1976); *accord* Collins & Aikman Corp. v. NLRB, 383 F.2d 722, 727 (4th Cir. 1967). *See generally* Getman, Goldberg & Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 38, 82-92 (1964); Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976); Samoff, *supra* note 4, at 234-38.

[6] *See* NLRB v. Exchange Parts Co., 375 U.S. 405, 410 (1964) (conferring benefits on employees during representation election for sole purpose of inducing employees to vote against union constitutes grounds for setting aside representation election); NLRB v. Arrow Elastic Corp., 573 F.2d 702, 704-06 (1st Cir. 1978) (employer's promise of pension benefits prior to election held sufficient to set aside representation election); Caron Int'l Inc., 246 N.L.R.B. 1120, 1120-21 (1979) (employer's single threat to dismiss employee if union prevailed in representation election held insufficient to overturn election); Model Dye Southern, Inc., 246 N.L.R.B. 589, 589 (1979) (election upheld where employer had provided employees with free soda pop five days before election); Smith Int'l, Inc., 242 N.L.R.B. 20, 20-21 (1979) (election set aside where employer on election day conducted raffle awarding all expense paid trip).

[7] *See* NLRB v. Johnson & Hardin Co., 554 F.2d 275, 276 (6th Cir. 1977) (union's confusing instructions to employees concerning waiver of initiation fees held sufficient to set aside representation election); NLRB v. Schapiro & Whitehouse, Inc., 356 F.2d 675, 678-79 (4th

union agent,[8] or third-person[9] with employees' right to self-organization can constitute grounds for setting aside a representation election.[10] In

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Cir. 1966) (representation election set aside on account of racial propaganda disseminated by union); Fontaine Truck Equip. Co., 241 N.L.R.B. 1069, 1070 (1979) (election set aside where union misrepresented employer's profits in pamphlet distributed shortly before election); United Packinghouse, 153 N.L.R.B. 956, 957-58 (1965) (physical assaults on employees by union representatives during organizational campaign held sufficient to overturn representation election).

[8] *See* NLRB v. Advanced Syss., Inc., 681 F.2d 570, 575-77 (9th Cir. 1982) (threats and vandalism conducted by union agents against company employees held sufficient to deny enforcement of NLRB bargaining order and to remand case for an evidentiary hearing); NLRB v. Georgetown Dress Corp., 537 F.2d 1239, 1240-45 (4th cir. 1976) (representation election set aside where union agents had threatened company employees); NLRB v. Urban Tel. Corp., 499 F.2d 239, 243-44 (7th Cir. 1974) (election set aside on account of union agent's threats against company employees).

Section 2(13) of the NLRA provides that prior authorization or subsequent ratification of the acts of another are not controlling in establishing a principal-agent relationship under the Act. Labor-Management Relations Act of 1947, § 2(13), ch. 120, 61 Stat. 136, 139 (1947) (current version at 29 U.S.C. § 152(13) (1976)). Prior to the enactment of § 2(13) of the NLRA, unions received 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. Norris-LaGuardia Act, § 6, ch. 90, 47 Stat. 70, 71 (1932) (current version at 29 U.S.C. §§ 101-115 (1976)); *accord* United Bhd. of Carpenters & Joiners v. United States, 330 U.S. 395, 406-07 (1947) (union is liable only for acts which it expressly or impliedly authorized). Congress enacted § 2(13) of the NLRA to counteract the broad immunity accorded labor organizations by § 6 of the Norris-LaGuardia Act. Section 2(13) of the NLRA restored the common-law principle of apparent authority to labor proceedings. H.R. REP. NO. 510, 80th Cong., 1st Sess. 3b, *reprinted in* 1947 U.S. CODE CONG. & AD. NEWS 1142. Implied or apparent authority, therefore, is sufficient to establish an agency relationship under the NLRA. *See* Worley Mills, Inc. v. NLRB, 685 F.2d 362, 366-67 (10th Cir. 1982) (election interference not attributable to union since pro-union employee did not possess apparent authority to act on union's behalf); NLRB v. Advanced Syss., Inc., 681 F.2d 570, 572 (9th Cir. 1982) (evidence supported in-plant organizing committee member's apparent authority to act on behalf of union); NLRB v. Georgetown Dress Corp., 537 F.2d 1239, 1242-45 (4th Cir. 1976) (union accountable for acts of in-plant organizing committee pursuant to principle of apparent authority); *see also infra* note 38 (definition of apparent authority). *See generally* Evans, *The Law of Agency and the National Union*, 49 KY. L.J. 295, 300-37 (1961) (application of agency law within NLRA).

[9] *See* Methodist Home v. NLRB, 596 F.2d 1173, 1183 (4th Cir. 1979). In *Methodist Home* the Fourth Circuit denied enforcement of an NLRB order and remanded the case for a full evidentiary hearing on allegations that the union and its agents engaged in coercive conduct which fatally tainted a representation election. *Id.* at 1184-85. The coercive conduct complained of in *Methodist Home* consisted of a pro-union employee assaulting a procompany employee on the eve of a representation election. *Id.* at 1179. The court, in addressing the merits of Methodist Home's claim that the NLRB improperly denied the petitioner an evidentiary hearing, noted that third-party conduct which creates a general environment of fear, rendering free choice of representation impossible, requires setting aside a representation election. *Id.* at 1183; *see* Sonoco of P.R., Inc., 210 N.L.R.B. 493, 494 (1974) (threats of physical harm by pro-union employees against procompany employees justified overturning election); Steak House Meat Co., 206 N.L.R.B. 28, 29 (1973) (third-party conduct which renders free choice of representation impossible requires voiding election); *see also infra* notes 12 & 13 (laboratory condition standard for representation elections).

[10] *See infra* notes 12 & 13 (laboratory conditions standard).

their review of representation elections, courts and the Board however accord less weight to misconduct of third persons than to misconduct of the employer, the union, or union agents.[11] Regardless of the source of election interference, courts and the Board judge misconduct against a "laboratory like" environment to determine whether the alleged election interference had an impact on employees' choice of a bargaining representative.[12] Under the laboratory conditions standard, an election is set aside whenever election interference creates an atmosphere among voting employees of fear or confusion which renders employees'

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[11] *See* Emerson Elec. Co. v. NLRB, 649 F.2d 589, 594 (8th Cir. 1981) (less weight accorded to third-person misconduct than to party misconduct); Orleans Mfg. Co., 120 N.L.R.B. 630, 633 (1958) (Board accords less weight to conduct of third persons than to conduct of parties). Courts have advanced several reasons for distinguishing between party and third-person election misconduct. NLRB v. Staub Cleaners, Inc., 418 F.2d 1086, 1088 (2d Cir. 1969), *cert. denied*, 397 U.S. 1038 (1970). Generally, employees regard threats from non-authoritative sources more lightly than threats backed up by either a union or an employer. *Id.* at 1088. Employees also regard threats from a union or an employer more seriously than threats from third persons since the employer controls, and the union seeks to control, the conditions of employment. *Id.* Moreover, since the union and the company incur the expense of repeat elections, subjecting them to repeat elections on account of misconduct of parties over whom the company or union have no control is inequitable and does not deter third persons from interfering with elections. *Id.*; *see also* NLRB v. Aaron Bros. Corp., 563 F.2d 409, 412 (9th Cir. 1977) (according less weight to third-person misconduct credits employees with ability to give true weight to allegations of fellow employees); NLRB v. Sauk Valley Mfg. Co., 486 F.2d 1127, 1131 n.5 (9th Cir. 1973) (according less weight to third-person misconduct promotes efficient elections since unions and employers, as a practical matter, cannot control conduct of third persons). *But see* Zeiglers Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000, 1006-07 (3rd Cir. 1981) (third-person threats are not necessarily less frightening); Cross Baking Co. v. NLRB, 453 F.2d 1346, 1348 (1st Cir. 1971) (employees perceive fear from anonymous threats no less effective than fear from union or employer threats).

[12] *See* General Shoe Corp., 77 N.L.R.B. 124 (1948). The NLRB first enumerated the laboratory condition standard for reviewing representation election conduct in General Shoe Corp., 77 N.L.R.B. 124 (1948). In *General Shoe*, the Board did not consider company campaign tactics on the eve of a representation election as unfair labor practices within the meaning of the amended Act. *Id.* at 127; 29 U.S.C. § 158 (1976) (unfair labor practices). The Board, however, did conclude that the company tactics created an atmosphere calculated to prevent a free and uninhibited choice of bargaining representative by the employees. 77 N.L.R.B. at 127. The Board, therefore, set the election aside. *Id.* The Board in *General Shoe* noted that the NLRB's function in election proceedings is to provide a laboratory environment, suitable for conducting experiments, under conditions as nearly ideal as possible, in which employees may express their choice of representative free from coercion. *Id.* at 126. Consequently, conduct which renders the free and unhampered choice of representative improbable, regardless of whether that misconduct amounts to an unfair labor practice, constitutes grounds for setting aside a representation election. *Id.*; *see also* NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946) (employees' free choice dispositive in review of representative election misconduct); Mississippi Valley Structural Steel Co., 196 N.L.R.B. 1129, 1132 (1972) (conduct which constitutes unfair labor practice under § 8 but does not interfere with employees' free choice is insufficient grounds for setting aside representation election); Hy Plains Dressed Beef, Inc., 146 N.L.R.B. 1253, 1257 (1964) (laboratory condition standard determinative even when misconduct constituted unfair labor practice). *But see* Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786-87 (1962) (conduct violative of § 8(a)(1) is conduct violative of laboratory conditions standard).

free choice of bargaining representative impossible.[13] In *PPG Industries, Inc. v. National Labor Relations Board*,[14] the Fourth Circuit Court of Appeals addressed the issue of union accountability for election interference by organizing committees composed of pro-union employees.

The controversy in *PPG* arose out of threats of violence which preceded a union representation election.[15] The union[16] prevailed in the election by a vote of 678 to 639.[17] PPG, the employer, filed objections to the election results with the NLRB's regional director.[18] The regional director, however, dismissed PPG's objections to the election proceedings and certified the union as the employees' bargaining representative.[19] PPG then petitioned the NLRB to review the regional director's decision.[20] The Board granted PPG's request for review and remanded the case for an evidentiary hearing on three[21] of PPG's objections.[22]

During the evidentiary hearing,[23] company witnesses testified that

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[13] *See* Worley Mills, Inc. v. NLRB, 685 F.2d 362, 365, 367 (10th Cir. 1982) (threats of harm and illegal electioneering did not constitute grounds for setting aside election under laboratory conditions standard); NLRB v. Advanced Syss., Inc., 681 F.2d 570, 576 (9th Cir. 1982) (threats of bodily harm and property damage constitute grounds for setting aside representation election under laboratory conditions standard); Emerson Elec. Co. v. NLRB, 649 F.2d 589, 591-94 (8th Cir. 1981) (pro-union committee threats of bodily harm, property damage, and disparate economic treatment held insufficient to warrant overturning election under laboratory conditions standard); Zeiglers Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000, 1006-08 (3d Cir. 1981) (threats of bodily harm directed at company employees by pro-union employee constituted destruction of laboratory conditions); Methodist Home v. NLRB, 596 F.2d 1173, 1178 (4th Cir. 1979) (assault of pro-company employee by pro-union employee constitutes grounds for setting aside election under laboratory conditions standard); Abbott Laboratories v. NLRB, 540 F.2d 662, 667 (4th Cir. 1976) (threats of physical violence were not destructive of laboratory conditions); Intertype Co. v. NLRB, 401 F.2d 41, 45-6 (4th Cir. 1968) (union misrepresentation on handbill was not destructive of laboratory conditions), *cert. denied*, 393 U.S. 1049 (1969); Cambridge Wire Cloth Co., 256 N.L.R.B. 1135, 1137 (1981) (threats of bodily harm and job loss held insufficient to set election aside under laboratory conditions standard); Sonoco of P.R., Inc., 210 N.L.R.B. 493, 494 (1974) (threats of bodily harm and property damage warrant overturning election under laboratory conditions standard).

[14] 671 F.2d 817 (4th Cir. 1982).

[15] *Id.* at 818.

[16] *Id.* The *PPG* union's official designation was Teamsters Local No. 391. *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*; *see supra* note 5 (NLRB possesses power of review over decisions of regional directors).

[21] *Id.*; PPG Indus., Inc., 251 N.L.R.B. 1146 (1980). Upon receipt of PPG's request for review, the NLRB remanded the case to the hearing officer for an evidentiary hearing on PPG's allegations of union accountability for threats of personal and property harm. 671 F.2d at 818.

[22] 671 F.2d at 818.

[23] *Id.* at 818; *see* Brief for Teamsters Local Union No. 391 at 4-5, PPG Indus., Inc. v. NLRB, 671 F.2d 817, 819 (4th Cir. 1982). The *PPG* evidentiary hearing lasted nine days and received testimony from ninety-nine witnesses. *Id.*

members of a union-sponsored in-plant organizing committee[24] had threatened procompany employees with bodily harm and property damage.[25] The hearing uncovered several instances in which committee members had threatened procompany employees in the presence of other PPG employees.[26] The hearing officer, however, found that the company's objections lacked merit.[27] The NLRB adopted the hearing officer's conclusion that the union was not accountable for the committee's misconduct[28] and certifed the union as the employees' representative.[29]

On appeal[30] to the Fourth Circuit, PPG challenged the NLRB's ruling

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[24] 671 F.2d at 819. The committee consisted of 300 of the 1400 PPG employees eligible to vote. *Id.* PPG employees became committee members by signing a release which enabled the union to submit the employees' names to PPG management. *Id.* Although committee members wore no special insignia and did not conduct exclusive meetings, committee members did voice support for the union at the plant and on occasion at other employees' homes. *Id.*

[25] *Id.* at 819.

[26] *Id.* The hearing officer credited five situations in which committee members threatened PPG employees opposed to the union. *Id.*; *see* Brief For Petitioner PPG Industries, Inc. at 11-12, PPG Indus., Inc. v. NLRB, 671 F.2d 817, 819 (4th Cir. 1982) (testimony on threats of violence credited by hearing officer). First, one female employee, who recently had revoked her union card, testified that a male committee member had threatened her with bodily harm. 671 F.2d at 819. Second, another procompany female employee testified that a male committee member had threatened to damage her home and automobile. *Id.* Third, one procompany male employee testified that a male committee member had threatened him with bodily injury for his opposition to the union. *Id.* Fourth, a procompany employee testified that a committee member threatened to assault him if the union lost the election. *Id.* Finally, a female employee testified that a male committee member threatened to damage her automobile. *Id.*

[27] *Id.* at 819.

[28] *Id. See generally* Joint Appendix, Vol. 1—Record at 94-120, PPG Indus., Inc. v. NLRB, 671 F.2d 817, 819 (4th Cir. 1982). The hearing officer did not find the union accountable for the acts of the in-plant organizing committee. *Id.* at 107-110; *see supra* note 8 (common-law of agency controls under Act). The officer, however, did note that if the union were accountable for the acts of the committee, PPG's objections to the election would be sustainable. Joint Appendix, Vol. 1—Record at 114. Party accountability for election interference is important to the extent that accountability enables a reviewing court to accord more weight to party misconduct when evaluating the misconduct's impact on the laboratory conditions of the election process. NLRB v. Georgetown Dress Corp., 537 F.2d 1239, 1242 (4th Cir. 1976); *see supra* note 11 (coercive acts attributable to party to election receive more weight when considering the impact of such act on employees' free choice). *But see supra* notes 12 & 13 (laboratory conditions standard dispositive in judging election interference); *infra* notes 104-30 and accompanying text (party accountability is but one factor in assessing election interference). The hearing officer further noted that the five credited threats did not result in any physical violence. Joint Appendix, Vol. 1—Record at 114. The hearing officer also found that the voting group was large, 1400 employees, and that the threats were spread over a three and one-half month period. *Id.* at 112. The hearing officer concluded that the committee's misconduct did not create an atmosphere of fear or confusion among the voting employees and that the threats therefore did not render employees' free choice of representatives impossible. *Id.*; *see supra* notes 12 & 13 (laboratory conditions standard).

[29] 671 F.2d at 818, 823 n.10.

[30] *Id.* at 818. In order to challenge the validity of the election, PPG refused to bargain

that the committee members were not the union's agents.[31] PPG's appeal relied primarily upon the Fourth Circuit's decision in *National Labor Relations Board v. Georgetown Dress Corp.*[32] In *Georgetown*, the Fourth Circuit addressed the issues of whether election interference by a pro-union employee organizing committee[33] was attributable to a union and whether the election interference warranted overturning the election.[34] The election interference had consisted of threats of bodily harm and property damage directed by committee members against other Georgetown employees.[35] Since the union had authorized the *Georgetown* committee to be the in-plant organizer,[36] and never had repudiated the committee's authority or misconduct,[37] the *Georgetown* court held the election interference attributable to the union in accordance with the principle of apparent authority.[38] Finding the union

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with the union. *Id.*; *see* Boire v. Greyhound Corp., 376 U.S. 473, 476-79 (1964). A federal court cannot review an election certification directly. *Id.* at 476-77. If the company refuses to comply with an NLRB order directing the company to bargain with the union, however, the certification is reviewable in the ensuing unfair labor practice proceeding in federal court. *Id.* at 478-79; *see, e.g.*, Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 154 (1941) (NLRB certification order is reviewable in federal court incident to unfair labor practice charge); NLRB v. Dick Seidler Enters., 666 F.2d 383, 385 n.1 (9th Cir. 1982) (company's refusal to bargain with union permits review of NLRB certification in federal forum).

[31] 671 F.2d at 819.

[32] 537 F.2d 1239 (4th cir. 1976).

[33] 537 F.2d at 1242. The *Georgetown* committee had consisted of pro-union employees willing to solicit support for the union in the Georgetown plant and at the homes of other company employees. *Id.*

[34] *Id.* at 1242-45. The controversy involved in *Georgetown* arose out of threats of violence which preceded a union representation election. *Id.* at 1241-42; *see* infra note 35 (*Georgetown* committee members' threats). The union won the election by a vote of 184 to 105. 537 F.2d at 1240. Georgetown, the employer, filed objections to the election results with the NLRB. *Id.* The Board, however, overruled Georgetown's objections and certified the union as the Georgetown employees' bargaining representative. *Id.* Georgetown refused to bargain with the union in order to obtain judicial review of the election certification. *Id.*; *see supra* note 30 (federal courts cannot review NLRB certification orders directly). In *Georgetown*, the Fourth Circuit ordered the election set aside since the misconduct of the Georgetown employee committee created an atmosphere of fear and coercion which made a fair election impossible. 537 F.2d at 1240-41; *see* supra notes 12 & 13 (laboratory conditions standard).

[35] 537 F.2d at 1241-42. The administrative law judge in *Georgetown* found several situations in which committee members threatened procompany employees. *Id.* at 1241. First, prior to a company-arranged meeting, a member of the *Georgetown* committee produced a knife and threatened violence at the meeting. *Id.* Second, a committee member threatened one employee with vandalism to the employee's car if the employee did not support the union. *Id.* Third, a committee member warned company employees of her intention to disclose all employee conversations regarding unionism to the union. *Id.* The administrative law judge further found that a specific committee member hovered over employees and took notes on union conversations. *Id.*

[36] *Id.* at 1244.

[37] *Id.* at 1243-44.

[38] *Id. See generally* RESTATEMENT (SECOND) OF AGENCY § 8 (2d ed. 1958) [RESTATEMENT]. Section 8 of the *Restatement* defines apparent authority as "the power to

accountable for the acts of the committee,[39] the *Georgetown* court concluded that the committee's misconduct, combined with threats from non-identifiable sources,[40] created an atmosphere of fear which had rendered a fair election impossible.[41] The Fourth Circuit in *Georgetown*, therefore, denied enforcement of the NLRB bargaining order and overturned the election.[42]

The *PPG* court found *Georgetown* dispositive on the question of the union's accountability for the acts of the *PPG* committee.[43] In light of the factual similarities existing between *Georgetown* and *PPG*,[44] the *PPG*

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affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." *Id.*

The *Georgetown* court cited comments (a)(b)&(c) of § 8 of the *Restatement* in support of its conclusion that the committee possessed apparent authority to act on behalf of the union. 537 F.2d at 1244. Comment (a) provides that apparent authority results from a manifestation by X to Y that Z is X's agent. RESTATEMENT, *supra*, § 8, comment a. In *Georgetown*, the union's failure to repudiate the acts of the committee combined with the committee's position as the union's only in-plant contact with the employees constituted the requisite manifestation to the Georgetown employees that the committee had apparent authority to act on behalf of the union. 537 F.2d at 1244. In addition, comment (b) to § 8 of the *Restatement* permits X's manifestation to Y to occur through signs or advertising to the community. RESTATEMENT § 8, comment b. In *Georgetown*, the union distributed notices which implied a close relationship between the committee and the union. 537 F.2d at 1243. Finally, comment (c) of § 8 of the *Restatement* requires that Y actually believe Z possesses X's authority before apparent authority will arise in Z. RESTATEMENT, *supra*, § 8, comment c. The *Georgetown* court noted that the committee's acts did not exceed their authority so far as to imply that the committee was not the union's agent. 537 F.2d at 1244. In fact, the *Georgetown* court concluded that the employees recognized the committee as the union's in-plant representative. *Id.*

[39] 537 F.2d at 1244. The *Georgetown* court noted, in reference to the judicial policy of according more weight to party misconduct, that a finding of union accountability for the acts of the committee was determinative in setting aside the election. *Id.*; *see supra* notes 11 & 28 (significance of party misconduct as opposed to third-person misconduct).

[40] 537 F.2d at 1242. In addition to the agency relationship existing between the committee and the union, the *Georgetown* court noted additional factors which, combined with the committee's misconduct, rendered a fair election impossible. *Id.* The court held that threats from unidentifiable sources contributed to an atmosphere which magnified the coercive impact of the committee's misconduct on employees' free choice. *Id.* The *Georgetown* court further found that Georgetown's position as the principal employer in the area and the lack of alternative employment elsewhere increased the employees' sensitivity to threats of job loss. *Id.* The Fourth Circuit in *Georgetown* concluded that the poor attendance at company sponsored meetings during the organizational campaign reflected the worker's sensitivity to the pro-union threats. *Id.*

[41] *Id.* at 1242, 1245; *see supra* notes 12 & 13 (laboratory conditions standard).

[42] 537 F.2d at 1240-41, 1245.

[43] 671 F.2d at 820.

[44] *Id.* at 819, 820, 822. Although the Fourth Circuit in *PPG* did not undertake a direct comparison of the *PPG* and *Georgetown* controversies, factual similarities exist between the two decisions. First, the composition and organization of the two committees are similar. *Compare* 671 F.2d at 819 (*PPG* committee membership open) *with* 537 F.2d at 1242 (committee membership in *Georgetown* open); 671 F.2d at 819 (*PPG* committee members receive no compensation) *with* 537 F.2d at 1242-43 (committee members in *Georgetown*

court concluded that the *Georgetown* decision compelled a finding of union accountability in *PPG*.[45] The Fourth Circuit in *PPG* noted that the union organizer, on occassion, had employed *PPG* committee members to relay messages to employees within the *PPG* plant.[46] In addition, the court recognized that the *PPG* union had prepared and distributed to employees pro-union handbills[47] which had implied a close relationship between the committee and the union.[48] Finally, the Fourth Circuit in

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received no compensation); 671 F.2d at 819 (*PPG* committee meetings were open) *with* 537 F.2d at 1242 (no formal structure to *Georgetown* committee). Second, the misconduct of the committees' in both cases is similar. *See supra* notes 26 (*PPG* threats); *supra* note 35 (*Georgetown* threats). *Compare* 671 F.2d at 819 (*PPG* committee misconduct consisted of threats of bodily injury and property damage) *with* 537 F.2d at 1241 (*Georgetown* committee misconduct consisted of threats of bodily injury and property damage). Third, committee members performed similar tasks. *Compare* 671 F.2d at 819 (*PPG* committee members solicited support for union at plant and in homes of other employees) *with* 537 F.2d at 1243 (*Georgetown* committee members solicited support for union at plant and in homes of other employees). Finally, the union in both cases distributed notices to employees which implied the existence of a close relationship between union and committee. *Compare* 671 F.2d at 819 (*PPG* notice implying close bond between union and committee) *with* 537 F.2d at 1243 (*Georgetown* notice implying close bond between union and committee).

Although *PPG* and *Georgetown* are factually similar, differences exist between the two decisions. The union organizer in *PPG* disavowed the threats of a *PPG* committee member while the union organizer in *Georgetown* never disavowed committee misconduct. *Compare* 671 F.2d at 820 *with* 537 F.2d at 1243-44. Moreover, the union organizer in *PPG* took a much more active role in the election campaign than did the Georgetown organizer. *Compare* 671 F.2d at 819-20 (*PPG* union representatives were present at plant gate during campaign to answer employee questions on unionism) *with* 537 F.2d at 1243 (*Georgetown* committee was union's only contact with employees). Finally, the *Georgetown* controversy involved additional coercive conduct from unidentifiable sources while the *PPG* controversy involved only the threats attributable to the committee. *Compare* 671 F.2d 819 (*PPG* election interference) *with* 537 F.2d 1241-42 (Georgetown election interference).

[45] 671 F.2d at 820, 822-23.

[46] *Id.* at 819. The Fourth Circuit noted in a footnote that had the *PPG* management directed a committee in the fashion that the union directed the *PPG* committee, the company would have been held accountable for the acts of the committee. *Id.* at 821 n.6. *See generally* RESTATEMENT, *supra* note 38, § 8, comment a. Pursuant to comment (a) to § 8 of the *Restatement*, in order for apparent authority to arise in the *PPG* committee the union had to make manifestations to *PPG* employees that the committee represented the union's agent. *Id.*; *see also supra* note 38 (*Georgetown* union's failure to repudiate committee misconduct and committee's position as union's sole in-plant contact constituted *Georgetown* union's manifestation to Georgetown employees that committee was union's agent).

[47] *See* 671 F.2d at 819 (committee member names appeared on several union handbills and one handbill referred to committee as part of union). *But see id.* at 822 n.7 (hearing officer noted handbill which reflected separation between union and committee). *See generally* Joint Appendix, *supra* note 28, at 106-07; 671 F.2d at 822 n.7.

[48] 671 F.2d at 819; *see also id.* at 821 n.6 (if organizing committee in *PPG* had been a procompany organization, Board would have held company accountable for committee's misconduct). *See generally* RESTATEMENT, *supra* note 38, § 8, comment b. Pursuant to comment (b) to § 8 of the *Restatement*, the union's manifestation to the *PPG* employees could have occurred through signs or advertising to the community. *Id.*; *see also supra* note 38 (*Georgetown* union manifested its delegation of authority to committee through handbills which implied close relationship between union and *Georgetown* committee).

PPG noted that the union organizer had requested *PPG* committee members to solicit support for the union in the plant, and on occasion, in the homes of other employees.[49] The court further noted that the organizer had requested the committee to represent the "eyes and ears" of the union during the campaign.[50] The Fourth Circuit, therefore, held the union accountable for the acts of the committee and consequently overturned the election.[51]

In connection with its conclusion that the *Georgetown* decision compelled a finding of union accountability in *PPG*,[52] the Fourth Circuit noted that the NLRB could not disregard established circuit precedent in their resolution of labor controversies.[53] The court held that the broad discretion accorded the NLRB by Congress[54] did not include the authority to disregard established circuit precedent in NLRB decisions.[55] The court, consequently, concluded that the NLRB must recognize the agency aspects of the *Georgetown* decision as binding authority on union agency questions in the Fourth Circuit.[56]

In addition to holding the NLRB bound by circuit precedent, the *PPG* court interpreted the agency aspects of the *Georgetown* decision.[57]

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[49] 671 F.2d at 819; *see id.* at 821 n.6 (*PPG* union's request that committee members solicit support for union in homes of other employees was an element in union's accountability for acts of *PPG* committee).

[50] *Id.* at 819; *see id.* at 821 n.6 (Fourth Circuit considered union's request that *PPG* committee represent union's eyes and ears fundamental to courts conclusion that committee possessed apparent authority to act on union's behalf). *See generally* RESTATEMENT, *supra* note 38, § 8, comment c. Comment (c) to § 8 of the *Restatement* requires that the *PPG* employees actually believe the committee possesses the union's authority before apparent authority will arise in the committee. *Id.*; *see supra* note 38 (*Georgetown* court noted that *Georgetown* committee's acts did not exceed committee's supposed authority to extent that Georgetown employees might question committee's authority); *see also supra* note 26 (*PPG* threats); *supra* note 35 (*Georgetown* threats). *Compare* 671 F.2d at 819 (*PPG* committee misconduct consisted of threats of bodily harm and property damage) *with* 537 F.2d at 1241 (*Georgetown* committee misconduct consisted of threats of bodily harm and property damage).

[51] 671 F.2d at 821, 823.

[52] *Id.* at 820-21.

[53] *Id.*

[54] *Id.* at 823 n.9; *see supra* note 5 (NLRB possesses wide discretion in representation election certifications).

[55] 671 F.2d at 823 n.9; *see* Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261, 272 (1968) (courts rather than NLRB are final authority on statutory construction), *modified on other grounds*, 392 U.S. 901 (1968); Ithaca College v. NLRB, 623 F.2d 224, 228-29 (2d Cir.), (Board and hearing officers must follow circuit law), *cert. denied*, 449 U.S. 975 (1980); *see also supra* note 5 (NLRB orders subject to federal court review); Ithaca College, 623 F.2d at 228 (NLRB possesses no greater standing than federal district court and therefore must comply with circuit authority); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979) (decisions by federal appellate courts are binding on all inferior courts and administrative bodies); NLRB v. Gibson Prods. Co., 494 F.2d 762, 766 (5th Cir. 1974) (established law of circuit binding on NLRB).

[56] 671 F.2d at 820-21; *see supra* note 38 (*Georgetown* agency analysis).

[57] *Id.* at 822 n.8.

According to the *PPG* court, the absence of a professional union organizer at the Georgetown plant was not the determinative factor in the *Georgetown* agency analysis.[58] The *PPG* court wrote that the absence of a professional full time union organizer in *Georgetown* was only one factor in the *Georgetown* court's holding.[59] The *PPG* court concluded that the proper approach in analyzing union agency questions in representation elections is to consider the totality of circumstances and to accord no single factor determinative weight.[60] The *PPG* court held that the standard for determining a union's accountability for the acts of an organizing committee is whether the amount of association between the union and the organizing committee is significant enough to justify charging the union with the conduct of the committee.[61] Accordingly, the Fourth Circuit in *PPG*, after considering the totality of circumstances,[62] held the union accountable for the committee's misconduct and set aside the election.[63]

The Fourth Circuit in *PPG* properly concluded that the NLRB could not disregard the decisions of the federal circuit court in the circuit in which the action was pending.[64] Since the NLRB is only an administrative agency,[65] the Board must defer to the courts on matters of statutory interpretation.[66] Congress, moreover, has entrusted the federal circuit courts with the power and authority to enforce, modify, or overturn NLRB orders.[67] The NLRB, therefore, must recognize as controlling the law of the circuit in which the labor dispute arose.[68]

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[58] *Id.*

[59] *Id.*; *see* Emerson Elec. Co. v. NLRB, 649 F.2d 589, 594 (8th Cir. 1981) (reading determinative factor in *Georgetown* to be absence of a professional union organizer at plant); Certain-Teed Prods. Corp. v. NLRB, 562 F.2d 500, 510 n.5 (7th Cir. 1977) (absence of union organizer dispositive in *Georgetown* decision).

[60] 671 F.2d at 822 n.8.

[61] *Id.*

[62] *Id.* at 819-23.

[63] *Id.* at 821, 823.

[64] 671 F.2d at 820-21.

[65] *See generally supra* note 5 (history and procedures of NLRB).

[66] *See* International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 565-66 (1979) (courts rather than NLRB have final word on matters of statutory interpretation); Securities & Exch. Comm'n v. Sloan, 436 U.S. 103, 118 (1978) (courts rather than administrative agencies have final say on matters of statutory interpretation); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (matters of statutory interpretation are within sole province of judiciary); *see also* Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir.) (NLRB must follow circuit precedent), *cert. denied*, 449 U.S. 975 (1980); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979) (Board must follow law of circuit).

[67] *See* 29 U.S.C. § 160(e) (1976) (NLRB must appeal to federal circuit courts for enforcement of NLRB orders); *id.* § 160(f) (1976) (federal circuit courts grant litigants relief from Board orders).

[68] 671 F.2d at 820-21, *see* Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 862 (7th Cir. 1980) (NLRB must recognize law of circuit); Federal-Mogul Corp. v. NLRB, 566 F.2d 1245, 1252 (5th Cir. 1978) (NLRB must recognize law of circuit since circuit court alone can enforce Board orders); NLRB v. Gibson Prods. Co., 494 F.2d 762, 766 (5th Cir. 1974) (NLRB must follow circuit law); Morand Bros. Beverage v. NLRB, 204 F.2d 529, 532 (7th Cir. 1953) (Board is similar to a district court and must apply law of circuit).

The Fourth Circuit also properly held the union accountable for the acts of the *PPG* organizing committee.[69] The determination of an agent-principal relationship is a question of fact.[70] An appellate court need not accept NLRB factual findings unless substantial evidence in support of those findings exists in the record considered as a whole.[71] According to the Supreme Court, the substantial evidence test consists of whether the evidence considered as a whole reasonably supports the Board's conclusions.[72] An appellate court, consequently, can overturn an NLRB decision whenever substantial evidence opposed to the Board's decision exists.[73]

Substantial evidence supports the Fourth Circuit's conclusion that the union was accountable for the *PPG* committee's misconduct.[74] The union organizer's request that the *PPG* committee members represent the union's eyes and ears supports the Fourth Circuit's conclusion that the union was accountable for the committee's threats.[75] Courts confronting the agency issue consistently have found a union's authorization of an employee organizing committee influential in holding the union accountable for the committee's misconduct.[76] For example, in *National Labor Relations Board v. Georgetown Dress Corp.*,[77] a union organizer

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[69] 671 F.2d at 821.

[70] Worley Mills, Inc. v. NLRB, 685 F.2d 362, 366 (10th Cir. 1982); *see supra* note 38 (union agency principles).

[71] *See* Worley Mills Inc. v. NLRB, 685 F.2d 362, 364 (10th Cir. 1982) (in order to overturn NLRB bargaining order record must be devoid of substantial evidence in support of Board's position); Jamesway Corp. v. NLRB, 676 F.2d 63, 66-67 (3d Cir. 1982) (proper standard for reviewing NLRB factual findings is substantial evidence test rather than abuse of discretion test); Zeiglers Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000, 1008 (3d Cir. 1981) (NLRB factual findings are subject to substantial evidence test on review). *But cf.* NLRB v. A. J. Tower Co., 329 U.S. 324, 330-31 (1946) (standard for reviewing NLRB orders is whether Board abused discretion accorded NLRB by Congress); Emerson Elec. Co. v. NLRB, 649 F.2d 589, 592 (8th Cir. 1981) (NLRB decisions are subject to abuse of discretion standard on review); NLRB v. Urban Tel. Corp., 499 F.2d 239, 242 (7th Cir. 1974) (standard of review is whether Board abused its discretion in arriving at its decision); Intertype Co. v. NLRB, 401 F.2d 41, 45 (4th Cir. 1968) (abuse of discretion is standard for reviewing NLRB orders), *cert. denied*, 393 U.S. 1049 (1969). *See generally supra* note 5 (procedure for reviewing NLRB orders).

[72] Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951), *quoting* NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939).

[73] Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); *see* Jamesway Corp. v. NLRB, 676 F.2d 63, 66-67 (3d Cir. 1982) (discussion of various appellate standards for review of NLRB orders).

[74] 671 F.2d at 819-21; *see supra* text accompanying notes 44-50 (evidence which supports holding union accountable for committee's threats).

[75] 671 F.2d at 819.

[76] *Id.* at 821; *see infra* text accompanying notes 77-98 (significance of union authorization of employee organizing committees). *But cf.* Cambridge Wire Cloth Co., 236 N.L.R.B. 1326, 1329 (1980) (members of employee organizing committees are not agents of union simply because of their membership in committee).

[77] 537 F.2d 1239 (4th Cir. 1976); *see supra* text accompanying notes 32-42 (*Georgetown* decision).

requested an employee organizing committee to represent the union within the Georgetown plant.[78] In holding the union accountable for the *Georgetown* committee's misconduct,[79] the Fourth Circuit noted that the union organizer had authorized, and the Georgetown employees had perceived, the committee members as the union's representative.[80]

In *Worley Mills, Inc. v. National Labor Relations Board*,[81] a recent decision construing both *PPG* and *Georgetown*, the Tenth Circuit also noted the significance a union's authorization of an employee has in the determination of the union's accountability for an employee's misconduct.[82] In *Worley Mills*, the Tenth Circuit addressed the agency questions in the context of whether the union was accountable for a pro-union employee's electioneering near the polls on election day.[83] The pro-union employee had been the employee responsible for introducing the union into the plant.[84] The employee also had campaigned actively by soliciting support for the union, discussing unionism with other employees, attending union meetings, and serving as the union's translator for the Spanish-speaking employees.[85] In upholding the Board's certification of the *Worley* union, the Tenth Circuit noted that no reason existed to hold the union accountable for the misconduct of the employee since no evidence existed that the union had appointed, authorized, or solicited the employee to represent the union within the mill.[86]

The *Worley Mills* court also distinguished the agency applications of both the *PPG* and *Georgetown* decisions.[87] According to the Tenth Circuit, the *PPG* committee's apparent authority[88] resulted from the *PPG* union organizer's request that the committee solicit support for the union and that the committee represent the union's eyes and ears during the election campaign.[89] In addition, the Tenth Circuit in *Worley Mills* wrote that the *Georgetown* union's accountability for the acts of the *Georgetown* committee resulted from the union's failure to take an active role in the organization of the plant,[90] and from the union's failure to

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[78] 537 F.2d 1242-43.

[79] *Id.* at 1244; *see supra* note 35 (*Georgetown* committee misconduct).

[80] 537 F.2d at 1244; *see* Abbott Laboratories v. NLRB, 540 F.2d 662, 666-67 (4th Cir. 1976) (principal pro-union employee was not union agent since union never authorized employee).

[81] 685 F.2d 362 (10th Cir. 1982).

[82] *Id.* at 366.

[83] *Id.* at 365-67.

[84] *Id.* at 365.

[85] *Id.* at 365-66.

[86] *Id.* at 366.

[87] *Id.* at 366-67.

[88] *See supra* note 38 (apparent authority defined).

[89] 685 F.2d at 367.

[90] *Id.* The active role taken by the *PPG* union to organize *PPG* employees was not dispositive of the union's accountability for the *PPG* committee's misconduct. 671 F.2d at 821-22; *see* NLRB v. Advanced Syss., Inc., 681 F.2d 570, 576 (9th Cir. 1982) (evidence sup-

repudiate the misconduct of the *Georgetown* committee.[91] Concluding that *Georgetown* and *PPG* were distinguishable on the facts, the Tenth Circuit did not hold the *Worley Mills* union accountable for the pro-union employee's electioneering.[92]

In *National Labor Relations Board v. Advanced Systems, Inc.*,[93] the Ninth Circuit also considered a union's request that an employee represent the union an essential element in the establishment of apparent authority in the employee.[94] In *Advanced Systems*, a member of a pro-union organizing committee had threatened another employee with bodily harm.[95] The evidence supported the conclusion that the union had appointed the pro-union employee a member of an organizing committee and had requested the employee to solicit support for the union.[96] The Ninth Circuit concluded that the evidence presented a substantial and material issue of whether the pro-union employee had apparent authority to act on the union's behalf.[97] The court, therefore, remanded the case to the Board for an evidentiary hearing on the election objections.[98]

In addition to the *PPG* organizer's request that the *PPG* committee members represent the union's eyes and ears during the campaign, the *PPG* organizer's employment of the committee to relay messages to

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ported apparent authority of pro-union employee despite presence of professional organizers at plant); Methodist Home v. NLRB, 596 F.2d 1173, 1182-83 (4th Cir. 1979) (although union officials established office in local motel to answer employee questions on unionism, pro-union employee's misconduct attributable to union since pro-union employee had greater exposure and visibility to other employees than union officials had).

[91] 685 F.2d at 367. The union organizer in *PPG* had disavowed a threat made by one of the committee members to another PPG employee. 671 F.2d at 820; *see* Abbott Laboratories v. NLRB, 540 F.2d 662, 667 (4th Cir. 1976) (election enforced since union had no notice of pro-union employee's misconduct and therefore no opportunity to disavow misconduct); NLRB v. Urban Tel. Corp., 499 F.2d 239, 243, 244 (7th Cir. 1974) (representation election set aside since union did not disavow pro-union employee's misconduct and company employee's had associated pro-union employees with union); NLRB v. Tampa Crown Distribs., Inc., 272 F.2d 470, 473 (5th Cir. 1959) (agency relationship existed between union and source of anonymous threats since union had not disavowed threats).

[92] 685 F.2d at 366-67.

[93] 681 F.2d 570 (9th Cir. 1982).

[94] *Id.* at 576. In *Advanced Systems*, the Ninth Circuit noted additional evidence which supported holding the union accountable for a pro-union employee's misconduct. *Id.* First, the employee's name had appeared on union leaflets which the committee had distributed to the other employees. *Id.*; *see supra* note 47 (*PPG* committee member names had appeared on union handbills). Moreover, the other employees in the plant had regarded the employee as the union's principal spokesman. 681 F.2d at 576. In addition, the union as well as the pro-union employee had suggested that the employee would be the shop steward after the election. *Id.* Finally, evidence also suggested that the employee had relayed messages between the union and the employees. *Id.*; *see supra* text accompanying note 46 (*PPG* committee had relayed messages between union and employees).

[95] 681 F.2d at 575-76.

[96] *Id.* at 576.

[97] *Id.*

[98] *Id.* at 577.

other PPG employees supports the Fourth Circuit's conclusion that the union was accountable for the acts of the committee.[99] In *National Labor Relations Board v. Urban Telephone Corp.*,[100] the Seventh Circuit confronted the issue of whether election interference by a pro-union employee necessitated setting aside a representation election.[101] The election interference consisted of threats of bodily harm and property damage.[102] In setting the election aside, the Seventh Circuit noted that the pro-union employee had conveyed information between the union and the employees.[103]

Although substantial evidence[104] supports the Fourth Circuit's determination that the union was accountable for the *PPG* committee's misconduct,[105] the record lacks substantial evidence in support of the court's conclusion that the committee misconduct interfered with the laboratory conditions[106] of the election.[107] The laboratory conditions standard requires a reviewing court to scrutinize the record in order to determine whether election misconduct disruptive of employees' free choice interfered with the election.[108] Appellate courts consider the totality of circumstances involved in an election proceeding in determining whether election interference had breached the laboratory conditions of the election.[109]

The Third Circuit in *Zeiglers Refuse Collectors, Inc. v. National Labor Relations Board*,[110] held several factors helpful in assessing whether election misconduct had interfered with the laboratory conditions of an election proceeding.[111] In *Zeigler*, a pro-union employee repeatedly threatened other Zeigler employees within two weeks of a

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[99] 671 F.2d at 819.

[100] 499 F.2d 239 (7th Cir. 1974).

[101] *Id.* at 240-41.

[102] *Id.* at 241-42.

[103] *Id.* at 241; *see* Worley Mills, Inc. v. NLRB, 685 F.2d 362, 366-67 (10th Cir. 1982) (NLRB bargaining order enforced since misconduct not attributable to union). The Tenth Circuit in *Worley Mills* concluded that the facts presented in *Urban Telephone* had established the Urban Telephone union's accountability for the threats of the employee. *Id.* at 367; *see also* NLRB v. Advanced Syss., Inc., 681 F.2d 570, 576 (9th Cir. 1982) (hearing granted since pro-union employee had conveyed information between union and employees).

[104] *See supra* text accompanying notes 70-73 (substantial evidence test is standard for reviewing NLRB factual findings).

[105] *See supra* text accompanying notes 74-76 (substantial evidence in support of Fourth Circuit's conclusion on union accountability in *PPG*).

[106] *See supra* notes 12-13 (laboratory conditions standard).

[107] 671 F.2d at 818-20.

[108] *See supra* notes 12-13 (laboratory conditions standard).

[109] NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941); *see* Intertype Co. v. NLRB, 401 F.2d 41, 46 (4th Cir. 1968) (in assessing impact threat had on employees' free choice court must consider totality of circumstances), *cert. denied*, 393 U.S. 1049 (1969).

[110] 639 F.2d 1000 (3d Cir. 1981).

[111] *Id.* at 1005. According to the *Zeigler* court, the number and severity of the threats, the proximity of threats to election, the closeness of election, whether the threats affected

representation election.[112] The Third Circuit concluded that the pro-union employee's threats[113] interfered with Zeigler employees' free choice of a bargaining representative.[114] According to the *Zeigler* court, the election results had been very close,[115] the threats had occurred within two weeks of the election,[116] and the threats had been serious, creating fear in the minds of the voting employees.[117] The Third Circuit, therefore, denied enforcement of the NLRB bargaining order and set aside the election.[118]

In *PPG*, on the other hand, the facts do not support the Fourth Circuit's holding that the committee's misconduct interfered with the laboratory conditions of the election proceedings.[119] Although the court correctly decided that the union was accountable for the committee's misconduct,[120] an appellate court must consider the totality of circumstances in assessing whether election misconduct interfered with

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all employees, and whether the threats were attributable to a party are factors helpful in assessing whether certain threats interfered with the laboratory conditions of an election proceeding. *Id.*

[112] *Id.* at 1003.

[113] *See id.* at 1003 (pro-union employee misconduct consisted of threats of bodily injury directed at Zeigler employees).

[114] *Id.* at 1011.

[115] *Id.* at 1002, 1009-10 (union prevailed in *Zeigler* by vote of 16 to 14); *see* Methodist Home v. NLRB, 596 F.2d 1173, 1184 (4th Cir. 1979) (closeness of vote was influential in court's denial of NLRB bargaining order); NLRB v. Urban Tel. Corp., 499 F.2d 239, 244 (7th Cir. 1974) (17 to 15 union majority was influential in court's decision to set election aside); Cross Baking Co. v. NLRB, 453 F.2d 1346, 1350 (1st Cir. 1971) (close vote was influential in court's decision to set aside election); Collins & Aikman Corp. v. NLRB, 383 F.2d 722, 724. 729-30 (4th Cir. 1967) (13 to 12 election results were influential in court's decision to set aside election). *But see* Worley Mills, Inc. v. NLRB, 685 F.2d 362, 364, 369 (10th Cir. 1982) (NLRB bargaining order enforced despite close election); Abbott Laboratories v. NLRB, 540 F.2d 662, 664, 667 (4th Cir. 1976) (same).

[116] 639 F.2d at 1002-03, 1009; *see* Emerson Elec. Co. v. NLRB, 649 F.2d 589, 595 (8th Cir. 1981) (five threats occurring during ten week election campaign held insufficient to set election aside); Methodist Home v. NLRB, 596 F.2d 1173, 1179, 1184-85 (4th Cir. 1979) (pro-union employee's assault of procompany employee on eve of election created fear in minds of other employees sufficient to remand case to NLRB for evidentiary hearing); Cross Baking Co. v. NLRB, 453 F.2d 1346, 1348-49 (1st Cir. 1971) (physical assault occurring two months before election had not created fear in minds of voting employees).

[117] 639 F.2d at 1003, 1009; *see* NLRB v. Georgetown Dress Corp., 537 F.2d 1239, 1242, 1245 (4th Cir. 1976) (threats of bodily harm and property damage created fear in minds of employees and constituted grounds for setting election aside); NLRB v. Urban Tel. Corp., 499 F.2d 239, 244 (7th Cir. 1974) (pro-union employees' threat of bodily harm created fear in minds of other employees rendering election a nullity).

[118] 639 F.2d at 1011.

[119] 671 F.2d at 819.

[120] *See supra* text accompanying notes 74-76 (substantial evidence supports *PPG* court's holding union accountable for committee's activity in *PPG*); *supra* text accompanying note 11 (more weight accorded to party misconduct).

the laboratory conditions of an election proceeding.[121] In *PPG*, the election results were not close.[122] The union prevailed by a vote of 698 to 639.[123] Furthermore, the *PPG* committee threats were not numerous.[124] The hearing officer credited only five situations in which committee members directed threats at other *PPG* employees.[125] Moreover, the *PPG* committee misconduct did not occur close to the election.[126] The five credited situations occurred during a three and one-half month campaign in which over 1300 employees voted.[127] In addition, the hearing officer's report revealed that the *PPG* committee member's threats did not frighten the *PPG* employees.[128] Finally, none of the *PPG* threats resulted in physical violence.[129] The Fourth Circuit, consequently, erred in setting aside the *PPG* election, since the record contained substantial evidence in support of the NLRB's decision to uphold the *PPG* representation election.[130]

Not only is the Fourth Circuit's decision to set aside the *PPG* election unsupported by the facts, but the court's holding is also incorrect since the holding involved a misconception of the issues.[131] The *PPG* court initially framed the issue as whether the NLRB's certification of the union as the employees' bargaining representative was proper.[132]

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[121] *See supra* text accompanying note 109 (totality of circumstances test).

[122] *See supra* note 115 and accompanying text (effect of close election on laboratory conditions standard).

[123] 671 F.2d at 818.

[124] *See supra* note 111 (effect of numerous threats on laboratory conditions standard).

[125] 671 F.2d at 819.

[126] *See supra* note 116 and accompanying text (effect of proximity of threats to election to laboratory conditions standard).

[127] Brief for The National Labor Relations Board at 15-16, PPG Indus., Inc. v. NLRB, 671 F.2d 817 (4th Cir. 1982).

[128] Joint Appendix, *supra* note 28, at 936, 111, 112, 844; *supra* note 117 and accompanying text (seriousness of threats on laboratory conditions standard).

[129] 671 F.2d at 819-20; *see* Emerson Elec. Co. v. NLRB, 649 F.2d 589, 594-95 (8th Cir. 1981) (NLRB bargaining order enforced since election interference had not resulted in physical violence); NLRB v. Van Gorp Corp., 615 F.2d 759, 764, 766 (8th Cir. 1980) (election set aside since threats culminated in an act of physical violence); Abbott Laboratories v. NLRB, 540 F.2d 662, 665-67 (4th Cir. 1976) (rough talk not sufficient to set election aside). *But see* NLRB v. Georgetown Dress Corp., 537 F.2d 1239, 1244-45 (4th Cir. 1976) (organizing committee threats sufficient to set aside election); Cross Baking Co. v. NLRB, 453 F.2d 1346, 1348-49 (1st Cir. 1971) (physical assault two-months before election did not interfere with laboratory conditions).

[130] 671 F.2d at 819-20. The *Georgetown* decision does not compel the Fourth Circuit in *PPG* to conclude that the *PPG* committee threats had interferred with the laboratory conditions since *PPG* and *Georgetown* are distinguishable. *See supra* text accompanying note 40 (presence of additional threats from non-identifiable sources in *Georgetown* differentiates *Georgetown* decision from *PPG* in terms of laboratory conditions review); *supra* note 40 & 44 (same).

[131] 671 F.2d at 818-19.

[132] *Id.* at 818.

The Fourth Circuit, however, proceeded to decide the merits of the case pursuant to whether the union was accountable for the misconduct of the committee members.[133] Underlying the court's determination of the issue as one of agency is the assumption that misconduct attributable to a party in a representation election has more impact on the employees than conduct attributable to third persons.[134] Courts and the Board, however, consistently have held the decisive factor in reviewing election misconduct to be whether the misconduct created fear or anxiety in the minds of the voting employees and not whether a party is accountable for the election interference.[135]

By placing too much emphasis on the agency question, the Fourth Circuit in *PPG* failed to subject the committee's election misconduct to the laboratory conditions standard.[136] Courts and the Board consider the existence of a free and uncoerced election environment in which employees can express freely their preferences for or against union representation dispositive in the resolution of representation election questions.[137] Although the concept of agency is one factor in the proper review of an election proceeding,[138] the principal-agent relationship is not the controlling factor in determining whether election interference warrants overturning an election.[139] The destruction of the laboratory conditions conducive to a free election is the principal question in the proper review of a representation election and the Fourth Circuit erred in not addressing this question in *PPG*.[140]

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[133] *Id.* at 818-21.

[134] *See supra* note 11 (courts and Board accord less weight to third-person election interference).

[135] *See* Zeiglers Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000, 1007-08 (3d Cir. 1981) (question is not culpability of union but whether atmosphere of fear and confusion existed in fact); Methodist Home v. NLRB, 596 F.2d 1173, 1183 (4th Cir. 1979) (laboratory conditions standard looks to effect of threats on employees' free choice rather than to source of threats); Cross Baking Co. v. NLRB, 453 F.2d 1346, 1348 (1st Cir. 1971) (existence of coercive atmosphere rather than culpability of union is dispositive in laboratory condition analysis); Home Town Foods, Inc. v. NLRB, 379 F.2d 241, 244 (5th Cir. 1967) (laboratory conditions standard looks to existence of coercive atmosphere rather than to party accountability in determining effect of election interference on employees' free choice).

[136] *See* 671 F.2d at 818-23 (*PPG* opinion contains no mention of laboratory conditions standard).

[137] *See supra* notes 12 & 13 (laboratory conditions standard).

[138] *See supra* notes 11 & 38 (agent-principal relationship helpful in assessing effect threats had on employees' free choice); *supra* note 11 (courts and Board accord more weight to election interference attributable to party).

[139] *See supra* text accompanying notes 12 & 13 (employees' free choice dispositive in determining whether to set aside election).

[140] *See supra* text accompanying notes 119-130 (*PPG* court failed to address laboratory conditions standard).