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COMMENT

AN EMPLOYER'S REMEDIES AGAINST INDIVIDUAL UNION MEMBERS FOR BREACH OF A NO-STRIKE PROVISION IN A COLLECTIVE BARGAINING AGREEMENT*

Most labor contracts contain a no-strike provision as the quid pro quo of a provision in a collective bargaining agreement requiring final and binding arbitration of unresolved disputes between the employer and the union over the agreement.¹ If individual union members engage in a work stoppage without the authorization of their union, such a wildcat strike clearly would be a violation of the collective bargaining agreement's no-strike provision. The employer would then be deprived of the benefit of his contract and the production and profits of the firm would be affected. Presumably, the employer would then be entitled to seek a legal remedy. The range of remedies available to an employer in such a predicament has been significantly constricted, however, during recent Supreme Court terms, and most notably by the Court's decision last year in *Complete Auto Transit, Inc. v. Reis*.² In *Reis*, the plaintiff-employers brought suit under section 301 of the Labor Management Relations Act³ seeking damages from individual union members for a

* The author wishes to express her appreciation for the gracious assistance of Lynn Paul Mattson, Steve Andrew, and Jan Brami in preparing this Comment.

1. Handsaker & Handsaker, *Remedies and Penalties for Wildcat Strikes: How Arbitrators and Federal Courts Have Ruled*, 22 CATH. U.L. REV. 279, 279 (1973). The United States Supreme Court has held that a no-strike provision can even be implied by the existence of an arbitration clause. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105-06 (1962). No obligation to arbitrate a labor dispute arises by operation of law; the law compels a party to submit to arbitration only if he has contracted to do so. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374 (1974).

2. 451 U.S. 401 (1981).

3. 29 U.S.C. § 185 (1976). The statute provides in part:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United

wildcat strike.⁴ The issue raised on appeal to the United States Supreme Court was whether section 301(a) of the Labor Management Relations Act of 1947⁵ authorizes such actions, a question that had been expressly reserved by the Supreme Court.⁶

The Labor Management Relations Act of 1947, also commonly referred to as the Taft-Hartley Act,⁷ was passed by Congress to reduce the large number of strikes in the United States, to strengthen the collective bargaining process, and to rebalance the bargaining power of employers and unions created by earlier legislation.⁸ Section 301 was enacted as a part of the Taft-Hartley Act to ameliorate the concerns that previous legislation had given unions too much power.⁹ Under the common law prior to 1947, unions were not recognized as legal entities. The adoption of section 301 remedied this by treating unions as if they were corporations for purposes of federal court litigation.¹⁰ Consistent with allowing unions to be sued, section 301(b) prevents money judgments against a union from being collected against individual union members.¹¹ The Taft-Hartley Act, however, does not deal directly with

States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the act of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

4. 451 U.S. at 403.

5. 29 U.S.C. § 185(a) (1976).

6. *See Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 249 n.7 (1962) (holding that § 301 of the Labor Management Relations Act of 1947 does not authorize an action against individual union officers and members when their union is liable for violating a no-strike clause).

7. Pub. L. No. 101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-187 (1976)).

8. The Wagner Act of 1935, the original form of the present National Labor Relations Act, which contains provisions derived from the Wagner Act and others added by the Taft-Hartley Act in 1947, and the Landrum-Griffin Act in 1959, outlawed only unfair labor practices by employers which interfere with the employees' freedom to organize and bargain collectively. The Taft-Hartley Act added prohibitions against union conduct. *See generally* A. COX, D. BOK & R. GORMAN, *LABOR LAW CASES AND MATERIALS* 81-87 (9th ed. 1981) (discussing the contributions of the Taft-Hartley Act to national labor policy).

9. Kozub, *Wildcat Strikers: Individual Liability Under Section 301?*, 3 *INDUS. REL. L.J.* 671, 673 (1980).

10. *Id.* *See* Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 *HARV. L. REV.* 274, 303-04 (1948). The prior common law necessitated service of process on every union member, Kozub, *supra* note 9, at 672, which illustrates the imbalance of bargaining power remedied by § 301. The Act also imposed liability on unions for unfair labor practices. *See* 29 U.S.C. § 158(b) (1976).

11. *See supra* note 3.

the question of whether an employer can recover monetary damages against individual union members for the actions they take without the authorization of the union.

Section 7 of the National Labor Relations Act protects employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection,"¹² which protects strikes conducted by lawful means. A strike in violation of a no-strike promise, however, is unprotected conduct¹³ and, as such, contravenes the basic policy of the Act to provide for industrial peace through the enforcement of collective bargaining agreements.¹⁴ In exchange for a no-strike promise on the part of the employees, a union usually negotiates for a grievance and arbitration procedure, whereby management bargains away its discretion to a third party.

Federal policy favoring the arbitration of labor disputes as a substitute for industrial strife is firmly grounded in the Labor Management Relations Act. Section 203(d) provides that the "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."¹⁵ In the 1960 *Steelworkers* trilogy,¹⁶ the Supreme Court enunciated the now well established presumption governing a dispute's arbitrability under a collective bargaining agreement: An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.¹⁷ The policies favoring arbitration have been construed so broadly that in the absence of contrary language in the contract, the duty to arbitrate extends to a dispute arising even after an

12. 29 U.S.C. § 157 (1976).

13. See *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 344 (1939) (participating employees subject to discipline, including discharge, for contract breach).

14. A strike that protests serious unfair labor practices of an employer, however, is not a violation of a no-strike clause. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 284 (1956). See *Arlan's Dep't Store*, 133 N.L.R.B. 802, 804 (1961) (strikers are in breach of contract if employer's unfair labor practices are not serious); *NLRB v. Northeast Okla. City Mfg. Co.*, 631 F.2d 669, 677 (10th Cir. 1980) (serious unfair labor practice excused breach of no-strike clause).

15. 29 U.S.C. § 173(d) (1976).

16. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

17. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

agreement's expiration.¹⁸

As the Supreme Court has noted, "[n]o obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so."¹⁹ An arbitration agreement and a no-strike promise are so closely linked, however, that the Supreme Court has found that a no-strike obligation can be implied from the existence of an arbitration provision.²⁰ In sharp contrast to the broad coverage of arbitration, a right that management has bargained away, stands the no-strike promise of the union and employees, which appears to be a highly devalued promise in recent terms of the Court, especially since the decision last term in *Complete Auto Transit, Inc. v. Reis*.²¹

I. THE FACTS IN *REIS*

Three employers engaged in the trucking industry brought suit under section 301(a) against named and unnamed employees seeking monetary and injunctive relief from the employees' participation in a strike not authorized by their union, Teamsters Local 332, in violation of the governing collective bargaining agreement.²² All three employers were parties to the same collective bargaining agreement with the Teamsters Union covering their operations, including those at their Flint, Michigan facilities.²³ The contract contained both a no-strike clause and a clause providing for the binding arbitration of grievances.²⁴ On June 8, 1976, the employees of Complete Auto Transit, Inc. began an unauthorized work stoppage in violation of the contract, and on June 10, the employees of the other two employers did likewise.²⁵ These employees believed that "the union was not properly representing them in current negotiations for amendments to the col-

18. *Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 255 (1977).

19. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374 (1974).

20. *Id.* at 382.

21. 451 U.S. 401 (1981).

22. 451 U.S. at 402-03.

23. *Id.* at 403.

24. The no-strike clause states that:

The Unions and the Employers agree that there shall be no strike, tie-up of equipment, slowdowns or walkouts on the part of the employees, nor shall the Employer use any method of lockout or legal proceedings without first using all possible means of a settlement as provided for in this Agreement, of any controversy which might arise.

Id. n.1.

25. Brief for Petitioners at 4, *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981).

lective bargaining agreement."²⁶

In separate, identical actions, the employers initially sought to enjoin the wildcat strikes, but after consolidation the federal district court denied that relief, finding that the strikes were not an arbitrable issue.²⁷ The court held that the differences which led to the work stoppage were between the union members and the union rather than between the employers and employees.²⁸ Additionally, the court found that the strikes had not been authorized by the union.²⁹ The Sixth Circuit Court of Appeals affirmed the district court on February 28, 1978.³⁰

On June 16, 1976, the employers renewed their motion for injunctive relief by amending their complaint to state that the local union had offered to enter into an agreement with the employer by which the striking employees would return to work in exchange for assurances that no discipline would be imposed.³¹ After additional hearings, the district court concluded that the work stoppage continued only because of a dispute between the union and the employers over amnesty from discipline for the striking employees and that this issue was arbitrable. The court then issued a preliminary injunction against the employees and directed the employers to submit to arbitration procedures should any discipline be imposed.³² The employees obeyed the injunction for

26. *Complete Auto Transit, Inc. v. Reis*, 614 F.2d 1110, 1111 (6th Cir. 1980).

27. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), requires that certain conditions be met before a federal court may enjoin a strike due to the prohibition against injunctions in labor disputes contained in § 4 of the Norris-LaGuardia Act of 1932, 29 U.S.C. § 104 (1976). Those requirements are: (1) that the collective bargaining agreement contain a mandatory grievance or arbitration procedure; (2) that the collective bargaining agreement give rise to an obligation on the part of the union not to strike over the subject grievance; (3) that the strike arise out of the subject grievance; (4) that breaches of the collective bargaining agreement are occurring and will continue to occur, or that such breaches have been threatened and will be committed; (5) that irreparable injury has occurred or will occur to the detriment of the employer; and (6) that the employer would suffer more from denial of the injunction than the union would from its issuance. *See* 398 U.S. at 254. *See also* Note, *Boys Markets Injunctions Against Employers: Lever Brothers, Inc. v. Chemical Workers Local 217*, 91 HARV. L. REV. 715, 719-24 (1978) (analysis of standards governing an order to arbitrate and a *Boys Markets* injunction).

Boys Markets overruled this aspect of *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962) (which held that a suit under § 301 to enjoin a work stoppage was barred by § 4 of the Norris-LaGuardia Act), and held that § 4 must be viewed in light of the subsequent passage of § 301 because equitable remedies are essential to the peaceful solution of labor disputes. 398 U.S. at 253.

28. *Reis*, 614 F.2d at 1111.

29. *Id.* This decision was delivered orally on June 14, 1976, with an order entered on June 21, 1976.

30. *Id.* This order was not published.

31. *Id.*

32. *Id.* at 1112. The injunction was issued on June 21, 1976, with no appeal taken from this order.

nine months and then, on March 25, 1977, sought to dismiss the entire consolidated complaint and to dissolve the injunction on the basis that it was moot.³³ In response, the plaintiff-employers argued that although the employees had returned to work, the issues of the case were not moot and that they were not precluded from obtaining damages from the individual employees for their lengthy breach of the contract's no-strike provision.³⁴

Relying on the United States Supreme Court's decision in *Buffalo Forge Co. v. United Steelworkers*,³⁵ which held that the issue of a strike's legality would not support an injunction against it, the district court denied the injunction on the grounds that the work stoppage was not precipitated by an arbitrable issue, a finding later reversed by the Sixth Circuit Court of Appeals.³⁶ The Sixth Circuit found that the strike had been transformed from a nonarbitrable internal dispute to an arbitrable underlying cause due to the amnesty dispute over the discharged workers, thus entitling the employers to an injunction within the ambit of *Boys Markets*.³⁷

The district court also dismissed the employers' claim for damages, holding that "one of the congressional purposes behind enactment of section 301 of the Labor Act was to shield union members from liability and that this purpose would be undercut if monetary damages were recoverable by an employer from individual employees."³⁸ The Sixth Circuit noted that this issue had never been addressed by the United States Supreme Court and that section 301 of the Labor Management Relations Act of 1947 does not directly deal with the question of whether the individual members of a union may be sued for damages resulting from a wildcat strike.³⁹ Finding that the legislative history indicates that individual members may not be sued for such damages under section 301,⁴⁰ and relying on the Seventh Circuit Court of Appeals' interpretation of section 301 in *Sinclair Oil Corp. v. Oil, Chemical*

33. *Id.*

34. *Id.*

35. 428 U.S. 397, 409 (1976) (the decision was handed down in the midst of the *Reis* dispute).

36. 614 F.2d at 1114.

37. *Id. Buffalo Forge*, which held that the issue of a strike's legality, while arbitrable, is not sufficient to support an injunction in light of the policy of the Norris-LaGuardia Act, was held not to be dispositive in this case because the underlying cause of the *Reis* strikes was found to be broader than merely the strike's legality. *Id.*

38. 614 F.2d at 1112 (summarizing the proceedings in the district court below).

39. *Id.* at 1115.

40. *Id.* Other federal courts have held that neither the text nor the legislative history of § 301 necessitates immunity for wildcat strikers. *See infra* notes 69-75 and accompanying text.

& *Atomic Workers International Union*,⁴¹ the Sixth Circuit affirmed the district court's dismissal of the employers' damages claim.⁴² The employers then petitioned the United States Supreme Court for reversal on the damages issue only.⁴³

II. STATUTORY BACKGROUND

The legal issue raised by *Reis* is one not previously addressed by the United States Supreme Court. Section 301 was enacted as a part of the Taft-Hartley Act of 1947 to grant federal district courts original jurisdiction over suits for violations of collective bargaining agreements. Both federal and state courts have concurrent jurisdiction under section 301, with state courts applying federal substantive law.⁴⁴ Section 301(b) expressly prevents money judgments against a union from being collected against individual union members, but does not address whether an employer can recover monetary damages against individual union members for their own actions, unauthorized by the union.⁴⁵

The major impetus underlying the theory of section 301(b) in protecting individuals from liability for union actions was the notorious *Danbury Hatters*⁴⁶ case, decided in 1915, in which union members were held personally liable for an illegal union-directed boycott that resulted in severe economic hardship. Prior to the decision in *Reis*, the lower federal courts and other authorities were divided on whether section 301(b) and its legislative history prevented suits against individual union members for monetary relief based on their individual actions.⁴⁷

An employer does have the right to enforce a collective bargaining agreement by virtue of section 301. This includes the right to sue a

41. 452 F.2d 49 (7th Cir. 1971). See *infra* notes 64-67 and accompanying text.

42. 614 F.2d at 1116.

43. 451 U.S. at 405. Review of the Sixth Circuit's ruling on injunctive relief was not sought by any party and will not be analyzed herein. The reasoning of the Sixth Circuit concerning monetary relief is discussed in conjunction with the discussion of the Supreme Court's decision. See *infra* notes 91-118 and accompanying text.

44. See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 514 (1962).

45. See *supra* note 3.

46. See *Loewe v. Lawlor*, 208 U.S. 274, 284 (1908) (cause of action can be maintained for union-directed boycott as violation of Sherman Antitrust Act); *Lawlor v. Loewe*, 235 U.S. 522, 535 (1915) (union members' property attached); *Loewe v. Savings Bank of Danbury*, 236 F. 444, 445 (2d Cir. 1916) (judgment of \$252,130 against union satisfied by attachment of individual members' property), *aff'd*, 242 U.S. 357 (1917). In these *Danbury Hatters* cases, an antitrust treble damage action was successfully brought against a large number of union members for the employer's losses from the union-directed boycott of his hats. See *Kozub, supra* note 9, at 673.

47. See *infra* notes 59-74 and accompanying text.

union for breach of a no-strike provision but only if the union "instigated, supported, ratified, or encouraged" the strike.⁴⁸ A wildcat strike, as the term will be used herein, refers to a strike by employees without union authorization which is in violation of the collective bargaining agreement,⁴⁹ thus, by definition, precluding obtaining damages from the union. It is well settled that section 301(a) confers jurisdiction on federal courts to decide lawsuits alleging violations of collective bargaining agreements and that it "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements."⁵⁰

The Supreme Court has provided guidelines for fashioning this body of federal law:

The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.⁵¹

In *Smith v. Evening News Association*,⁵² the Supreme Court explicitly recognized that section 301 does not exclude suits brought by individual employees and construed the phrase "between an employer and a labor organization" to modify "contracts" rather than "suits."⁵³ The

48. *Carbon Fuel v. United Mine Workers*, 444 U.S. 212, 216-18 (1979) (upholding the right to sue only when the union may be found liable under principles of agency in the absence of a contract clause requiring a higher duty of the union). See also *United Steelworkers v. Lorain*, 616 F.2d 919, 922 (6th Cir. 1980), cert. denied, 451 U.S. 983 (1981) (which held that the union was not liable even though the contract required the union to discourage and prevent work stoppages because such a clause did not appear in the damages section of the contract, which limited the union's liability to stoppages it authorized and encouraged).

49. See *Kozub*, supra note 9, at 671 n.1.

50. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957). For some years after its enactment, the scope of § 301 was interpreted narrowly, limiting it to actions between the parties to the collective bargaining agreement (i.e., the employer and the union), thus precluding suits involving individual employees. See Note, *Labor Law—Section 301 of the Labor-Management Relations Act—Individual Liability of Employees for an Unauthorized Work Stoppage in Breach of the No-Strike Clause of a Collective Bargaining Agreement*, 18 WAYNE L. REV. 1657, 1660-61 (1972).

51. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

52. 371 U.S. 195 (1962).

53. *Id.* at 200.

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having

scope of section 301 was thereby broadened since individual claims often lie at the "heart" of the contractual grievance procedure and are "intertwined" with the interests of the union.⁵⁴ But prior to *Reis*, the Court had not taken a clear position on whether an employer may sue individual employees under section 301. This question was not considered by the Court in *Atkinson v. Sinclair Refining Co.*⁵⁵ In *Atkinson*, the employer sought to hold the union liable for causing a strike in violation of the no-strike agreement. Furthermore, the employer sought to hold the individual union members and officials liable for their actions on behalf of the union.⁵⁶ The Court concluded that section 301 does not authorize a damages action against individual union officers and members when their union is liable for violating a no-strike clause.⁵⁷ The question of whether an employer may maintain a damages suit against "individual defendants acting not in behalf of the union but in their personal and nonunion capacity" when their actions have violated the no-strike clause was expressly reserved.⁵⁸

III. CONSTRUCTION OF SECTION 301

In *Hines v. Anchor Motor Freight, Inc.*,⁵⁹ the Supreme Court remarked that section 301 "contemplates suits by and against individual employees as well as between unions and employers."⁶⁰ *Hines* did not deal with the same issue addressed here, however, so prior to *Reis*, this statement could reasonably be viewed as nothing more than an indication of the Court's attitude toward the permissibility of a suit against an individual employee.⁶¹

The federal courts were divided on this question before *Reis*, with the Fourth, Sixth, and Seventh Circuits and some district courts dis-

jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1976).

54. 371 U.S. at 200. In *Smith*, a union member sought to collect wages in the form of damages from his employer who had refused to permit the plaintiff to report to work during a strike by another union although he allowed non-union employees to work. *Id.* at 196.

55. 370 U.S. 238 (1962).

56. *Id.* at 249.

57. *Id.*

58. *Id.* n.7.

59. 424 U.S. 554 (1976).

60. *Id.* at 562.

61. See Kozub, *supra* note 9, at 676. In *Hines*, the plaintiff-employee brought suit against the employer for wrongful discharge, as opposed to the employer suing the employee for monetary damages. 424 U.S. at 562.

missing suits against employees,⁶² and a number of other district courts allowing such suits.⁶³ In *Sinclair Oil Corp. v. Oil, Chemical & Atomic Workers International Union*,⁶⁴ the employer sought damages from six individual defendants as representatives of a class of approximately one thousand employees for breach of a no-strike clause in the collective bargaining agreement.⁶⁵ The court recognized that section 301 neither expressly authorizes nor expressly prohibits such a cause of action and therefore scrutinized the legislative history to determine congressional intent.⁶⁶ The court concluded that section 301 does not authorize a suit by an employer against an employee for engaging in a wildcat strike; furthermore, the court noted, section 301 was enacted to prevent the assessment of damages against individual union members.⁶⁷

A different reasoning was applied a few months before the *Sinclair Oil* decision by a district court within the Seventh Circuit in a decision not mentioned in the *Sinclair Oil* opinion. In *Duquoin Packing Co. v. Local P-156, Amalgamated Meat Cutters*,⁶⁸ a federal district court allowed a suit against individual employees for breach of a no-strike

62. *See, e.g.*, *Putnam Fabricating Co. v. Null*, 631 F.2d 311, 313 (4th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *United Steelworkers v. Lorain*, 616 F.2d 919, 924 (6th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Sinclair Oil Corp. v. Oil, Chem. & Atomic Workers Int'l Union*, 452 F.2d 49, 55 (7th Cir. 1971); *Lakeshore Motor Freight Co. v. International Bhd. of Teamsters, Steelhaulers Local No. 800*, 483 F. Supp. 1150, 1154 (W.D. Pa. 1979), *appeal dismissed*, 614 F.2d 772 (3d Cir. 1980); *United States Steel Corp. v. United Mine Workers, Local 8003*, 83 LAB. CAS. (CCH) ¶ 10,612 (D. Utah Apr. 14, 1978); *Benada Aluminum Prod. Co. v. United Steelworkers*, 83 LAB. CAS. (CCH) ¶ 10,609 (N.D. Ohio Apr. 5, 1978).

63. *See, e.g.*, *Certain-Teed Corp. v. United Steelworkers*, 484 F. Supp. 726, 728 (M.D. Pa. 1980); *New York State United Teachers v. Thompson*, 459 F. Supp. 677, 683 (N.D.N.Y. 1978); *Alloy Cast Steel Co. v. United Steelworkers*, 429 F. Supp. 445, 451 (N.D. Ohio 1977); *Duquoin Packing Co. v. Local P-156, Amalgamated Meat Cutters*, 321 F. Supp. 1230, 1233 (E.D. Ill. 1971).

64. 78 L.R.R.M. (BNA) 2601 (N.D. Ind. 1969), *aff'd*, 452 F.2d 49 (7th Cir. 1971).

65. 78 L.R.R.M. (BNA) at 2602. The action arose when a group of workers refused to cross the picket line of another bargaining unit of the same local union which was in the process of negotiating a new agreement. *See Note, supra* note 50, at 1657-58.

66. 452 F.2d at 52.

67. *Id.* at 55. The court did not expressly state that § 301 precludes an employer from bringing a similar action under another theory, although such prohibition seems to be implied from the court's statement that § 301 does "not authorize" such suits. *See Note, supra* note 50, at 1663. *See also* 6 GA. L. REV. 797, 799-800 (1972) (analysis of *Sinclair Oil*).

In a recent decision that followed the holding in *Sinclair Oil*, the Fourth Circuit stated that it was influenced by the fact "that in some nine years since the Seventh Circuit decided *Sinclair Oil*, Congress has not seen fit to take any action to alter the result in that case." *Putnam Fabricating Co. v. Null*, 631 F.2d 311, 313 (4th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981). *See also* *Westinghouse Elec. Corp. v. International Union of Elec. Workers*, 470 F. Supp. 1298, 1299 (W.D. Pa. 1979) (following *Sinclair Oil*), *appeal dismissed*, 614 F.2d 772 (3d Cir. 1980).

68. 321 F. Supp. 1230 (E.D. Ill. 1971).

agreement.⁶⁹ In that decision, the court distinguished the *Danbury Hatters* situation, involving a union-authorized breach of contract, from a situation involving a true wildcat strike.⁷⁰ Similarly, the federal district court in *New York State United Teachers v. Thompson*⁷¹ stated that to allow individual conduct to fall outside the scope of section 301 would leave a gap in the uniform enforcement of that statute. The court thus concluded that the rights of an employer were not to be accorded a lesser degree of protection.⁷² *Thompson* involved an educational leave provision of a collective bargaining agreement that required employees to return to their jobs for at least the length of their leave, which two employees violated upon their resignations. Since the two employees resigned, the court noted that the "usual" remedy of discipline or discharge was not available, but the court reasoned that the employees should be held liable in damages to their employer for their contract breach.⁷³

Furthermore, in *Alloy Cast Steel Co. v. United Steelworkers*,⁷⁴ individual union members were found liable for damages based on the Supreme Court's language in *Hines v. Anchor Motor Freight, Inc.*⁷⁵ With this background of limited and divided authority and with the absence of express statutory coverage, in *Reis*, the Supreme Court resolved the question of an individual's liability for a wildcat strike that breached a no-strike provision, pursuant to section 301, in favor of the individual and against the employer.

In interpreting the legislative history of section 301, the petitioners-employers in *Reis* argued that "[t]he concern of Congress was to insulate individuals from monetary liability because of actions taken by labor organizations as demonstrated in the *Danbury Hatters* cases."⁷⁶ The petitioners contended that the Sixth Circuit failed to distinguish

69. *Id.* at 1233.

70. *Id.*

71. 459 F. Supp. 677, 683 (N.D.N.Y. 1978).

72. *Id.* at 683-84.

73. *Id.* at 679-80. The unavailability of discharge and discipline remedies distinguishes this case from wildcat strike cases; furthermore, the collective bargaining contract therein required an employee violating the leave provisions to pay a pro rata share of their leave expense. Kozub, *supra* note 9, at 678. The reasoning in *Thompson* that employees should be liable on their collective bargaining agreement was relied on, however, in *Certain-Teed Corp. v. United Steelworkers*, 484 F. Supp. 726, 728 (M.D. Pa. 1980) (employer's suit against employees for violating a no-strike clause upheld), despite its factual differences from wildcat strike cases.

74. 429 F. Supp. 445, 451 (N.D. Ohio 1977).

75. 424 U.S. 554 (1976). See *supra* notes 59-61 and accompanying text for a discussion of the significance of *Hines*.

76. Brief for Petitioners at 8, *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981).

between the factual situation in *Danbury Hatters* and a factual situation where union members act as individuals and not as agents for their union.⁷⁷ According to the petitioners, in enacting the Taft-Hartley Act, Congress hoped to achieve the following goals: (1) to reduce the large number of strikes in the United States; (2) to strengthen the collective bargaining procedure; (3) to equalize the balance of power between employers and unions; (4) to provide for the enforcement of collective bargaining agreements; and (5) to eliminate the possibility of holding individuals liable when the union is responsible for the contractual breach.⁷⁸ The petitioners argued, however, that the overriding concern that existed in Congress was that collective bargaining agreements must be enforceable and binding upon the parties.⁷⁹ Congress condemned individual liability, the petitioners contended, only when union members were held responsible for the actions of the union.⁸⁰ In interpreting the legislative history of the Taft-Hartley Act of 1947, one must begin with its precursor, the Case bill of 1946,⁸¹ which was passed by

77. *Id.* at 9. As examples of other instances when courts have made similar erroneous interpretations, the petitioners cited *Putnam Fabricating Co. v. Null*, 631 F.2d 311, 313 (4th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981), and *Westinghouse Elec. Corp. v. International Union of Elec. Workers*, 470 F. Supp. 1298 (W.D. Pa. 1979), *appeal dismissed*, 614 F.2d 772 (3d Cir. 1980). Brief for Petitioners at 9.

78. Brief for Petitioners at 9-10. See 29 U.S.C. § 141(b) (1976) (statement of general purposes of Taft-Hartley Act); H.R. REP. NO. 245, 80th Cong., 1st Sess. 3-6 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 292, 294-97 (1948); S. REP. NO. 105, 80th Cong., 1st Sess. 1-3 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407, 407-09 (1948).

79. Brief for Petitioners at 10-12. See 93 CONG. REC. 3839 (1947) (remarks of Sen. Taft); 93 CONG. REC. 4410 (1947) (remarks of Sen. Taft).

80. Brief for Petitioners at 13. Under such reasoning, § 301 would then apply only to *Danbury Hatters* cases.

In the "Danbury Hatters" case it will be remembered a judgment was obtained, and because it was a voluntary organization, the houses of all the various members were levied on and taken in satisfaction of the judgment. We do not want to perpetuate such a condition. Therefore, we provide very simply that a labor union may be sued as if it were a corporation, and if it is sued, then the funds of the labor organization and its assets are responsible for the judgment, but the funds and the assets of the individual members are not liable on such a judgment.

92 CONG. REC. 5705 (1946) (remarks of Sen. Taft). See also 93 CONG. REC. 5014 (1947) (remarks of Sen. Ball) (concerning the *Danbury Hatters* cases); H.R. REP. NO. 510, 80th Cong., 1st Sess. 66 (1947), *reprinted in* 1947 U.S. CODE CONG. & AD. NEWS 1135, 1172 (stating that § 301(b) provides for money judgments against unions to be enforceable "against the organization as an entity and against its assets and not against any individual member or his assets"); 93 CONG. REC. 6283 (1947) (remarks of Rep. Case) (noting that the objection to *Danbury Hatters* cases is the attachment of property of individual members "to satisfy a judgment for action taken by officers whom they did not control"); Note, *supra* note 50, at 1664-66 (summary of legislative history).

81. H.R. 4908, 79th Cong., 2d Sess. (1946) (vetoed in 1946). See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962) (held that § 10 of the Case bill was the direct antecedent of § 301). Section 10 of the Case bill, as originally introduced in the House of Representatives, reads:

All collective bargaining contracts shall be mutually and equally binding and enforceable

both Houses of Congress, but vetoed by the President.⁸² The petitioners argued that the Court should not interpret statements made in a Senate debate on this bill in a vacuum, as the Sixth and Seventh Circuits had allegedly done in finding that discipline was the sole and exclusive remedy intended by Congress,⁸³ and that congressional debate focused on strikes for which a union was responsible and not on an individual's liability for a wildcat strike.⁸⁴

The respondents-employees argued that the Sixth Circuit had correctly interpreted Congress' purpose in insulating individual employees from a damages action.⁸⁵ In support of their proposition, the respondents cited the *Danbury Hatters* case and the final form of the Case bill as passed by the House and the Senate, which included a subsection (d) in section 10, which provided that employees who participated in unauthorized work stoppages would lose their status as employees under the National Labor Relations Act.⁸⁶ The respondents contended that sec-

ble either at law or in equity against either of the parties thereto, any other law to the contrary notwithstanding. In the event of a breach of any such contract or of any agreement contained in such contract by either party thereto, then, in addition to any other remedy or remedies existing either in law or equity, a suit for damages for such breach or for injunctive relief in equity may be maintained by the other party or parties in any United States district court having jurisdiction of the parties. If the defendant against whom action is sought to be commenced and maintained is a labor organization such action may be filed in the United States district court of any district wherein any officer of such labor organization resides or may be found.

H.R. 5262, 79th Cong., 2d Sess. (1946).

82. For the presidential message vetoing the Case bill and the unsuccessful congressional attempt to override the veto, see 92 CONG. REC. 6674-78 (1946).

83. Brief for Petitioners at 16-17, *Reis*. The Seventh Circuit used the following statements concerning fines by unions against their members as definitive support of discipline as the sole remedy of § 301. See *Sinclair Oil Corp. v. Oil, Chem. & Atomic Workers Int'l Union*, 452 F.2d 49, 53 (7th Cir. 1971). The full exchange between the Senators reads as follows:

MR. CAPEHART: I believe I am correct in the statement that in many miners' contracts an agreement is contained that if any member of the union pulls a wildcat strike or a sitdown strike, or refuses to work, he is automatically fined by the union, and I think the fine has been as high as \$6 a day. I think it will be found today that such provisions are contained in miners' contracts, by which they try to discipline their own members by fining them \$2, or \$4, or \$6 a day if they refuse to work according to the terms of the collective bargaining contract.

MR. TAFT: Yes, I think so. Generally, this particular provision has been approved by the labor people. They feel, and I feel, that a responsible labor leader who wants to keep his contract should not be hampered by the fact that members of the union whom he cannot control put on a wildcat strike. Four or five men can tie up an entire plant—and it has happened repeatedly—if they happen to be in a crucial spot. Those are the men who ought to be disciplined if they prevent a responsible labor leader from carrying on his collective bargaining contract.

92 CONG. REC. 5706 (1946).

84. Brief for Petitioners at 16, *Reis*.

85. Brief for Respondents at 8, *Reis*.

86. (d) Any employee who participates in a strike or other interference with the performance of an existing collective bargaining agreement, in violation of such agreement,

tion 10(d) evidenced congressional intent to provide discipline and discharge as the sole remedy for an employer.⁸⁷ Furthermore, the respondents noted that the Court has questioned the advisability of an employer's use of the money damage remedy even against a union as an instrument of attaining industrial peace,⁸⁸ thus such a remedy should likely be questioned as an action against individuals.

In its amicus curiae brief, the AFL-CIO indicated that while provisions similar to section 10(d) of the Case bill of 1946 were not a part of the final form of the Labor Management Relations Act of 1947, the Conference Committee did so only because of recent NLRB decisions upholding discharges of wildcat strikers.⁸⁹ Further, the AFL-CIO contended that Congress expressly rejected the creation of a damage remedy against individual employees with the exclusive remedy of discharge sanctioned for employers.⁹⁰

IV. DECISION OF THE SUPREME COURT IN *REIS*

The Supreme Court prefaced its opinion in *Reis* with a reference to the federal courts' authority to fashion a body of federal law for the enforcement of collective bargaining agreements, but noted that such authorization was to be exercised with substantial deference to revealed congressional intent.⁹¹ In examining the "penumbra" of section 301(b), the Court found congressional intent to clearly shield individual employees from liability for damages arising from their breach of the no-strike clause of a collective bargaining agreement, regardless of whether the union participated in or authorized the illegality.⁹² "Indeed, Congress intended this result even though it might leave the employer unable to recover for his losses."⁹³

if such strike or interference is not ratified or approved by the labor organization party to such agreement and having exclusive bargaining rights with such employee, shall lose his status as an employee of the employer party to such agreement for the purposes of Sections 8, 9 and 10 of the National Labor Relations Act: Provided, that such loss of status for such employee shall cease if and when he is re-employed by such employer.

H.R. 4908, 79th Cong., 2d Sess. (1946).

87. Brief for Respondents at 16, *Reis*.

88. *Id.* at 30 (citing *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 248 (1970)).

89. Brief for Amicus Curiae, AFL-CIO at 27, *Reis*.

90. *Id.* at 27-28.

91. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 406 (1981). Justice Brennan delivered the opinion of the Court, in which Justices Stewart, White, Marshall, Blackmun, and Stevens joined. Justice Powell concurred in part and in the judgment. Chief Justice Burger filed a dissenting opinion, in which Justice Rehnquist joined.

92. *Id.* at 407.

93. *Id.* at 407-08.

Beginning its review of the legislative history of section 301 with the Case bill, the Court focused on section 10(d), which explicitly permitted the discharge of a wildcat striker, and cited examples of Congress' "clear" understanding of its limitations of an employer's remedies.⁹⁴ Due to the "substantial" similarity between the Case bill and section 301, the Court found that Congress' intent was to shield individual employees from liability.⁹⁵

Six months after the presidential veto of the Case bill, Congress began work on the legislation that became section 301.⁹⁶ The House proposal included a provision imposing damages liability on individuals for unlawful concerted activity which was defined to include, among other things, jurisdictional and sympathy strikes, but not wildcat strikes; the Court noted that this proposal was rejected by the Senate in its version and that a Joint Committee adopted the Senate version.⁹⁷ Furthermore, the Court noted that the Joint Committee deleted the proposal of the House version of section 301 that dealt with the right to discharge wildcat strikers, as it was deemed no longer necessary in light of recent NLRB decisions.⁹⁸ The Court concluded that the penumbra of section 301(b) and its legislative history indicate a congressional "preference" for discharge of a wildcat striker, with its

94. *Id.* at 410. The principal proponent, Senator Taft, explained:

If the union violates its collective bargaining agreement, it is responsible but no individual member is responsible, and he can in no way be deprived of his rights. But if the union tries to keep its contract, and, in violation of its undertaking, some of its members proceed to strike, then the employer may fire those members and they do not have the protection of the Wagner Act.

92 CONG. REC. 5705-06 (1946) (remarks of Sen. Taft). *See* 92 CONG. REC. 5930-31 (1946) (remarks of Rep. Case).

95. 451 U.S. at 410.

96. *Id.*

97. *Id.* at 412. Senator Taft offered an amendment for individual damages actions for secondary boycotts similar to the House proposal, but in debate he altered the language to limit damages to claims against unions in order to conform with § 301(b). *See* 93 CONG. REC. 4900, 5041-42 (1947). The Court found the debate on this proposal to be critical:

MR. MORSE: [T]he proposal of the Senator from Ohio would open wide the doors of the Federal Courts to damage suits against any person who engaged in a strike or attempted to persuade other employees to engage in a strike for one of the prohibited objectives.

The proposal would very definitely take us back at least 40 years and we would again have the spectacle of mass suits against employees similar to the infamous Danbury Hatters case. . . .

It should be pointed out that the substitute proposal is inconsistent with the present provision in the bill allowing a union to be sued for breach of contract. . . . Also, section 301 limits recovery to the assets of the union. The substitute allows the attachment of employees' bank accounts and all their property.

451 U.S. at 413-14.

98. *Id.* at 414. *See* Scullin Steel Co., 65 N.L.R.B. 1294, 1317-18 (1946); Joseph Dyson & Sons, Inc., 72 N.L.R.B. 445, 446-47 (1947).

express language not only precluding enforcement of judgments against individuals entered against unions, but excluding individual strikers from damages liability as well.⁹⁹ The Court then dismissed its prior statement in *Hines v. Anchor Motor Freight, Inc.* that “[s]ection 301 contemplates suits by and against individual employees”¹⁰⁰ as essentially dictum.¹⁰¹

After *Reis*, the question arises of what remedies an employer may pursue. For example, assume that an employer gives a work assignment to an influential employee who refuses the assignment as undesirable. The employee is then discharged, but the employee's peers believe the employee was wronged and walk out in support of the discharged employee's reinstatement. Both parties refuse to compromise so the employer turns to the union which denies any involvement.¹⁰² Legal counsel informs the employer of the *Reis* decision and that the union is liable only for strikes it authorizes.¹⁰³ The reality of a wildcat strike is thus visited upon the employer, who feels cheated of his bargain because he has exchanged his unreviewable discretion in employment matters by agreeing to arbitrate disputes in return for a no-strike commitment in the negotiations of the collective bargaining agreement.

In *Reis*, the Court identified a “significant” array of other remedies available to an employer in such a situation. First, the Court noted an employer could seek monetary damages when responsibility may be traced to the union.¹⁰⁴ Additionally, the Court indicated that an employer may discharge or otherwise discipline an employee who unlawfully walks off the job.¹⁰⁵ The petitioners in *Reis* had argued that a damages remedy against individuals furthered industrial peace in its deterrence of wildcat strikes. In rejecting this contention, the Court pointed to the alternative of having the union itself discipline its wild-

99. 451 U.S. at 415.

100. 424 U.S. 554, 562 (1976). See *supra* notes 59-61 and accompanying text for a discussion of *Hines*.

101. 451 U.S. at 415 n.17.

102. Fishman & Brown, *Union Responsibility for Wildcat Strikes*, 21 WAYNE L. REV. 1017, 1017-18 (1975).

103. See *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 216-18 (1979).

104. 451 U.S. at 416 n.18.

105. *Id.* See *Lakeshore Motor Freight Co. v. International Bhd. of Teamsters, Steelhaulers Local No. 800*, 483 F. Supp. 1150, 1154 n.2 (W.D. Pa. 1980) (wildcat strikers discharged, and those allowed to return were rehired as new employees). When discipline is imposed by the company, the union may then submit the matter to arbitration by filing a grievance concerning the discipline. In such cases, arbitrators have upheld whatever discipline was imposed in the majority of cases. *Handsaker & Handsaker*, *supra* note 1, at 286.

cat members.¹⁰⁶ The final remedy suggested by the Court in *Reis* is that of injunctive relief against the union for breach of a no-strike provision when the underlying dispute giving rise to the breach is subject to binding arbitration.¹⁰⁷ As for injunctive relief against individuals, the Court found this issue not to be before it, but commented that the district court judge found that the strike therein commenced over a nonarbitrable labor dispute for which injunctive relief would not be available.¹⁰⁸

Justice Powell's concurring opinion, while agreeing with the Court's interpretation of the Taft-Hartley Act, does not agree that an employer has a significant array of other remedies.¹⁰⁹ Justice Powell observed that "[i]n reality, more often than not, each of these remedies [injunction, discharge, union discipline, and damages when the union is liable] is illusory."¹¹⁰ While noting that the result of this absence of remedies is a lawless vacuum that leaves such strikes undeterred and the public interest unprotected,¹¹¹ Justice Powell concluded, however, that it is within the province of Congress, and not that of the Court, to authorize a damages remedy against individual wildcat strikers.¹¹²

Chief Justice Burger's dissent, which Justice Rehnquist joined, agrees with Justice Powell's analysis of the remedies actually available to an employer.¹¹³

These measures, however, are no answer; they may be too little and they surely come too late, after the employer has suffered substantial losses to its business due to a strike that, under the contract, never should have occurred. In theory, the employer might mitigate damages by hiring substitute

106. 451 U.S. at 416 n.18. The Landrum-Griffin Act imposes procedural due process on such union discipline.

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. § 411(a)(5) (1976).

107. 451 U.S. at 416 n.18. *See* *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 407 (1976) (issue of strike's legality cannot support injunction); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 253-54 (1970) (arbitrable issue and equitable relief requirements necessary for enjoining a strike). For a discussion of the Sixth Circuit's application of these injunction principles in *Reis*, see notes 27-37 *supra* and accompanying text.

108. 451 U.S. at 416 n.18.

109. *Id.* at 417 (Powell, J., concurring).

110. *Id.* at 420.

111. *Id.* at 423.

112. *Id.*

113. *Id.* at 428 n.4 (Burger, C.J., dissenting).

workers, but this assumes qualified workers could be found who would be willing to cross even a "wildcat" picket line.¹¹⁴ Moreover, the Chief Justice argued that the majority had misinterpreted the scope of section 301. He contended that not only does the statute not apply on its face, but that the legislative history cited by the majority does not even address the issue of individual liability for individual conduct undertaken without union involvement.¹¹⁵ According to Chief Justice Burger, the Court reached its decision purely by relying on negative implications from the legislative history of section 301.¹¹⁶

The Chief Justice opined that the Court's holding would significantly undermine the usefulness and reliability of the collective bargaining process and would erode the fundamental principle that individuals are accountable when they breach a contract voluntarily executed through their agent, the union.¹¹⁷ If workers can "have their cake and eat it too" by holding the employer liable for its breaches but receiving immunity for their own, industrial harmony will be jeopardized as an employer's incentive to enter a collective bargaining agreement is sharply diminished.¹¹⁸

V. ANALYSIS OF THE REMEDIES AVAILABLE TO AN EMPLOYER

As the Supreme Court acknowledged in *Reis*, the express language of section 301 neither grants nor prohibits a damage remedy against individuals for wildcat strikes.¹¹⁹ The Court was convinced, however, that the penumbra of section 301(b) as delineated by its legislative history excludes individual strikers from damages liability.¹²⁰ Despite this determination, there is no definite conclusion that can be drawn from the legislative history to indicate that Congress intended to provide immunity to wildcat strikers for their own breaches of contract. As Chief Justice Burger observed, "[t]he Court cites various comments by Members of Congress regarding immunity for union members when they act with union approval. Those remarks do not address the issue before us—individual liability for individual conduct *without* union

114. *Id.* at 428-29 (footnote omitted).

115. *Id.* at 427 n.2.

116. *Id.* The closest support for the majority interpretation is a remark by Senator Taft, made during the debate on the predecessor Case bill, stating that employers may fire "wildcat" strikers, which does not directly touch the issue. *See* 92 CONG. REC. 5705-06 (1946).

117. 451 U.S. at 427.

118. *Id.*

119. *Id.* at 415.

120. *Id.*

involvement."¹²¹

In determining congressional intent in enacting section 301, the Court also placed unwarranted reliance on the rejection by the Senate and Joint Committee of a House proposal establishing a damages action against individuals engaged in secondary boycotts.¹²² The discussion between Senators Morse and Taft, relied on by the Court,¹²³ does not support any clear inference that Congress intended to preclude damages suits against wildcat strikers; the discussion definitively establishes only that Senator Taft agreed that individual union members acting on behalf of a union in a secondary boycott should not be subject to individual liability. A secondary boycott is by its nature conducted by union members on behalf of their union, and Senator Taft's alteration of his amendment may very well have been done with the *sole* intent of conforming to the policy of section 301 that prevents individuals from being liable for acts performed by their agent, the union.¹²⁴

In the absence of any explicit congressional intention to prohibit individuals from being liable for their own acts, the majority in *Reis* seems to have violated the Court's own admonishment against negative implications from section 301(b).¹²⁵ The legislative history of section 301 is inconclusive at best, and the propriety of the Court's decision should be judged in its fairness and effectiveness in implementing the national labor policy of promoting industrial peace.¹²⁶

In *Reis*, the Supreme Court states that there is a significant array of other remedies available to employers to achieve adherence to collective bargaining agreements.¹²⁷ The first remedy suggested, that of damages from the union when responsibility may be traced to it, is totally inapplicable to the factual situation in *Reis* in which it was specifically alleged that the union was not responsible and could not be held liable.¹²⁸ The Court also suggests that an employer may discharge

121. *Id.* at 427 n.2 (emphasis in original) (Burger, C.J., dissenting).

122. *Id.* at 412. A secondary boycott, which is an unfair labor practice, is the application of economic pressure upon a person with whom the union has no dispute regarding its own terms of employment in order to induce that person to cease doing business with another employer with whom the union does have such a dispute. *See* A. COX, D. BOK & R. GORMAN, *supra* note 8, at 721-22.

123. 451 U.S. at 413-14. *See supra* note 98 and accompanying text.

124. *See* Brief for Petitioners at 9-11, *Reis*.

125. *See* 451 U.S. at 407.

126. *See* *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 249 (1970).

127. 451 U.S. at 416 n.18.

128. Justice Powell noted in his concurring opinion that strike encouragement by a union is more often cryptic than explicit. "One court noted that unions sometimes employ 'a nod or a wink

or discipline an employee who strikes in breach of his contract because a strike that is in breach of contract is unprotected conduct under the National Labor Relations Act.¹²⁹ The effect of such action on industrial peace is questionable; it is easily foreseeable that such a strategy could result in requiring reinstatement of "martyred" workers as a condition to concluding the strike. If the employer's business is on the line, he may capitulate and thereby reward a contract breach.¹³⁰ Moreover, wholesale discharges are not practical because an employer cannot terminate a majority of his labor force without crippling production. Selective discharges of union officers are discriminatory and therefore illegal under section 8(a)(3) of the National Labor Relations Act, according to the NLRB, even when the union officer fails to fulfill a contractual requirement to help terminate strikes.¹³¹ Furthermore, an employer can exercise an individual damage remedy without inflicting any hardships upon his own business, as a discharge scheme could; the additional deterrence provided by a damages remedy when the strikers still have their jobs also provides support for this form of relief for the employer.¹³² It does not seem that an individual damage remedy would antagonize employees any more than discharge would¹³³ and, with a damages remedy, at least a portion of the employer's losses may be recovered.

The Court in *Reis* also pointed to the alternative of the union itself disciplining its wildcat members.¹³⁴ Practically, a union officer is not likely to press charges against a union member when the union is not being harmed. Although it would seem that a union unable to control its members would lose bargaining power,¹³⁵ under the recent decision

or a code . . . in place of the word "strike."'" *Id.* at 418 n.1 (citations omitted) (Powell, J., concurring).

129. *See* NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939) (workers who strike illegally may be terminated).

130. Fishman & Brown, *supra* note 102, at 1022.

131. 451 U.S. at 421 (Powell, J., concurring). *See, e.g.*, Precision Casting Co., 233 N.L.R.B. 183 (1977). Some courts of appeals have disagreed with the Board and have found that union officers may be held to a higher contractual duty. *See* Fournelle v. NLRB, 109 L.R.R.M. (BNA) 2441, 2447 (D.C. Cir. 1982); Gould, Inc. v. NLRB, 612 F.2d 728, 730 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980); Indiana & Mich. Elec. Co. v. NLRB, 599 F.2d 227, 230 (7th Cir. 1979).

132. Note, *supra* note 50, at 1670.

133. *Id.* at 1669. *Contra* Note, *Labor Law—Strikes—Individual Union Members Not Liable for Breach of Contractual No-Strike Clause Even When Strike Unauthorized by Union*, 86 HARV. L. REV. 447, 450-51 (1972) (questioning deterrence value of damages remedy due to likely animosity from imposition of such).

134. 451 U.S. at 416 n.18.

135. Kozub, *supra* note 9, at 671.

in *Carbon Fuel Co. v. United Mine Workers*,¹³⁶ there is no real incentive to take action against striking employees.

Injunctions in labor disputes are generally prohibited except within the limited provisions of *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,¹³⁷ which provide for injunctive relief only when the underlying dispute giving rise to the contract breach is subject to binding arbitration. Injunctive relief against the union was the final remedy suggested by the Court in *Reis*. The Court implicitly recognized, however, that such relief is not always available, as in *Reis* wherein the district court initially denied it.¹³⁸ Although an injunction was eventually issued in *Reis*,¹³⁹ the employer was denied immediate relief from the strike. Thus, it appears that after the *Reis* decision the Court's "significant array of other remedies" is actually quite limited.

In addition to the alternative remedies addressed by the Court, damages for a violation of an injunction may be available in those limited instances in which an injunction may issue.¹⁴⁰ Of course, these damages will be paid into the court and not to the employer to compensate his losses;¹⁴¹ nevertheless this would appear to have some deterrent value. In fact, deterrence seems to be one of the strongest arguments for an individual damage remedy, which was denied in *Reis* without full consideration of this aspect.

One commentator has also suggested that a possible avenue for obtaining a damages remedy may lie in judicial enforcement of an arbitrator's award directing employees to pay damages.¹⁴² Before *Boys Markets*, the courts were split on this approach in a somewhat analogous situation involving the enforcement of arbitrator's awards directing employees to return to work.¹⁴³ The Fifth Circuit upheld a

136. 444 U.S. 212, 216-18 (1979) (upholding the right of an employer to sue only when the union authorized the strike absent a contract clause requiring a higher duty of the union to prevent strikes). See *supra* note 48 and accompanying text. See also *United States v. Railroad Trainmen*, 27 L.R.R.M. (BNA) 2308, 2311 (N.D. Ill. 1951) (the court determined that it is unrealistic to expect a union officer to punish a co-worker).

137. 398 U.S. 235, 253-54 (1970). See *supra* notes 27-37 and accompanying text.

138. 451 U.S. at 416 n.18.

139. For a discussion of the Sixth Circuit's application of the *Boys Markets* principles in *Reis*, see notes 27-37 *supra* and accompanying text. In *Reis*, the Supreme Court did not address the propriety of injunctive relief against individual wildcat strikers, thus leaving the question open. 451 U.S. at 415 n.17.

140. Kozub, *supra* note 9, at 679.

141. *Id.*

142. *Id.* at 683.

143. See *Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n, Local 1291*, 368 F.2d 932 (3d Cir. 1966) (sanctioning enforcement of arbitrator's award), *rev'd on other grounds*, 389 U.S. 64 (1967). *Contra Tanker Serv. Comm., Inc. v. International Org. of Masters*,

district court order enforcing such an arbitrator's award while acknowledging that the court itself had no power to issue the order for an injunction.¹⁴⁴ Although these cases dealt with enjoining strike activity in violation of the no-strike provision of an agreement,¹⁴⁵ the analogy to the enforcement of an arbitrator's award that is beyond the court's authority to issue is valid. Unfortunately, not all arbitrators have construed their powers to encompass the imposition of monetary liability for instances of union culpability,¹⁴⁶ and there is a lack of authority for the imposition of damages against individuals for breach of a no-strike provision.¹⁴⁷ Additionally, to enforce such an award, it would be necessary to include a provision in the collective bargaining agreement specifying that damages may be awarded when individual employees engage in a wildcat strike. The employer would then be seeking to uphold the agreement rather than pursuing an independent court action for a money judgment.¹⁴⁸

The question arises, however, whether such a subject can be legally included in a collective bargaining agreement. In *NLRB v. Wooster Division of Borg-Warner Corp.*,¹⁴⁹ the Supreme Court divided lawful subjects of bargaining into two categories, mandatory and permissive, based upon section 8(a)(5) of the National Labor Relations Act,¹⁵⁰ which requires an employer to bargain collectively with his employees' representative, and section 8(d),¹⁵¹ which requires good faith bargaining with respect to wages, hours, and other terms and conditions of employment. Mandatory subjects of bargaining are defined as

Mates & Pilots, 269 F. Supp. 551 (E.D. Pa. 1967) (order to enforce award precluded by § 4 of the Norris-LaGuardia Act); *Marine Transp. Lines v. Curran*, 65 L.R.R.M. (BNA) 2095, 2097 (S.D.N.Y. 1967) ("The court is being asked to enjoin a work stoppage. This is the reality of the situation, whatever may be the form of the proceeding.").

144. *New Orleans S.S. Ass'n v. General Longshore Workers*, 389 F.2d 369, 372 (5th Cir. 1968).

145. See *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 253-54 (1970). *Boys Markets* overruled *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962) (held that a suit under § 301 to enjoin a work stoppage was barred by § 4 of the Norris-LaGuardia Act). See *supra* note 27.

146. See *Handsaker & Handsaker*, *supra* note 1, at 310-11. Compare *PPG Indus., Inc.*, 51 Lab. Arb. (BNA) 500, 504 (1968) (Vadakin, Arb.) (authority to award monetary damages even where contract silent on such) with *Waycross Sportswear, Inc.*, 53 Lab. Arb. (BNA) 1061, 1062 (1969) (Marshall, Arb.) (no power to award monetary damages).

147. Kozub, *supra* note 9, at 685.

148. *Id.*

149. 356 U.S. 342 (1958). For a more detailed discussion of these concepts, see Stark, *Preliminary Issues as Permissive Subjects of Bargaining: The Implications of NLRB v. Bartlett-Collins Co.*, 16 TULSA L.J. 691, 697-99, 711-19 (1981).

150. 29 U.S.C. § 158(a)(5) (1976).

151. *Id.* at § 158(d).

"wages, hours, and other terms and conditions of employment,"¹⁵² and a party may reach an impasse over these demands and attempt to back them with economic pressure. Furthermore, it is an unfair labor practice to refuse to bargain about such a subject. Any other subjects of bargaining that fall outside section 8(d) are non-statutory; therefore, there is no duty to bargain. Insisting upon bargaining to agreement over a permissive subject is considered the equivalent of a refusal to bargain and thus is an unfair labor practice.¹⁵³

A clause that subjects a union to liability for damages from the breach of a no-strike clause has been construed by the NLRB as a permissive bargaining subject¹⁵⁴ and any damages clause that imposes liability on individuals probably could also be construed as a permissive bargaining matter. It seems more likely, however, that such a clause would be illegal due to its inconsistency with the duty of fair representation owed by the union to the employees.¹⁵⁵ While permissive subjects of bargaining may be included in collective bargaining agreements, illegal subjects cannot be included as they violate the National Labor Relations Act.¹⁵⁶

Another potential employer remedy not mentioned by the Court in *Reis* is a state tort action for tortious interference with an employer's business.¹⁵⁷ The question then becomes whether a state tort action is preempted since section 301 now precludes a federal cause of action

152. *Borg-Warner*, 356 U.S. at 349.

153. See Stark, *supra* note 149, at 698.

154. Radiator Specialty Co., 143 N.L.R.B. 350 (1963), *enforced in part*, 336 F.2d 495, 500 (4th Cir. 1964) (disagreeing with Board and holding that legal-liability clause is mandatory subject); Hall Tank Co., 214 N.L.R.B. 995, 1000 (1974) (employer's insistence on indemnification clause from union for damages resulting from work stoppage violated § 8(a)(5)).

155. Galveston Maritime Ass'n, Inc., 148 N.L.R.B. 897, 899 (1964) (union held to breach its duty to bargain in good faith under § 8(b)(3) for demanding provision inconsistent with fair representation). See generally C. MORRIS, *THE DEVELOPING LABOR LAW* 726-56 (1971 & supplements) (discussion of union's duty to employees).

156. See, e.g., *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 803 (7th Cir. 1951) (closed shop clause held illegal subject). Beyond express violations of the National Labor Relations Act, the category of illegal subjects is unclear. See C. MORRIS, *supra* note 155, at 435-39; Comment, *Application of the Mandatory-Permissive Dichotomy to the Duty to Bargain and Unilateral Action: A Review and Reevaluation*, 15 WM. & MARY L. REV. 918, 920-21 & n.15 (1974); Stark, *supra* note 149, at 697 n.57.

157. *Louisville & N.R.R. v. Brown*, 252 F.2d 149, 156 (5th Cir. 1958) (tortious interference with business relations recognized as cause of action in wildcat strike of railroad employees, who were not subject to the National Labor Relations Act), *cert. denied*, 356 U.S. 949 (1958). For criticisms of this case, see Givens, *Responsibility of Individual Employees for Breaches of No-Strike Clause*, 14 INDUS. & LAB. REL. REV. 595 (1961); Comment, *Liability of Employees Under State Law for Damages Caused by Wildcat Strike: The Brown Case*, 59 COLUM. L. REV. 177 (1959). See generally Annot., 5 A.L.R.4th 9, § 2 (1981) (summary of cases dealing with the interference of business relations).

against individual strikers for damages.¹⁵⁸ Although section 301 contemplates only contract actions against individuals, unions, or employers, a state tort claim, of course, cannot be exercised to evade national labor policy.¹⁵⁹

The general rule of *San Diego Building Trades Council v. Garmon*¹⁶⁰ is applicable to the question of a state tort action for damages from a wildcat strike:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations.¹⁶¹

In applying a state tort action to wildcat strikers for tortious interference with business relations, the protections of section 7 of the National Labor Relations Act are not invoked unless there have been serious unfair labor practices committed by the employer.¹⁶² Moreover, the Court has recognized exceptions to *Garmon* when there has been violent tortious activity, when there is an overriding state interest

158. The Supreme Court of Oklahoma, prior to passage of the National Labor Relations Act, held that a peaceable and orderly strike, apart from contractual liability, is not in violation of the law. *Roddy v. United Mine Workers*, 41 Okla. 621, 626, 139 P. 126, 128 (1914) (limited to instances when the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for the employees). Oklahoma statutorily protects employees' rights to concerted action against employers in trade disputes in both civil and criminal cases in peaceable and legitimate endeavors. *See Lair v. State*, 316 P.2d 225, 236 (Okla. 1957) (construing statute now at OKLA. STAT. tit. 40, § 166 (1981)). This statute, however, expressly excludes acts of force or violence. *Id.* It could therefore be inferred that an action in tort against wildcat strikers may be valid in Oklahoma. The United States Supreme Court has long recognized that local common law actions such as injunctions, libel, and tort are not necessarily preempted by federal law. *See, e.g., Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 297 (1971).

159. *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 249 (1962).

160. 359 U.S. 236 (1959).

161. *Id.* at 244. *See Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 138-41 (1976) (state regulation of overtime preempted although neither § 7 nor § 8 applied).

162. *See Lincoln Tech. Inst., Inc.*, 256 N.L.R.B. No. 32, 1980-81 NLRB Dec. (CCH) ¶ 18,115 (May 27, 1981) (discharge of employees for breach of no-strike clause justified).

deeply rooted in a local feeling of responsibility, and when there is little risk of interference with the effective administration of national labor policy.¹⁶³ Although the Court has not specifically addressed the status of a state tort action for tortious interference with business relations against a wildcat striker since *Reis*, such an action is arguably not preempted due to the state's interest in the welfare of its citizens.¹⁶⁴ The assertion of state jurisdiction does not create any risk of violating protected labor activity¹⁶⁵ as a wildcat strike is not a lawful means of economic sanction.¹⁶⁶

The final potential remedy available to an employer is prevention of a wildcat strike. This depends in considerable measure on improved communication so that the tensions which frequently precipitate a wildcat strike will not mount. Ideally, workers should accept the grievance procedures already available to deal with disputes.¹⁶⁷

VI. CONCLUSION

Even if the Court in *Reis* is correct in concluding that the legislative history of section 301 of the Labor Management Relations Act precludes a damages remedy against individual wildcat strikers, which seems questionable,¹⁶⁸ the alternative remedies suggested by the Court as available to the employer are severely limited, if not entirely illusory.¹⁶⁹ Furthermore, the future validity of the additional remedies raised herein—monetary relief through an arbitrator's award or a state tort action—is uncertain.¹⁷⁰ As the Supreme Court has effectively left the employer without a remedy for wildcat strikes, which will likely be disruptive to industrial harmony since wildcat strikes are left undeterred, congressional consideration of damages against wildcat strikers is needed. A no-strike obligation, express or implied, is usually considered the quid pro quo of an undertaking by the employer to submit to

163. See *Farmer v. United Bhd. of Carpenters & Joiners, Local 25*, 430 U.S. 290, 297-301 (1977). See generally Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277 (1980) (analyzing the *Garmon* rule and its exemptions).

164. Cf. *Farmer v. United Bhd. of Carpenters & Joiners, Local 25*, 430 U.S. 290, 297-301 (1977) (state tort action for intentional infliction of emotional distress not preempted).

165. Cf. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978) (enforcement of state trespass laws against picketing not preempted).

166. Cf. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 138-41 (1976) (state regulation of failure to agree to overtime as unfair practice preempted as union control of overtime is lawful economic weapon).

167. See *Handsaker & Handsaker*, *supra* note 1, at 321.

168. See *supra* notes 119-26 and accompanying text.

169. See *supra* notes 127-39 and accompanying text.

170. See *supra* notes 140-66 and accompanying text.

arbitration. Indeed, the purpose of arbitration procedures is to provide a mechanism for the settlement of labor disputes without resort to strikes. However, the incentive for an employer to negotiate such measures is sharply dissipated by *Reis*.

Moreover, the *Reis* decision, in conjunction with the Supreme Court's decision in *Carbon Fuel Co. v. United Mine Workers*,¹⁷¹ creates new concerns for the parties to a collective bargaining agreement. With the foreclosure of a section 301 damages action against wildcat strikers along with the limitation of liability for the breach of a no-strike clause for a local or parent union to the instigation, support, ratification, or encouragement of the strike,¹⁷² an employer's damages are without remedy, unless a contract is artfully drafted for his protection. A contractual provision requiring that a union intervene and terminate a wildcat strike could be the basis for a damages action.

While a no-strike clause is a mandatory subject of bargaining,¹⁷³ a clause subjecting a union to legal liability for violation of a no-strike clause is a permissive matter.¹⁷⁴ Moreover, the possibility of holding a local union liable is of little value because a local is often judgment-proof.¹⁷⁵ Ideally, an employer would have a no-strike clause imposing on the parent union a duty to terminate wildcat strikes. In negotiating such a clause, however, an employer must be aware that the only required parties to a collective bargaining agreement are the employer and the certified bargaining representative(s) of the company.¹⁷⁶ If the parent union is not a certified representative, the negotiation of the status of the parent union as a party is a permissive subject of bargaining. Insistence to the point of impasse on signing a union entity other than one certified would be an unfair labor practice. Most assuredly, an employer is treading on shifting sands in any attempt to remedy his losses from a wildcat strike.

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171. 444 U.S. 212 (1979).

172. *Id.* at 218.

173. C. MORRIS, *supra* note 155, at 410. See *Shell Oil Co.*, 77 N.L.R.B. 1306 (1948).

174. C. MORRIS, *supra* note 155, at 431. See *supra* note 154 and accompanying text.

175. *Reis*, 451 U.S. at 423 n.10 (Powell, J., concurring).

176. C. MORRIS, *supra* note 155, at 428. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958) (a clause recognizing additional parties to a contract is a permissive subject of bargaining).