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UNION LIABILITY FOR ILLEGAL STRIKES:
THE MASS ACTION THEORY REDEFINED

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I. INTRODUCTION

Labor law is often characterized by instances of posturing and masquerading by both management and labor, as anyone who has sat at the collective bargaining table can attest. A problematic example of such gamesmanship arises when, in an effort to pressure management, a union covertly sanctions or supports an unlawful strike. To deter such illegal activity, Congress enacted section 301 of the Labor Management Relations Act (LMRA), which establishes an employer’s right to sue a union for breach of contract. The drafters of the LMRA envisioned common law agency to be the exclusive test for holding labor organizations responsible for the acts of their agents. Union liability is proved in such cases if the union is demonstrated to have authorized or ratified a work stoppage in breach of a commitment not to strike.

This Article is concerned with a judicial theory which has been developed to assist the employer in proving that a supposedly “wildcat” strike was in fact

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** B.B.A., University of Iowa, 1980; M.A., Institute of Labor and Industrial Relations, University of Illinois at Urbana-Champaign, 1982; J.D. (candidate), Temple University, 1985.
1 United Bd. of Carpenters v. United States, 330 U.S. 395, 415 (1947) (Frankfurter, J., dissenting) (union escape from responsibility may be easily contrived under § 6 of the Norris-LaGuardia Act, which requires clear proof of union authorization of an illegal strike).
2 Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 423 (1981) (Powell, J., concurring) (“It is a foolish union that would invite a damages suit by explicitly endorsing a strike in this manner.”).
3 Employers who are victimized by illegal strikes are often without any viable defendant to look to for recompensation for their damages. The employer is barred from seeking damages from the employees who engage in illegal strikes. Id. Discipline of strikers does not remedy the economic harm wrought by the strike, even though it may deter future strikes. In addition, absent an explicit contractual duty, it is an unfair labor practice for an employer to impose more severe punishment on union officials than on other employees for participating in an unlawful work stoppage. Metropolitan Edison Co. v. NLRB, 103 S. Ct. 1467 (1983).
4 29 U.S.C. § 185 (1976) provides in pertinent part:
   (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 chapter shall be bound by the acts of its agents....
   (c) For the purpose of this section, in determining whether any person acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.
authorized by the union. The "mass action theory," simply put, raises an evidentiary presumption that when workers act en masse they are acting at the direction of the union.

II. BACKGROUND

A. The Evidentiary Problem

The serious problem of proving union liability under common law agency became apparent in the debate over section 301: in order to avoid liability, unions can simply characterize unlawful strikes as the individual decision of each striker. This scenario is nowhere more vividly presented than in United States v. International Union, UMWA. In that case, Judge Goldsborough rejected as "ridiculous" the union's contention that 350,000 to 450,000 mine workers simultaneously walked off their jobs without leadership. As unsupportable as the union's assertion appears in that case, it underscores the employer's evidentiary dilemma: large groups of people do not spontaneously act in the same fashion without leadership, and yet, in most cases, direct proof of agency is unavailable to the employer because it is within the exclusive control of the union.

The mass action theory of liability was formulated in United States v. International Union, UMWA, as a direct response to this evidentiary problem. According to the mass action theory, when a high percentage of union members act in concert to precipitate an unlawful work stoppage, liability for the striking union members' actions must be imputed to the union. The underlying premise is that large groups do not act collectively in the absence of leadership, and that a functioning union must be held responsible for the mass action of its members.

B. The Role of the Theory

Over the years, mass action has been maligned by its detractors as being beyond

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5 93 CONG. REC. 6858 (1947); see also United Bd. of Carpenters, 330 U.S. at 415 (Frankfurter, J., dissenting).
6 77 F. Supp. 563 (D.D.C. 1948). The mass action theory was initially defined in this case. The federal government filed contempt charges against the United Mine Workers alleging a violation of a Taft-Hartley "cooling off" injunction. While the injunction was still in effect, a pension dispute arose which prompted U.M.W. President, John L. Lewis, to write a series of letters to mining companies threatening "independent action necessary to the enforcement of the contract" and letters to local unions promising "to go forward in requiring the coal operators to honor your agreement" and assuring the members that "your ears will soon be assailed by their outcries and wails of anguish." Id. at 565. Approximately two days after the letters were received the mine workers walked off their jobs. The government enjoined the union from permitting or encouraging the strikers and sought contempt charges against the union and Mr. Lewis.
7 Id. at 566.
8 Id. at 566-67.
the legislative intent of section 301 of the LMRA. Critics, and some supporters as well, defined mass action as an independent legal theory separate and apart from agency law. In other instances, mass action has been viewed as a theory of vicarious liability used to hold unions strictly liable for damages. These interpretations of mass action have created judicial confusion and led to an unwillingness by courts to rely on mass action as a legal theory to hold unions liable for their role in wildcat strikes. When correctly defined, however, mass action may be applied to hold local unions liable under common law agency principles. The theory, when properly construed, treats the mass action of union members as circumstantial evidence of an agency relationship between union leaders and members. Once the inference of agency is established in this manner, the burden of going forward with the evidence to rebut the agency inference shifts to the union. This definition of mass action is entirely consistent with common law agency parameters and its application is, therefore, permissible under section 301 of the LMRA.

III. THE REASONABLE MEANS THEORY

Over the past few years, several federal courts have adhered strictly to the common law agency standard for finding union liability under section 301. In United Construction Workers v. Haislip Baking Co., the Fourth Circuit specifically limited the local and international unions' liability to situations where the union adopted.

9 See, e.g., Whitman, infra note 13, at 477-79. The author primarily criticizes the implied reasonable means theory in Eazor Express, Inc. v. IBT, 357 F. Supp. 158 (W.D. Pa. 1973) aff'd as modified, 520 F.2d 951 (3d Cir. 1975), cert. denied, 424 U.S. 935 (1976). However, many of his criticisms are applicable to the mass action theory and in Eazor, at the appellate level, mass action was considered an additional legal theory to hold unions liable, separate and apart from common law agency. Eazor Express, Inc. v. IBT, 520 F.2d 951, 963 (3d Cir. 1975), cert. denied, 424 U.S. 935 (1976).

10 See, e.g., Whitman, infra note 13, at 487-92.

11 Eazor Express, Inc., 357 F. Supp. at 158.


13 223 F.2d 872 (4th Cir.), cert. denied, 350 U.S. 847 (1955) (liability is premised on a finding of agency). Historically, employers have been reluctant to sue a union for damages resulting from an illegal work stoppage. See, e.g., Whitman, Wildcat Strikes: The Narrowing Path to Rectitude?, 50 Ind. L.J. 472, 473-74 (1975). There are three basic reasons for this reluctance. First, a lawsuit against the union would continue for months or years which may be perceived by the union as an attempt to break the union financially. To counter management's lawsuit, the union may engage in various forms of concerted activity and economic sanctions against the company. Second, a more practical remedy available to management is to enjoin the illegal strike and discipline participating employees. Boys Market, Inc., 398 U.S. at 235. Normally, the employer's primary concern is a quick return to production and profits while avoiding costly litigation and uncertain consequences. Third, in the event that management decides to sue the union for damages, the company may be required to reveal its financial records to the union. FED. R. Civ. P. 26-37. This information may concern profits and management compensation, which could be used by the union in formulating future collective bargaining proposals. Moreover, since the company's damages will inevitably include supplies and sales to and from other businesses, the accounting records of other business entitites may be discoverable by the union.
encouraged, or prolonged the continuance of an unlawful strike.\textsuperscript{14} In this leading case, an illegal strike occurred at the employer's bakery after two employees were discharged for unexplained absences. The local union advised its members to return to work even though the two terminated employees had not been reinstated. The membership rejected the union's request and voted to continue striking until the two discharged employees were reinstated. The employer refused to rehire the two individuals and decided to shut down operations without making any further attempt to reach an agreement with the workers. Because the union did not authorize or sanction the acts of its members, the national union was not held liable for damages caused by the wildcat strike.\textsuperscript{15} The court declined to adopt a test that would require unions to use their best efforts to terminate wildcat strikes. Instead, the court found that even though employees voted to strike illegally, the union could not be held liable unless there was clear proof of union ratification or authorization.\textsuperscript{16}

In direct conflict with the Fourth Circuit's decision in \textit{Haislip}, the Third Circuit, in \textit{Eazor Express, Inc. v. International Brotherhood of Teamsters},\textsuperscript{17} held that where the union and company have negotiated a "no strike" clause in their agreement, and an illegal strike occurs during the effective life of the agreement, the court would imply an obligation on all levels of the union hierarchy to use all reasonable means to terminate the unlawful strike. Eazor had contracted to purchase all the stock of the Daniels Company. The drivers and dock workers at Eazor's terminal were members of Teamsters Local 249, and dock workers and garage employees at Daniels' terminal were members of Teamsters Local 377. All parties were covered under collective bargaining agreements which contained no strike clauses.\textsuperscript{18} During the life of the agreements, Daniels discharged two employees for refusing a work assignment. As a result, those Daniels employees who were members of Local 377 walked off their jobs and established a picket line at the Eazor terminal in Pittsburgh which members of Local 249 refused to cross. Local union stewards and committee men at both terminals took no steps to dissuade fellow employees from striking or to induce them to return to work.\textsuperscript{19} The employer sued the international union and the two locals to recover damages for the strikes. The

\textsuperscript{14} 223 F.2d at 877-78.

\textsuperscript{15} \textit{Id.} The local union was held to have been liable because the strike, although informally commenced, clearly had been authorized by the local union. The Fourth Circuit wrote: "We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do; and there manifestly is no such liability." \textit{Id.} at 877. Twenty-four years later, the Supreme Court quoted this language with approval in \textit{Carbon Fuel Co. v. UMWA}, 444 U.S. 212, 215 (1979).

\textsuperscript{16} 223 F.2d at 877-78.

\textsuperscript{17} 520 F.2d 951 (3d Cir. 1975).

\textsuperscript{18} \textit{Id.} The "no strike" clause read as follows: "The Unions and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, [and in the National Agreement, if applicable] of any controversy which might arise." The bracketed clause appears only in the two supplemental agreements to which local 377 was a party.

\textsuperscript{19} \textit{Id.} at 956.
Third Circuit interpreted the contract to contain as part of the no strike agreement, an obligation to use every reasonable means to end a strike begun by their members, even though the strike occurred without the union’s authorization. In so holding, the court identified the mass action theory as a separate and additional basis for upholding liability of both international and local unions.20

In Eazor, the Third Circuit’s expansive definition and application of the mass action theory was criticized as a threat to the delicate balance between management, unions, and individual members, which serves to protect society from industrial strife.21 The court, in effect, engrafted an additional obligation onto the collective bargaining agreement which was not contemplated by Congress. To hold unions to this strict standard encouraged more charades by unions to avoid the devastating effects of financial responsibility for strikes they did not authorize and could not control. To resolve the conflict between the Third Circuit’s decision in Eazor and the Fourth Circuit’s decision in Haislip, the reasonable means theory was reviewed by the United States Supreme Court in Carbon Fuel v. UMWA.22

IV. THE DECISION IN CARBON FUEL

In Carbon Fuel v. UMWA, the employer and the United Mine Workers were parties to the National Bituminous Coal Wage Agreements of 1968 and 1971, both of which contained promises to settle all disputes through arbitration. A no strike obligation was implied by virtue of the arbitration clauses contained in both contracts. In violation of the implied agreements not to strike, members of three UMWA local unions engaged in forty-eight wildcat strikes at the employer’s coal mines. Carbon Fuel filed a section 301 lawsuit for injunctive relief and damages.23

In a jury trial, the district court awarded the plaintiff corporation damages against not only the locals, but the international and district unions as well.24 On appeal to the Fourth Circuit, all damages assessed against the international and district levels were vacated, and the locals were relieved of liability in seventeen of the forty-eight strikes.25 The circuit court approved the mass action theory as the basis of local liability in the remaining thirty-one strikes. It viewed a proper application of the mass action theory to be a “sensible and pragmatic approach to this difficult problem in the area of labor relations.”26 On the other hand, the court rejected Carbon Fuel’s contention that at the international and district levels the union also “had the duty and responsibility to use all reasonable means to prevent or terminate the wildcat strikes, and that the failure to do so would render

20 Id. at 963.
21 Whitman, supra note 13.
22 444 U.S. 212.
23 Id. at 213-14.
24 Carbon Fuel Co. v. UMWA, 582 F.2d 1346, 1348 (4th Cir. 1978), aff’d, 444 U.S. 212 (1979).
25 Id.
26 Id. at 1349-50.
them liable for the work stoppages.\textsuperscript{27} The court reaffirmed its earlier holding in \textit{Haislip}, which had rejected the reasonable means theory.\textsuperscript{28} In the employer's petition for certiorari to the United States Supreme Court, review of the judgment against the local unions was not sought.

In reliance on the statutory language of subsections 301(b) and (e)\textsuperscript{29} and the legislative history of section 301,\textsuperscript{30} the Supreme Court unanimously determined that the responsibility of the international and district unions to prevent and terminate unauthorized work stoppages in violation of the collective bargaining agreements was limited to cases where those unions could be found liable under the common law rule of agency. The Court rejected the company's arguments that the obligation of the district and international unions to use all reasonable means to prevent and terminate unauthorized strikes is implied in law because the contract contains an arbitration provision, or is to be implied because the agreement provides that the parties will maintain the integrity of the contract. In so holding, the Court overruled \textit{Eazor} to the extent that courts may not imply an obligation on international and district unions to use all reasonable means to terminate an unlawful strike.

\textbf{A. Conflict in the Courts}

In the wake of \textit{Carbon Fuel}, a conflict developed in the circuit and district courts concerning whether the mass action theory continued to have vitality.\textsuperscript{31} Appellate disagreement on this issue is vividly apparent between the Fourth and Tenth Circuits. In \textit{Consolidation Coal Co. v. UMWA, Local 1702},\textsuperscript{32} the Fourth Circuit held that the mass action theory is still applicable to local unions and that actions of union officers and committee members were sufficient to bind the union

\begin{footnotesize}
\textsuperscript{27} \textit{Id.} at 1350.
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} 444 U.S. at 216.
\textsuperscript{30} \textit{Id.}


\textsuperscript{32} 709 F.2d 882.
\end{footnotesize}
under common law agency principles. In this case, employees engaged in an illegal work stoppage when a union member was suspended for allegedly attempting to remove company property from the mine. The court found that the lack of efforts by Local 1702 to persuade its members to return to work compelled the court to conclude that the local unions ratified the illegal strike. The Fourth Circuit determined that local union liability under the mass action theory was not before the Supreme Court in *Carbon Fuel* and, therefore, courts were free to apply the theory in appropriate circumstances. In direct conflict with this decision, the Tenth Circuit, in *Consolidation Coal Co. v. UMWA, Local 1261*, held that neither the reasonable efforts theory nor the mass action theory survived the Supreme Court’s *Carbon Fuel* decision. In this case, members of Local 1261 walked off their jobs due to dissatisfaction over the manner in which a grievance was being considered. On appeal the issue narrowed to whether the mass action and reasonable efforts theories of liability were foreclosed by *Carbon Fuel*. The Tenth Circuit decided that the Supreme Court construed the Taft-Hartley Act as permitting only one basis of union liability without differentiating among union hierarchies, namely, the common law rule of agency. Because it construed mass action as a theory independent of common law agency principles, the court deemed itself foreclosed by *Carbon Fuel* from applying the theory.

Judicial disagreement on the viability of the mass action theory after *Carbon Fuel* is also apparent in the district courts. In *Keebler Co. v. Bakery Workers, Local 492-A*, Judge Pollack of the Eastern District of Pennsylvania stated that because the implied reasonable efforts theory was discarded by the Supreme Court, the case for survival of mass action had been strengthened. In contrast to *Keebler*, however, the Western District of Pennsylvania held in two separate cases that the Supreme Court in *Carbon Fuel* rejected the application of mass action to all levels of union hierarchy. In *Airco Speer Carbon-Graphite Co. v. Local 502, International Union of Electrical Workers*, Judge Knox stated that the Supreme Court announced the standard to determine all levels of union liability as being the common law of agency and ratification. In *Lakeshore Motor Freight v. International*
Brotherhood of Teamsters\textsuperscript{41} the district court judge wrote that Carbon Fuel clearly held that a union can be bound by the acts of its members only under principles of common law agency. In sum, district courts have disagreed as to the viability of mass action after Carbon Fuel; mass action remains a viable legal theory of local union liability to some courts, while in others the theory is separate and independent of common law agency, and, therefore, inapplicable to any level of union hierarchy, including local unions.

B. The Effect of Carbon Fuel

The Supreme Court concluded in Carbon Fuel that the legislative history clearly limited the responsibility of unions for strikes in breach of the contract to cases when they may be found responsible according to the common law rule of agency.\textsuperscript{42} The Court, however, addressed only the question of international and district union liability for the local union's unilateral action.\textsuperscript{43} The judgment against the local union, based on the mass action theory, was not reviewed by the Supreme Court.\textsuperscript{44} The precise question reviewed by the Court was whether international and district unions may be held liable for the illegal strike of a local union where they failed to use all reasonable means to terminate the local union's strike. Thus, the Court considered whether the law implies an obligation on international or district unions to use all reasonable means to terminate an unlawful strike. On the other hand, the question of local union liability under the mass action theory was not directly addressed by the Court.

A significant distinction exists between liability premised on an obligation to use reasonable means to end a wildcat strike, and the mass action theory. In a reasonable means analysis, an obligation to use all reasonable means to terminate any illegal strike becomes an implied term of the collective bargaining agreement. What constitutes reasonable means will vary, depending upon the circumstances of each union, its relationship to the strikers and its ability to exercise control and direction over the strikers.\textsuperscript{45} The fatal defect of the "reasonable means" test is that it does not embody any mechanism to establish agency, as required under section 301 of LMRA.

\begin{itemize}
\item \textsuperscript{41} 483 F. Supp. 1150.
\item \textsuperscript{42} 444 U.S. at 216.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id. at 215 n.3. This aspect of the holding was consistent with the Third Circuit's determination in U.S. Steel v. UMWA, 534 F.2d 1063 (3d Cir. 1976) that only the union whose members actually engage in the strike should be liable under mass action. This is usually the local union because leadership for an illegal mass action comes from within the group which generates the unlawful action.
\item \textsuperscript{45} In Eazor Express, Inc., the Third Circuit engrafted onto the mass action theory a requirement that the union use all available reasonable means to terminate a wildcat strike. Failure to make such efforts automatically resulted in liability on the part of the union. The Third Circuit subsequently modified this position by holding that only the union whose members were on strike was liable, thereby exculpating international unions and their intermediate level entities. U.S. Steel, 534 F.2d 1063. Ultimately, the "reasonable efforts" test was rejected by the Supreme Court in Carbon Fuel.
\end{itemize}
The mass action theory, when properly interpreted, is a means of establishing agency based on circumstantial evidence. A rebuttable inference of union liability is raised when a union is under an express or implied obligation not to strike and a significant number of union members walk off their jobs in violation of that obligation. The individual members' actions are imputed to the union as an entity due to the overwhelming probability that individual strikers do not act without leadership. Corrective measures and surrounding circumstances should be considered by courts to determine whether the inference of union liability is rebutted.

V. REDEFINING THE MASS ACTION THEORY

The question of union liability focuses on identifying the party responsible for the illegal strike: the individual members or the union, as an entity. In this regard, it is important to recognize that a union has an independent identity from its members just as a corporation has an independent identity from its shareholders. This independent identity is recognized in the LMRA which permits recovery of money damages only from the union as a group or "entity." In an illegal strike situation, members of the union may either act independently of the union, or act in accordance with union leadership. The acts of union members, however, may not necessarily be the acts of the union entity. This important distinction must be taken into account to understand the redefined mass action theory.

It has been argued that the mass action theory is distinct from common law agency, and is therefore not a theory of liability available to an injured party in a section 301 lawsuit. Indeed, the statute and interpreting case law make it clear that agency is the only theory of union liability contemplated by Congress when it enacted section 301 of the LMRA. Subsections 301(b) and (e) are explicit in stating that a union "shall be bound by the acts of its agents" and authorization or ratification "shall not be controlling" in determining whether a person is acting as an agent.

The better reasoned analysis is that mass action is not a separate and distinct theory of substantive law, removed and unrelated to rules of agency. Rather, it is an aspect of the law of agency which simply creates a mechanism whereby the
fact of agency may be inferred. Accordingly, those cases which interpret *Carbon Fuel* as rejecting mass action because it is not consistent with agency theory, have misconstrued the fundamental nature of mass action.\(^1\)

When properly viewed, the mass action theory is entirely consistent with agency principles.\(^2\) The theory permits a court to draw an inference of the union's involvement in an illegal strike based on the presence of certain facts. Analysis under the mass action theory involves three basic steps: First, was there an express or implied pledge not to strike? Second, was there a strike in violation of the agreement during which most or all union members participated? Finally, did the union, or could the union, make any effort reasonably calculated to end the work stoppage?\(^3\) If all or most union members engaged in an illegal strike, and the union took no action to end the work stoppage, then it is inferred from those facts that the union ratified the unlawful conduct of its members.

Once the inference is raised, the union has the opportunity to rebut the inference by evidence of its efforts to halt, or to at least disassociate itself from the strike by showing that it lost control of the situation. Accordingly, a union will not automatically be held liable merely because the prospect of liability is raised by a mass action analysis. The mass action inference is not a strict liability standard or an irrebuttable presumption. It is simply an inference which the union may rebut in the presentation of its case in chief.

Mass action has been erroneously described as a strict rule of vicarious liability, and therefore, separate and distinct from common law agency.\(^4\) The concept of a strict liability test has rightfully been rejected because it creates an imbalance in the relationship between employers and employees. Imposition upon unions of vicarious liability for the unauthorized acts of individuals could mean the elimination of labor unions as a social institution in America. In addition, irresponsible or violent acts by individual workers or by their agents, if automatically attributable to the union on the scene, could serve to destroy the union.

\(^1\) See e.g., *Consolidation Coal Co.*, 725 F.2d at 1258 (union liability not differentiated on the level of the union hierarchy).

\(^2\) See *supra* note 40.

\(^3\) To determine whether the union has used reasonable efforts, courts have relied on such factors as:

1. Did the union invoke disciplinary fines against its striking members?
2. Did the union use local television, telegrams, newspapers, or radio to instruct members to return to work?
3. Did the union hold meetings in which they instructed members to return to work?
4. Did union officials return to work?
5. Were the union's efforts foreseeably ineffective?

*Consolidated Coal Co.*, 709 F.2d at 882; U.S. Steel Corp. v. UMWA, 598 F.2d 363 (5th Cir. 1979). Also probative is the percentage of union members that ceased working. The implication is that if most members, including union officers, participated in the unlawful strike, then the likelihood that the union in fact authorized the strike is increased, and an inference of union involvement may be drawn.

\(^4\) See Whitman, *supra* note 13 for one scholar's criticisms of the judicial interpretation of the reasonable means and mass action theories.
The redefined mass action theory is properly applied to local unions, and therefore, it becomes necessary to differentiate the liability of a local union from that of an international union. It can be legitimately asserted that a local union should be deemed to have ratified the acts of its members in appropriate factual circumstances. It is an entirely different matter to extend that inference of liability to an international union. Unless there is a proven agency nexus, inferring international authorization of an illegal strike is an unwarranted imposition of vicarious liability on the international union for acts of the local union and its members. International unions are frequently geographically removed from the site of an illegal strike, and they generally play no direct role in administering local strikes. It is the local unions which provide the leadership force which works within the striking group. Logically, then, the only time an international or district union can be liable for an illegal strike by members of a local union is if the employer proves "complicity," (that is, participation or involvement) on the part of the higher level union entity. A stricter standard of international union liability was not envisioned by section 301 of the LMRA, and such an extension of liability was properly rejected by the Supreme Court in Carbon Fuel.56

Strict liability imposes an implied contract term neither contemplated nor agreed to by the parties and, in effect, requires a court to rewrite the no strike agreement. In the final analysis, a court applying a strict liability theory is intruding into the province of the private parties and rewriting their labor agreement. Such an analysis goes against the fundamental premise underlying federal labor laws to permit private collective bargaining without the government dictating the substantive provisions of the private parties' agreement.57

Under the mass action theory, the question of agency remains a fact question, but may be inferred circumstantially from the facts surrounding the illegal work stoppage. In Haislip, the Fourth Circuit's bastion of common law agency application, it was acknowledged that circumstantial evidence may be sufficient to prove union liability.58 In this regard, the court in Haislip stated that the subject case did not reveal circumstantial evidence which pointed to union authorization of the illegal strike. Rather, the court noted, the strike was "wildcat" in nature and no evidence existed which suggested the union or its agents had anything to do with the unlawful strike. In that case, the facts did not permit the court to infer union liability, and to that extent the reasoning is sound. If, however, the facts do exist and the inference is raised, the burden of going forward with the evidence shifts

55 Complicity is defined as participation, involvement, or the state of being an accomplice to an illegal strike. BLACK'S LAW DICTIONARY 258 (5th ed. 1979).
56 See supra text accompanying notes 23-24.
57 444 U.S. at 215.
58 223 F.2d at 877. "What we are dealing with is not a case where circumstantial evidence points to instigation of a strike by defendants or the agents who represented them, but a wildcat strike of local origin, without anything to suggest that defendants or their agents had anything to do with bringing it about."
to the union to rebut the inference. When the mass action theory is viewed in this light, it becomes apparent that it is fully consistent with the principle embodied in subsections 301(b) and (e): liability must be predicated upon agency.

VI. PUBLIC POLICY CONSIDERATIONS SUPPORTING THE MASS ACTION THEORY

There are compelling public policy reasons for the continuation of mass action as a viable theory of local union liability. The National Labor Relations Act of 1935 decrees that it is American labor policy to encourage collective bargaining as a means of avoiding and eliminating labor strife. Although the public policy underlying federal labor law recognizes the use of economic weapons, such as the primary strike, nevertheless, labor and management share the common goal of uninterrupted production. Basic to this country’s labor relations system is the concept of industrial self-government based on private dispute resolution rather than strikes, boycotts, or lock-outs during the life of a union contract. Indeed, the private resolution of disputes has become the primary means to effectuate the Act’s purpose of reducing labor strife in general, and strikes in particular. A grievance procedure culminating in final and binding arbitration has become the substitute for worker strikes during the life of collective bargaining agreements.

If unions are permitted to bypass the arbitration and participate in illegal strikes the result is injury to the productive capacity of the company involved as well as an undermining of the productive potential of the country. The cruel irony of unlawful strikes is underscored by the fact the major advantage of collective bargaining, from an employer’s point of view, is the assurance of labor peace for the duration of the contract. The mass action theory enhances the employer’s capability to prove the union actually authorized an illegal strike.

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29 U.S.C. § 151 (1976) provides in pertinent part:
Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.


Warrior & Gulf, 363 U.S. at 574; American Mfg. Co., 363 U.S. at 564.

Complete Auto Transit, 451 U.S. at 418 (Powell, J. concurring).
It has been argued that public policy militates against the adoption of the mass action theory. The first contention is that the local union and its leaders may not enjoy the loyalty and trust of all their bargaining unit members, and, therefore, it is “extreme” to hold the local union responsible where its leaders oppose the strike but are unable to deter union members from striking. The issue of union member loyalty, however, is legally irrelevant to the question of liability under any theory. The central question is whether the union sanctioned, by its action or inaction, the illegal work stoppage. In a traditional agency analysis, that question would turn on the employer’s ability to prove, through direct evidence, an agency relationship between the local union and its members. In a mass action analysis, as redefined herein, union responsibility would still be predicated on an agency relationship, but proving agency may be accomplished by the circumstantial fact of mass action. If union leaders do not enjoy the loyalty of their members and can prove they lost control of their illegally striking membership, an important factor in rebutting the inference of union liability will have been established.

Another argument is advanced which purportedly demonstrates the adverse policy aspects of mass action: to avoid liability, union officials would be placed in the awkward and embarrassing position of having to admit they lost control of their membership. Moreover, there is concern that, in light of the political nature of unions, union leaders would be expected to take unpopular actions in an attempt to avoid the inference that they ratified an unlawful strike. Union officers, however, have an overriding responsibility to comply with the terms and promises embodied within a collective bargaining agreement. Labor policy must attach greater import to the sanctity of contracts than to the potential embarrassment which may befall ineffectual union leaders. On balance, the public policy favoring adherence to contractual obligations, especially in the collective bargaining context, overweighs any concern for tarnished images or hurt feelings of union officials. Industrial chaos will result if either the union or the company perceive an opportunity to ignore these contractual obligations. Unfortunately, utilization of the common law agency theory as insurance against an illegal strike simply does not provide adequate protection against a local union, which through clandestine acts, or by simply failing or refusing to act, instigates or ratifies a strike in violation of the parties’ agreement. Clear evidence of union instigation, encouragement, or inducement of union members to strike is nearly impossible to prove to a court. Therefore, it is relatively easy for a union to circumvent the terms of a collective bargaining agreement by engaging in an illegal strike and later avoid liability due to the employer’s sheer inability to prove an agency relationship between the union and its members.


Id.

Id.
To provide teeth to the national public policy for labor relations, it must be clear to the parties that the spirit and intent of collective bargaining agreements will be enforced by the courts. Mass action is a sensible and pragmatic theory which may be applied to pierce the union's disguised role in a walk-out and uncover the act as one compelled or ratified by the union. The controversy, then, must focus on whether a properly defined mass action theory is an appropriate vehicle under subsections 301(b) and (e) of the LMRA to infer local union ratification or authorization of an illegal strike.

VIII. CONCLUSION

The goal of American labor policy is to reduce industrial strife through collective bargaining and private dispute resolution. Nevertheless, illegal strikes continue to undermine relationships between unions and management, and ultimately add to the inflated cost of American goods and services.

The weakening of collective bargaining relationships leads to a diminution of trust between labor and management, contributing to the atmosphere of adversarial hostility which continues to characterize most American labor relationships. It is precisely this scenario of mistrust and polarity, permeating our labor relations, which must be avoided. An important avenue of stabilizing labor relations is for both sides of the labor equation to be required to live up to their collective bargaining obligations fully, and to know that if they do not, adequate redress is available to the aggrieved party. Normally, that redress is by resort to the grievance procedure. But in illegal strike situations, that redress must be reposed in the courts, simply because the culpable party has itself scorned the grievance procedure to engage in prohibited self-help.

The practical effect of the mass action theory is to close an evidentiary loophole in the law of agency by creating an inference that individual union members do not simultaneously engage in concerted work stoppages without the encouragement of the union itself. By inferring union involvement when the union membership acts en masse, employers are not required to sustain the burden of proving union involvement through direct evidence, which most often is within the exclusive control of the union. With the adoption of a redefined version of the mass action theory, litigation concerning illegal strikes is less likely to result in judgments based, not on an evidentiary charade, but on the realities of workplace dynamics.

The mass action theory as defined herein is a viable and necessary judicial tool. It is unfortunate, however, that its continued existence is in doubt as a result of the Supreme Court's Carbon Fuel decision. Judicial reaffirmation of the redefined mass action theory is needed to end the confusion which presently exists in our courts.