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Unleashing the Wildcats: The Supreme Court Immunizes Wildcat Strikes from Individual Damage Liability for Employer Losses Resulting from the Wildcat Strike, in Complete Auto Transit, Inc. v. Reis

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UNLEASHING THE WILDCATS: THE SUPREME COURT IMMUNIZES WILDCAT STRIKES FROM INDIVIDUAL DAMAGE LIABILITY FOR EMPLOYER LOSSES RESULTING FROM THE WILDCAT STRIKE, IN *COMPLETE AUTO TRANSIT, INC. V. REIS*

INTRODUCTION

Some seventy years ago, in the celebrated *Danbury Hatters* cases,[1] the Supreme Court of the United States held individual union members personally liable for a damage judgment rendered against their parent union. In the ensuing efforts to satisfy that judgment, many unionists lost their homes through garnishment actions. To prevent a recurrence of this spectacle, Congress enacted legislation immunizing individual union members from fiscal responsibility for damage judgments against their unions. Under section 301(b) of the Labor Management Relations Act,[2] damage judgments can be satisfied only from the union as an entity, not from individual union members.

The Court, in *Complete Auto Transit, Inc. v. Reis*,[3] now has extended individual immunity from damage suits arising from union-authorized activities to cover unauthorized individual work stoppages, or wildcat strikes, as well. The Court relied largely upon congressional intent, which was construed as preventing garnishment and attachment proceedings against individual union members' homes to satisfy judgments against a union. The result, however, leaves the employer without means to recoup his losses incurred from a wildcat strike.

The Court's ruling completes a 180-degree change in position in the last seventy-five years. Individual union members, once held solely liable for damages arising from union-directed strikes, are now immune from damages arising from both union-authorized and wildcat strikes.

The pendulum has completed its arc since the *Danbury Hatters* cases; whether it will swing back depends on whether Congress recognizes that the inequitable financial burdens shouldered by the employer as a result of *Complete Auto Transit* are, ironically, those once shouldered by individual employ-

1. Loewe v. Savings Bank of Danbury, 236 F. 444 (2d Cir. 1916), *aff'd*, 242 U.S. 357 (1917); Lawlor v. Loewe, 235 U.S. 522 (1915); Lawlor v. Loewe, 209 F. 721 (2d Cir. 1913); Loewe v. Lawlor, 208 U.S. 274 (1908). Here, Danbury, Connecticut, hatmakers sued 175 members of the United Hatters of North America for damages resulting from a nationwide recognitional boycott on grounds of antitrust violations. In Loewe v. Lawlor, 208 U.S. 274 (1908), the Supreme Court sustained the hatmakers' right to sue union members under the Sherman Antitrust Act, 15 U.S.C. § 1 (1976), including the availability of treble damages under that act. The Court later affirmed a $252,130 judgment in Lawlor v. Loewe, 235 U.S. 522 (1915), and in Loewe v. Savings Bank of Danbury, 236 F. 444 (2d Cir. 1916), *aff'd* 242 U.S. 357 (1917), a writ of attachment for $240,000 was issued. The strike began on July 25, 1902, idling the plant for some seven months. Lawlor v. Loewe, 209 F. 721 (2d Cir. 1913).

2. 29 U.S.C. § 185(b) (1976).

3. 101 S. Ct. 1836 (1981).

ees. This recognition should provoke Congress to provide a legislative remedy to deter unauthorized work stoppages and to give the employer some financial relief; in doing so, Congress could snap the leash on striking wildcatters whose activities threaten to subvert the collective-bargaining process.

I. EVOLUTION OF DAMAGE SUITS AGAINST INDIVIDUAL UNION MEMBERS

At common law, damage suits could not be brought against labor unions or other unincorporated associations in their common names,[4] but had to be brought against union members as individuals.[5] The Supreme Court abolished this rule in *United Mine Workers v. Coronado Coal Co.*[6] by holding that unions were suable entities distinct from their individual members.[7] Both individual unionists and their unions were liable for money damage judgments for breach of their collective bargaining agreement until 1947, when Congress enacted section 301(b) of the Labor Management Relations Act of 1947,[8] principally to avoid another *Danbury Hatters*.[9] Section 301(b) provides that money judgments obtained against a union can be enforced only against union assets, not against individual members.[10] The statute was silent about whether individual union members could be sued in lieu of the union. A quarter of a century later, the Supreme Court in *Atkinson v. Sinclair Refining Co.*[11] held that individual union members could not be held liable when their union violated a no-strike clause in its collective bargaining agreement. The *Atkinson* Court did not reach the question of whether union members would be liable individually for wildcat strikes in breach of a no-strike clause.[12] That question was answered in the negative in *Sinclair Oil*

4. *See* Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 304 (1947). *See also* 4 J. JENKINS, TREATISE IN LABOR LAW, § 23.2 (1971).

5. *See, e.g.*, Loewe v. Lawlor, 208 U.S. 274 (1908). Damage suits against individual workers date from feudal times, when the infamous Statute of Laborers, 2 Stat. 31, 25 Edw. III (1350) was enacted after the emergency Ordinance of Laborers, 2 Stat. 26, 23 Edw. III (1349), to prevent the villein's flight from the manor into the towns for higher wages. Workers at that time were at a premium because the Black Plague had decimated the population of Europe. To stop escalating wages, the Statute of Laborers was enacted, fixing wages for various classes of workers and providing for imprisonment of violators. Other laws, the Elizabethan Statute of Artificers, 5 Eliz. ch. 4 (1562), and the Poor Laws, 39 & 40 Eliz. ch. 3; 43 Eliz. ch. 2 (1601), further inserted government into labor relations by fixing ordinary wages, with punishments ranging from whippings to imprisonment. *See* M. FORKOSCH, A TREATISE ON LABOR LAW, §§ 17-19, 23, 24 (1953). *See also* 7 ENCYCLOPEDIA OF THE LAWS OF ENGLAND 184 (A. Renton ed. 1898).

6. 259 U.S. 344 (1922). The common law rule that suits had to be brought against individual union members kept damage suits to a minimum because judgments could not be collected from union coffers. Consequently, such judgments were uncollectable because the individual workers could not pay them. *See* J. JENKINS, *supra* note 4, at § 23.2.

7. This rule has been codified as FED. R. CIV. P. 17(b).

8. Ch. 120, § 301(b), 61 Stat. 156 (1947) (current version at 29 U.S.C. § 185(b) (1976)).

9. *See* note 1 *supra*. *See also* Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 248 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); 93 CONG. REC. 6283 (1947) (remarks of Sen. Case); 93 CONG. REC. 5014 (1947) (remarks of Sen. Ball); 92 CONG. REC. 5705 (1946) (remarks of Sen. Taft).

10. 29 U.S.C. § 185(b) (1976).

11. 370 U.S. 238 (1962).

12. *Id.* at 249 n.7.

Corp. v. Oil, Chemical & Atomic Workers International Union,[13] where the court expressly immunized individual union members from fiscal responsibility for breaches of a no-strike provision even where the union was absolved of liability for such a strike.[14] The court noted that although section 301 language "does not expressly prohibit employer damage suits against employee union members who engage in a wildcat strike,"[15] neither does the language authorize such suits. Basing its decision primarily on the legislative history of section 301, the court insulated individual union members from damage liability for their own wildcat activities.

The *Sinclair Oil* holding, however, was not binding on other circuits.[16] During the decade between *Sinclair Oil* and *Complete Auto Transit*, federal district courts divided on whether to assess individual union member liability for wildcat strike activities.[17] Of the cases insulating individual union members from personal liability for wildcat activities, all cited the *Sinclair Oil* holding as controlling in their decisions.[18] *Sinclair Oil* was either disregarded as not controlling[19] or distinguished factually[20] in those decisions imposing individual liability for breaches of the no-strike provisions. Of the other cases imposing indiviual liability, *Alloy Cast Steel Co. v. United Steelworkers*[21] found liability by interpreting *Hines v. Anchor Motor Freight*[22] and *Smith v.*

13. 452 F.2d 49 (7th Cir. 1971).

14. The *Sinclair* court held, after analyzing the legislative history of section 301, that the employer's primary remedy is either discharge or discipline. *Id.* at 54.

15. *Id.* at 52. See *recent decisions*, 6 GA. L. REV. 797 (1972), for an analysis of *Sinclair Oil*.

16. Besides the Seventh Circuit, only the Sixth Circuit has faced the issue of whether to impose individual liability on wildcat strikers who breach a no-strike clause. *See* Complete Auto Transit, Inc. v. Reis, 614 F.2d 1110 (6th Cir. 1980), *aff'd*, 101 S. Ct. 1836 (1981).

17. Decisions finding no individual liability include Lakeshore Motor Freight v. Steel Haulers Local 800, Int'l Bhd. of Teamsters, 483 F. Supp. 1150 (W.D. Pa. 1980); Westinghouse Elec. Corp. v. International Union of Electrical, Radio & Mach. Workers, 470 F. Supp. 1298 (W.D. Pa. 1979); Benada Aluminum Prod. Co. v. United Steel Workers, 83 Lab. Cas. ¶ 10,609 (N.D. Ohio 1978); and United States Steel Corp. v. UMW Local 8003, 83 Lab. Cas. ¶ 10,612 (D.C. Utah 1978). Cases imposing individual liability include: Certain-Teed Corp. v. United Steelworkers Local 37A, 484 F. Supp. 726 (M.D. Pa. 1980); New York State United Teachers v. Thompson, 459 F. Supp. 677 (N.D.N.Y. 1978); Alloy Cast Steel Co. v. United Steelworkers, 429 F. Supp. 445 (N.D. Ohio 1977); DuQuoin Packing Co. v. Local P-156, Amalgamated Meat Cutters & Butcher Workmen, 321 F. Supp. 1230 (E.D. Ill. 1971).

18. Lakeshore Motor Freight v. Steel Haulers Local 800, Int'l Bhd. of Teamsters, 483 F. Supp. 1150, 1154 (W.D. Pa. 1980); Westinghouse Elec. Corp. v. International Union of Electrical, Radio & Mach. Workers, 470 F. Supp. 1298, 1299 (W.D. Pa. 1979); United States Steel Corp. v. UMW Local 8003, 83 Lab. Cas. ¶ 10,612, 10,613 (D.C. Utah 1978).

19. *See* New York State United Teachers v. Thompson, 459 F. Supp. 677, 683 (N.D.N.Y. 1978), where *Sinclair Oil* was rejected because the usual employer remedies of discharge or discipline did not exist; Certain-Teed Corp. v. United Steelworkers, Local 37A, 484 F. Supp. 726 (M.D. Pa. 1980), which cited the *Thompson* analysis as controlling over *Sinclair Oil*.

20. *See* DuQuoin Packing Co. v. Local P-156, Amalgamated Meat Cutters & Butcher Workmen, 321 F. Supp. 1230 (E.D. Ill. 1971), where the court found individual liability based on Smith v. Evening News Ass'n, 371 U.S. 195 (1962). The *DuQuoin* court distinguished *Sinclair Oil*, noting that in *Sinclair Oil*, the individual union members were charged with acting as agents and on behalf of their union, not individually as wildcatters.

21. 429 F. Supp. 445 (N.D. Ohio 1977).

22. 424 U.S. 554, 562 (1976). In *Hines*, the Court held that individual employees could, under § 301, bring an action against their employer independent of the union. Section 301, the Court observed, encompasses those suits seeking to vindicate "uniquely personal rights of employees." *Id.* at 562. *Hines* involved a suit by individuals employees against their employer for unlawful discharge for alleged dishonesty and against their union for failing in its duty of fair

Evening News Association[23] as authorizing damage suits against individuals for breach of a no-strike clause.[24]

The final case rejecting *Sinclair Oil, DuQuoin Packing Co. v. Local P-156, Amalgamated Meat Cutters & Butcher Workmen*[25] did so by examining the legislative history of section 301, as did the *Sinclair Oil* court, but arrived at an opposite conclusion by distinguishing both the *Danbury Hatters* cases and *Atkinson*. The court noted that in both *Atkinson* and the *Danbury Hatters* cases, the individual union members were charged with acting as agents of their parent union in furtherance of a union objective.[26] The *DuQuoin* court, finding this agency relationship missing, imposed individual liability; if the union had authorized individual wildcat activity, no liability would have been imposed. Because the individuals did not act pursuant to a union plan, but solely as individuals,[27] liability was found.

During the decade from *Sinclair Oil* to *Complete Auto Transit*, the Supreme Court embraced the agency theory of liability pronounced by *DuQuoin*, but applied the theory to a different wildcat question: Should the parent international union be liable for wildcat strikes by a local affiliate? In *Carbon Fuel Co. v. United Mine Workers*,[28] the Court held that international unions are liable for damages caused by wildcat strikes of local union affiliates only where the parent union authorizes or participates in the strike. Thus, with the district courts divided on whether to impose individual union member liability for wildcat strikes, and the Supreme Court finding parent union liability only where the parent union authorized or sanctioned the local wildcat strike, the stage was set for *Complete Auto Transit*.

II. FACTS OF *COMPLETE AUTO TRANSIT INC. V. REIS*

On June 8, 1976, drivers and other employees of Complete Auto Transit, Inc., a Flint, Michigan transporter of newly manufactured vehicles, engaged in an unauthorized work stoppage (wildcat strike) because of dissatisfaction with how their bargaining agent union, Teamsters Local 332, was representing them in current collective bargaining negotiations.[29] The wildcat strike violated a no-strike provision in the existing labor contract between the union and Complete Auto Transit, Inc., signatories along with other

representation to investigate the dishonesty charges and to exonerate the employees. The employees, after hiring an attorney, later were absolved of the dishonesty charges.

23. 371 U.S. 195 (1962). In *Smith*, the Court held that individuals are not barred by § 301 from suing their employers to vindicate their individual rights under the labor contract. In the case at bar, the employers argued unsuccessfully that a damage remedy would eliminate a double standard under which employees may sue individually and recover damages individually, but may not be held liable under the contract individually. *See* Petitioner's Brief for Certiorari at 8, Complete Auto Transit, Inc. v. Reis, 101 S. Ct. 1836 (1981). The lower court distinguished *Smith*, finding merely a dispute over jurisdiction, not over whether § 301 created a separate cause of action. 614 F.2d at 1116.

24. 429 F. Supp. at 451.

25. 321 F. Supp. 1230 (E.D. Ill. 1971).

26. *Id.* at 1232-33.

27. *Id.* at 1233. The same reasoning was advanced, albeit futilely, by the employers in *Complete Auto Transit*. *See* Petitioner's Brief at 9.

28. 444 U.S. 212, 216 (1979).

29. *Id.* at 1838. *See also* Respondent's Brief in Opposition to Writ of Certiorari at 5.

trucking companies to a collective bargaining agreement with the Teamsters Union.[30] After employees of two similar vehicle haulers also engaged in the wildcat strike, the employers filed suit under section 301(a) of the Labor Management Relations Act of 1947,[31] seeking an injunction and damages against the wildcatters individually for all losses arising from the strike.[32] The employers sought no damages from the union itself, alleging that the strike was neither union authorized nor union sanctioned.[33] The district court refused to issue the injunction on the ground that the wildcat strike was caused by a non-arbitrable issue—the intra-union dispute over adequacy of union negotiation representation.[34] After the employers renewed their plea for the injunction, the court held further hearings and issued a preliminary injunction stopping the strike after finding that the intra-union dispute had been settled; the only remaining issue was whether the employers would grant amnesty to the wildcatters, an arbitrable issue.[35] Nine months later the employees moved to dissolve the preliminary injunction and to dismiss the complaint for damages.[36] The district court, relying on *Buffalo Forge Co. v. United Steelworkers*,[37] dissolved the injunction on the ground that the strike was not caused by an arbitrable issue. The court thereby reapplied its original logic, and dismissed the damage suit on the ground that employers may not sue employees for money damages for breach of a labor contract.[38] On appeal, the Sixth Circuit affirmed the dismissal of the damage suit, but ruled that an injunction may be granted even where the issue precipitating the strike was itself non-arbitrable but led to an arbitrable issue of whether the wildcatters would receive amnesty.[39] The court of appeals affirmed the district court's dismissal of the damage claim by relying principally on the legislative history of section 301. The court concluded Congress did not intend to create a money damage remedy against individual union members for breach of a no-strike provision,[40] because Congress wanted to prevent a recurrence of the *Danbury Hatters* situation.[41] The Supreme Court affirmed the Sixth Circuit, relying almost exclusively on the legislative history of section 301 and its predecessor, sec-

30. 101 S. Ct. at 1838. *See also* Respondent's Brief at 4.

31. 29 U.S.C. § 185(a) (1976). Section 301(a) authorizes employers and labor unions to bring suits for breach of the labor contract in federal court.

32. 101 S. Ct. at 1838.

33. *Id.*

34. *Id.* at 1838-39. The judge denied the back-to-work order based on Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), which permits a narrow exception to the Norris-LaGuardia Act, 29 U.S.C. § 104 (1976 & Supp. III 1979), prohibition on federal courts enjoining strikes. A *Boys Markets* injunction will issue when the labor contract contains a mandatory grievance or arbitration procedure and when the underlying issue causing the strike is arbitrable. *Id.* at 1838 n.2.

35. 101 S. Ct. at 1838.

36. 614 F.2d at 1112.

37. 428 U.S. 397 (1976). The Court prohibited the lower court from enjoining a sympathy strike because the strike was not over any union-employer dispute subject to arbitration provisions.

38. 101 S. Ct. at 1839.

39. 614 F.2d at 1114.

40. *Id.* at 1115.

41. *See* note 1 *supra*.

tion 10 of the Case Bill,[42] which was vetoed in 1946 by President Truman.[43] The Court concluded that Congress intended to immunize individual union employees from damage liability both for union-authorized and non-union-authorized (wildcat) strikes, even if the result would leave the employer without means to recoup his losses from the wildcat strikes.[44] The Court's finding completes a 180-degree turn in the last seventy years from holding employees solely liable for damages for their collective bargaining activities[45] to finding union employees immune to damage suits for their participation either in, or out, of union strike activities.

III. *COMPLETE AUTO TRANSIT, INC. V. REIS*

In *Complete Auto Transit, Inc. v. Reis*,[46] the Supreme Court was confronted with whether to exercise its judicial inventiveness to fashion a federal common law of labor as prescribed by *Textile Workers Union v. Lincoln Mills*,[47] or to narrowly construe perceived congressional intent. With this admonition in mind, the Court acknowledged the *Lincoln Mills* prescription, but noted that *Lincoln Mills* did not call for judicial second-guessing of legislative commands; rather, "in fashioning federal law under § 301(a) substantial deference should be paid to revealed congressional intention."[48] The Court deferred, in its affirmance of the Sixth Circuit, both to perceived congressional intent and to the *Atkinson* and *Sinclair Oil* decisions.[49]

A. *The Employers' Position*

The employers mounted a three-pronged attack on the Sixth Circuit's dismissal of their damage claims against the individual wildcatters.[50] Branding the Sixth Circuit's analysis "at best superficial,"[51] the employers argued primarily that the court failed to distinguish the factual differences

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

43. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 509 (1962).

44. 101 S. Ct. at 1840.

45. *See* note 1 *supra*.

46. 101 S. Ct. 1836 (1981).

47. 353 U.S. 448, 456-57 (1957). In *Lincoln Mills*, a dispute over whether federal district courts had jurisdiction to enforce an arbitration provision in a collective-bargaining agreement, the Court held that § 301 of the Labor Management Relations Act of 1947 confers both procedural and subject matter jurisdiction on federal district courts regarding labor management controversies. The Court held that "in the penumbra of express statutory mandates," the lower courts should exercise their "judicial inventiveness" in fashioning federal labor common law. *Id.* at 457.

48. 101 S. Ct. at 1840. The opinion first discussed procedural requirements for obtaining a *Boys Markets* injunction. *See* note 34 *supra*. Issuance of the injunction and analysis behind its issuance are not pertinent to case analysis of the applicability of a damage remedy against wildcat strikers individually. This, however, does not suggest that *Boys Markets* injunctions may not issue individually against the wildcatters; the Court specifically reserved opinion on that particular issue. *See* note 83 *infra*. Some state courts, however, have issued injunctions against wildcatters individually. *See, e.g.*, Armco Steel Corp. v. Perkins, 411 S.W.2d 935 (Ky. App. 1967).

49. 101 S. Ct. at 1840.

50. Petitioner's Brief at 9.

51. *Id.* Petitioners insisted the Sixth Circuit did not address the fact that the strikers' actions were neither ratified nor authorized by the unions; the employees only were sued, individually, for individual breaches of the labor contract. *Id.* at 14.

between the *Danbury Hatters* cases and those of the instant case. For example, in *Danbury Hatters*, the employees acted pursuant to their union's directive, while in this case, they did not. The employers also argued, alternatively, that a failure to allow a damage claim would leave them without a remedy and with no means to enforce the "integrity" of the labor contract.[52] A damage remedy, they urged, would insure that employees would recognize their contractual responsibilities, would deter future wildcat strikes, and would promote industrial peace.[53] To allow employees to disregard the no-strike obligation in the agreement without penalty would render the obligation meaningless, and reduce it to a "hollow promise."[54]

B. *The Wildcatters' Position*

Predictably, the employees countered that the Sixth Circuit correctly interpreted the legislative history of section 301, and specifically argued that employers do not suffer a lesser degree of protection than that afforded employees under section 301.[55] Moreover, they argued, the Sixth Circuit decision leaves no gap in section 301 remedies because employers still can discharge or discipline the wildcatting strikers for breaches of the labor contract.[56] They added that no such option exists for employees for an employer's breach.[57]

Attacking the third prong of the employers' onslaught, the employees asserted that industrial peace would not be enhanced "one iota" by extending a damage remedy, but instead would be aggravated because collecting such a judgment could result in the same garnishment and attachment actions workers suffered in the *Danbury Hatters* debacle.[58] The employees added that congressional silence after the *Sinclair Oil* decision should be considered tacit approval of the practice of immunizing individuals from damage liability for breach of a labor contract;[59] any gaps in section 301 should be filled by Congress, not by the courts.[60]

C. *The Court's Holding*

Relying primarily on the legislative history of both section 301 of the Taft-Hartley Act and its predecessor, section 10 of the Case Bill,[61] the

52. *Id.* at 23.

> The companies are left in a position where they were victimized by a dispute over which they had no control; were unable to engage in normal operations; were coerced, albeit unsuccessfully, by the employees to give up additional rights under the agreement; and were left by the courts without any monetary remedy. This result is hardly what Congress had anticipated when it enacted § 301.

Id. at 24.

53. *Id.* at 25-26.

54. *Id.* at 25.

55. Respondent's Brief at 7.

56. *Id.* at 8. *See also* NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953); NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939).

57. Respondent's Brief at 7.

58. *See* note 1 *supra*.

59. Respondent's Brief at 32.

60. *Id.* at 33.

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

Supreme Court concluded that Congress intended to shield individual unionists from damage liability for breach of a no-strike clause in a labor contract. This immunization was intended, according to Justice Brennan's majority opinion, "even though it might leave the employer unable to recover for his losses."[62] Dismissing employer contentions that a damage remedy is indispensable to preserve the integrity of the labor contract and to advance the national labor policy of promoting industrial peace, the Court concluded that employers command "an array of potential remedies . . . apart from a damage remedy against individuals."[63] The remedies cited include discipline and discharge of wildcat strikers, damages against the union where the union is responsible for the contract breach, or an injunction against a union for breach of a no-strike clause where the underlying dispute is subject to binding arbitration.[64] Of the remedies cited, only two, discipline and discharge, refer to actions that may be taken against union members as individuals, not as members of the union as an entity.

IV. ANALYSIS OF THE HOLDING

Despite its conclusory language that legislative history reveals a congressional intent to shield individual employees from damage liability for breach of no-strike clauses,[65] the Court could have decided the issue against the wildcatters and still have been consistent with both congressional intent and previous case law, a position advanced by Chief Justice Burger's dissent. While nothing in section 301 expressly permits damage suits against individuals, nothing expressly prohibits such actions.[66] The *Atkinson* Court noted that no-strike clauses are binding on *individual* bargaining unit members, but held that Congress intended to insulate such individuals from fiscal responsibility for *union* liability for breach of a no-strike clause.[67] Later case law suggests the Court was leaning toward authorizing actions, including damage suits, against individuals under section 301.[68] The only easily discernible congressional intent was to prevent a recurrence of the *Danbury Hatters* incident. Imposing liability in that instance would be as unfair as imposing liability upon a stockholder for debts of the corporation.[69] No such unfairness issue appeared in *Complete Auto Transit*. Thus, sufficient factual differences existed for the Court to have imposed fiscal responsibility on the wildcatters while remaining consistent with congressional intent and previous decisions[70] interpreting section 301.

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62. 101 S. Ct. at 1840.

63. *Id.* at 1845 n.18.

64. *Id.*

65. *Id.* at 1840.

66. *See* Sinclair Oil Corp. v. Oil, Chemical & Atomic Workers Int'l Union, 452 F.2d 49, 52 (7th Cir. 1971).

67. 370 U.S. 238, 246 (1962).

68. *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957).

69. *See* Cox, *supra* note 4.

70. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962).

The better-reasoned analysis emanated from Justice Powell's concurring opinion,[71] which questioned whether management does indeed enjoy the plethora of remedies against wildcatters, as suggested by the majority,[72] and charged that the Court was being "unrealistic" when it suggested employers "have at their disposal a battery of alternate remedies for illegal strikes."[73] Justice Powell noted first that unions agree to such no-strike provisions in exchange for the employer's promise to arbitrate labor contract disputes that arise during the life of the contract, each promise being the consideration for the other, "because the employer yields traditional managerial autonomy in exchange for industrial peace."[74] Despite these mutual assurances, he noted, wildcat strikes still occur "with disturbing frequency."[75] Yet, he observed, the cited remedies do not solve the problem of deterring strikes that "squander human work capacity, the full use of which is essential to the enjoyment of the Nation's productive potential."[76] In arguing that each of the cited remedies, injunction, discharge, internal union discipline, or a damage suit against the union entity,[77] is illusory, Justice Powell dissected each remedy and concluded that "[t]he result of the absence of remedies is a lawless vacuum."[78] Injunctions, while generally prohibited in labor disputes by the Norris-LaGuardia Act,[79] are permitted by *Boys Market* pending arbitration if the grievance underlying the strike is arbitrable.[80] Justice Powell noted that some work stoppages cannot be enjoined, such as sympathy strikes,[81] and that strikers often disobey injunctions.[82] Justice Powell ignored the fact that such injunctions would be sought against the strikers individually, not as members of the union. The Court specifically dodged that particular issue.[83] Such an injunction would assume the union as an entity could be enjoined. But based on the *Carbon Fuel* holding that a parent union will be liable in damages for a local affiliate's wildcat strike only if the parent union authorized or participated in the strike,[84] no injunc-

71. 101 S. Ct. at 1845 (Powell, J., concurring in part).

72. *Id.* at 1845. Justice Powell suggests that the remedies available "are largely chimerical." *Id.*

73. *Id.* at 1848.

74. *Id.* at 1845-46.

75. *Id.* at 1846. In 1979, 1.5 million workers were idled by strikes. No figures were available to determine how many of those workers were wildcat strikers. *See News and Background Information*, 103 LAB. REL. REP. (BNA) 99 (1980).

76. 101 S. Ct. at 1846 (Powell, J., concurring in part).

77. *Id.* at 1847.

78. *Id.* at 1848.

79. 29 U.S.C. § 104 (1976 & Supp. III 1979).

80. 101 S. Ct. at 1847 (Powell, J., concurring in part).

81. *See* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976).

82. 101 S. Ct. at 1847 (Powell, J., concurring in part). Justice Powell mused that "courts may be reluctant to impose contempt penalties on individual workers; if ordered, such penalties are difficult to enforce." *Id.*

83. *Id.* at 1845 n.18: "Whether a *Boys Market-Buffalo Forge* injunction could have been issued against individual union members engaged in the wildcat strike at issue is not before us." Such a remedy was urged by one commentator. *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, 1671 (1972) [hereinafter cited as *Labor Law*].

84. 444 U.S. 212 (1979).

tion could issue against a union disavowing the wildcat strike.[85]

Justice Powell argued that discharge, although feasible and lawful,[86] proves unrealistic for three reasons. First, the employer cannot fire all wildcatters in a large wildcat strike or he will cripple production. Second, selective discharge may be illegal where exercised discriminately and such discharges may exacerbate, not alleviate, worker unrest. Third, discharges sometimes are denied by arbitrators.[87] Justice Powell then observed that internal union discipline has been proven ineffective because wildcat strikes often are "directed at the incumbent union leadership as much as at company management."[88] He concluded by suggesting Congress supply the necessary remedial legislation to combat wildcat strikes that are "at war" with labor rights and orderly labor relations.[89]

Justice Burger's dissent, joined by Justice Rehnquist,[90] confused labor contracts with individual commercial contracts. Nearly forty years ago, Justice Jackson eloquently distinguished the two types of agreements in *J.I. Case Co. v. NLRB*,[91] where the Court held that union-negotiated collective bargaining agreements supersede any private employment contracts arranged by the employer and any employees within the bargaining unit. The *J.I. Case* Court equated collective bargaining agreements with tariffs:

> [Tariffs] do not of themselves establish any relationships, but . . . do govern the terms of the shipper or insurer or customer relations whenever and with whomever it may be established . . . . The employer . . . is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring.[92]

The *J.I. Case* Court said further that:

> [an] individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits . . . . Wherever private contracts conflict with [the trade agreement], they obviously must yield . . . . The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the

85. One commentator argues for such injunctive relief against individual wildcatters. "Unless there is a remedy against individual violators of a labor contract (and preferably immediate injunctive relief), as a practical matter, the employer has no remedy at all in most cases." *See* Spelfogel, *Wildcat Strikes and Minority Concerted Activity—Discipline, Damage Suits and Injunctions*, SOUTHWESTERN LEGAL FOUNDATION: LABOR LAW DEVELOPMENTS 1973, 157, 195 (1973).

86. *See* text accompanying note 56 *supra*.

87. 101 S. Ct. at 1847, 1848 (Powell, J., concurring in part). *See* Spelfogel, *supra* note 85, at 184; Note, *Reaction to the Wildcat Strike—The Employer's Dilemma*, 20 CASE W. RES. L. REV. 423, 429-436 (1969) [hereinafter cited as *Employer's Dilemma*]; Note, *Employer Remedies for Breach of No-Strike Clauses*, 39 IND. L.J. 387, 403 (1964) [hereinafter cited as *Employer Remedies*].

88. 101 S. Ct. at 1848 (Powell, J., concurring in part).

89. *Id.* at 1849.

90. *Id.* (Burger, C.J., dissenting).

91. 321 U.S. 332, 335-36 (1944).

92. *Id.* at 336-39. Compare this with Cox's observation that a "collective agreement is most workable when it is treated as a constitutional instrument or basic statute charging an administrative authority with day-to-day application of general aims." Cox, *supra* note 4, at 305.

> strength and bargaining power and serve the welfare of the group . . . . The practice and philosophy of collective bargaining looks with suspicion on such individual advantages.[93]

Despite the faulty equation of labor contracts with ordinary commercial contracts, the *Complete Auto Transit* dissent correctly distinguished the factual situation of the *Danbury Hatters* cases from that of the instant case and concluded that congressional intent would have been served by imposing individual liability and accountability through a damage remedy.[94] The dissent, framing the issue as imposing individual liability for individual conduct taken without union investment, sharply chastised the majority for penalizing the employer and rewarding the wildcatters:

> It seems to me that, by now, the American labor movement has matured sufficiently so that neither unions nor their members need this kind of artificial, excessively paternalistic protection for admittedly illegal acts—a protection contrary to fundamental, centuries-old concepts of individual accountability. The stability of unions and the harmony of industrial relations will be enhanced, not impaired, by applying to union members the same standards of accountability that govern all other individuals in society.[95]

The Chief Justice concluded that a damage remedy would deter future wildcat strikes and thereby promote industrial peace. But Chief Justice Burger, along with the majority, failed to address the adequacy of the damage remedy itself as either a deterrent to, or as adequate compensation for, losses from wildcat strikes. The wisdom of extracting damages from individuals has been questioned[96] on the ground that such a judgment would barely compensate an employer for strike-related losses, and would simply serve as a device for an employer to punish strikers.[97] To collect such a judgment would also hark back to *Danbury Hatters*, the very spectre Congress wanted to avoid.

The deterrent effect of damages has been conceded. Damages arguably would antagonize the workers no more than would summary discharge;[98] thus, a damage remedy alone would not inevitably aggravate already strained industrial relations.[99] The problem not pointed out, however, is reconciling the nature of the damage remedy itself, which is punitive, with the nature of the Taft-Hartley Act, which is remedial in nature and purpose.[100] Because few individual workers would be financially able to pro-

93. 321 U.S. at 336-38.

94. 101 S. Ct. at 1850-51 (Burger, C.J., dissenting).

95. *Id.* at 1851.

96. *See Employer's Dilemma*, *supra* note 87, at 436-37. *See also* Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act*, 52 CORNELL L.Q. 672 (1967); *Recent Decisions*, 6 GA. L. REV. 797, 801 (1972).

97. *See, e.g.*, Givens, *Responsibility of Individual Employees for Breaches of No-Strike Clauses*, 14 INDUS. LAB. REL. REV. 595, 596 (1961). Givens charged that a damages remedy against wildcatters would be "cruel and unusual punishment." *Id.* at 600.

98. *See Labor Law*, *supra* note 83, at 1669-70.

99. *See Employer Remedies, supra* note 87, at 402.

100. Brown, *Exploring the World of Remedies*, SOUTHWESTERN LEGAL FOUNDATION: LABOR LAW DEVELOPMENTS 1968, 69, 83 (1968). Brown at that time was a member of the National Labor Relations Board. *See also* the Taft-Hartley Act, 29 U.S.C. § 160(c) (1976), which gives the National Relations Board its remedial powers.

vide adequate compensation to the employer for wildcat strike-caused losses, the damage remedy would serve more to punish the wildcatter than it would to compensate the aggrieved employer. Moreover, a damage remedy, even if collectable, would be a "hollow reward" to the business ruined because of lost customers resulting from the wildcat strike.[101] A punitive damage remedy, notwithstanding its conceded deterrent effect, would be inconsistent with the remedial nature of national labor policy as currently enacted.

Solutions to this inequitable situation range from imposing strict liability on the parent union for actions of its local affiliates who breach no-strike clauses[102] to subcontracting the strikers' jobs.[103] Other remedies could include requiring the union to post a bond or procure insurance policies to cover possible wildcat strike losses, or possibly inserting provisions in the labor contract requiring the union either to replace the strikers immediately so production can resume or pay all resulting damages.[104] When a certain number or percentage of the union work force engages in an unauthorized work stoppage, the courts could presume the strike to have been union-authorized, with the union then liable under *Carbon Fuel*. Management could insist either that it be allowed to impose disciplinary penalties on wildcatters without going through the grievance procedure, or that the union be required to discipline the wildcatters with set fines, loss of seniority rights or loss of vacation leave. When compounded with existing employer remedies of discharge and discipline, these suggested remedies could serve to deter wildcat strikes or in the alternative provide the employer with some avenue of relief. At present, no such avenue exists.

None of these suggested measures, however, would command the force of law required to effectively deter wildcat strikes. Regardless of whether "Congress meant to exclude individual strikers from damages liability,"[105] Congress now sits in the catbird seat in determining whether union employees will continue to exploit their immunity for unauthorized work stoppages as leverage to extract benefits beyond their labor contracts at the expense of employers, or whether employers will continue to be punished financially by wildcat strikes.

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101. *See Employer's Dilemma, supra* note 87, at 437.

102. Allison, *Wildcat Strikes—The Need for an Enforceable Damages Remedy*, 3 UTAH L. REV. 493, 501 (1980).

103. *See Employer Remedies, supra* note 87, at 405. However, the author admits that this form of self-help may be "more illusory than real." *Id.* at 409.

104. *See, e.g.*, Motor Haulage Co., 6 LAB. ARB. 720, 726 (1946) (Sheridan, Arb.), wherein the union was found liable for damages caused by a wildcat strike by some of its members, partly because the union made no attempt to reprimand the strikers or resupply the employer with other union workers. The case was not decided under an agency theory, but simply on the equitable ground that the employer would suffer unfairly because of the unauthorized work stoppage. The arbitrator said he wanted to avoid giving credence to the then-popular refrain that one who deals with a union does so at his own peril. *See also* Great Scott! Super Markets, Inc. v. Goodman, 50 Mich. App. 635, 213 N.W.2d 762 (1974), in which the court held that the employer bargained away his opportunity and contract right to recover damages against the union for wildcat strike damages. By extension, the court thus suggested that had the employer so bargained, he could have recovered for such strike-related damages. Such terms, however, must be bargained for, and will be subject to "the political realities of the shop." *See also Employer's Dilemma, supra* note 87, at 437.

105. 101 S. Ct. at 1844.

CONCLUSION

By holding that individual union members are insulated from damages arising from their breach of their labor contract's no-strike clause, the Court has swung full circle from *Danbury Hatters*. That individual unionists acted outside union directives in *Complete Auto Transit*, but acted pursuant to union orders in *Danbury Hatters*, proved inconsequential to the Court's rationale. The significance of *Complete Auto Transit* becomes apparent when analyzed with the *Carbon Fuel* finding of union liability for actions of their local affiliates only under traditional agency principles.[106] The two cases combine to eliminate any damage compensation to employers from either unions or their individual members for wildcat strike-caused losses. The net effect of these two cases, when combined with section 301 of the Labor Management Relations Act, is to judicially and congressionally create a union veil to shield both individual unionists and union officials from damage liability for wildcat strikes. Thus, unions, as unincorporated associations, and their members now share the same limited liability as corporate officers and directors.[107] Just as corporations are considered entities distinct from their shareholders,[108] unions similarly are held to be distinct from their members or local affiliates.[109]

This fiction of corporate limited liability, however, "may be and should be disregarded in the interests of and to promote justice in such cases as fraud, *violations of law or contract*, public wrong or to work out the equities among members of the corporation internally. . . ."[110] This disregard of the corporate entity, or a piercing of the corporate veil, is generally employed in fastening liability upon individual corporate officials when: 1) the unity of interest and ownership between the corporation and individual merge, so no distinction between them exists; and 2) an inequitable result will follow by treating the corporation's acts as solely those of the corporate entity.[111] The basic rule holds that a corporation will be considered a fictional legal entity with limited liability until it is "used to defeat public convenience, justify wrong, protect fraud or defend crime. . . ."[112]

The same analysis could be applied to justify a judicial piercing of the union veil, should the underlying nature of federal labor policy evolve from being remedial to being punitive. Given the current remedial purpose of federal labor policy, piercing the union veil to assess individual damage lia-

106. 444 U.S. at 216.

107. *See also* 92 CONG. REC. 5705 (1946) (remarks of Sen. Taft equating suability and liability of unions with that of corporations.)

108. *See* 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 25 (rev. perm. ed. 1974).

109. *See* Dean v. International Longshoremen's Ass'n, 17 F. Supp. 748, 750 (W.D. La. 1936) (*citing* UMW v. Coronado Coal Co., 259 U.S. 344, 345 (1922)).

110. W. FLETCHER, *supra* note 108, at § 25 (emphasis added). *See generally* Krendl & Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DEN. L.J. 1 (1978).

111. *See, e.g.*, McLaughlin v. L. Bloom Sons, 206 Cal. App. 2d 848, 24 Cal. Rptr. 311, 313 (1962).

112. *See* W. FLETCHER, *supra* note 108, at § 41. *See, e.g.*, Industrial Comm'n v. Lavach, 165 Colo. 433, 439 P.2d 359, 361 (1968); Contractors Heating & Supp. Co. v. Scherb, 163 Colo. 584, 432 P.2d 237, 239 (1967); Fink v. Montgomery Elevator Co., 161 Colo. 342, 421 P.2d 735, 739 (1966).

bility would be an inconsistent punitive result. For now, the focus shifts to Congress to consider whether to remedy, or to perpetuate, an apparent inequitable dilemma.[113]

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113. *Cf.* Fournelle v. NLRB, 670 F.2d 331 (D.C. Cir. 1982) where the United States Court of Appeals for the District of Columbia reversed the National Labor Relations Board and held that an employer lawfully could punish a union official who participated in a wildcat strike more severely than rank-and-file wildcatters. The court reasoned that such selective discipline is permitted if the collective bargaining process has imposed higher duties on union officials than on rank-and-file employees.