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Remedies and Penalties for Wildcat Strikes: How Arbitrators and Federal Courts Have Ruled

Morrison* and Marjorie L. Handsaker**

The typical wildcat strike is one in which the workers in a strong display of protest walk off their jobs in the hope of correcting something they believe unjust. They ignore the established methods for dealing with complaints and thus precipitate an unauthorized work stoppage. These strikes are by no means as common in the United States as in some foreign countries (Great Britain for example). Nevertheless, they occur with sufficient frequency in the United States to warrant careful study.

The No-Strike Clause, Arbitration, and Wildcat Strikes

The wildcat strike represents a violation by the strikers of the collective bargaining agreement. The vast majority of agreements in the United States provide for final and binding arbitration of unresolved disputes over the interpretation and application of the agreement. Usually the agreement to arbitrate these grievances is accompanied by an explicit clause providing that there will be no strikes or lockouts for the duration of the agreement. This clause, usually referred to simply as a “no-strike” clause, is considered a quid pro quo for the agreement to arbitrate. The close relationship between the two clauses is expressed by the Supreme Court in *Textile Workers v. Lincoln Mills.*

Even where there is no explicit “no-strike” clause, the Supreme Court has held that the existence of an arbitration clause implies the existence of the no-strike clause.

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** A.B., Radcliffe College; A.M. Harvard University.
1. 353 U.S. 448 (1957).
The Options Open to the Employer

When a wildcat strike violating such a no-strike clause occurs, the employer has several options open to him. The first option often followed by the employer is to take no action beyond doing whatever he can informally—often with the help of local or international union officials—to get the workers back on the job.

Frequently, however, the employer, in addition to taking such informal action, elects to follow one of several other courses open to him.

(1) He may secure, or attempt to secure, injunctive relief to compel the strikers to return to work.

(2) He may bring suit for damages suffered by reason of the wildcat strike.

(3) He may take disciplinary action against some or all of the employees engaging in the strike. This appears to be the most common type of action when any action is taken beyond the informal effort to get the workers to return to work.

He may, of course, elect to follow more than one of these courses of action.

This article shall discuss the three options set forth above. First, the imposition of discipline by the employer against employees involved in the strike will be considered in detail. Particularly we shall examine the action taken by arbitrators when discipline against wildcat strikes is protested by unions and the discipline is the subject of an arbitration award.

Secondly, employers' actions for damages either in the courts, or through arbitration, will be discussed.

Finally, consideration will be given to injunctive relief as a remedy for wildcat strikes, dealing especially with the decision of the U. S. Supreme Court in the Boys Markets case.3

The Development of Principles of Discipline

It should be recognized at the outset, of course, that there is no stare decisis in labor-management arbitration cases. The decision of one arbitrator is never binding on another. A number of principles have been established, however, by arbitral decision and are now generally agreed upon by companies, unions, and arbitrators. This forms a body of what approaches common law. It is one of the aims of this article to set forth these principles. Companies and unions involved with discipline for wildcat strikes cannot safely disregard these principles, and any party engaging in such disregard is almost certain to lose if the question of the propriety of discipline for such a strike is presented to an arbitrator.

It is the hope of the authors that this study may be useful to companies and unions and to their advocates in a multitude of situations. The variety of contract clauses that may be used in this general area will be enumerated. The situations in which arbitrators are likely to sustain discipline and the situations in which it is likely that the arbitrator will modify or revoke the discipline will be indicated. It is also the authors' hope to indicate to companies and unions ways in which the occurrence of wildcat strikes may be minimized.

The Ingredients of the Problem

In discipline cases involving wildcat strikes and in arbitration cases concerning the propriety of such discipline, the major ingredients are (1) the no-strike clause, (2) the arbitration clause, and (3) the discipline clause in the agreement. As it shall be seen, there is a great variety in all three of these key clauses in different collective bargaining agreements. The interaction of these three clauses, taken in conjunction with the facts in the particular case, will largely determine the outcome of the arbitration proceeding.

A Preliminary, Synthetic, Example

At the onset, it may be helpful to those who are not familiar in detail with discipline, arbitration, and collective bargaining agreements to present a typical case. The reader who is a practitioner in the field may wish to move rapidly over this hypothetical illustration which is synthesized from a variety of actual cases.

The workers in an industrial plant may become very disturbed over some real or fancied grievance. It may be that some disciplinary action has been taken against a union officer. It may be that the employer has been, in the minds of the workers, very slow in dealing with some complaint they have made. It may be that a rumor which is quite without foundation has gone around the plant. Whatever the cause, there is a feeling among the workers that direct action must be taken and the workers walk out.

This is clearly a violation of the no-strike clause. There is an alternative course which the workers should have followed. Typically the agreement provides a procedure for the handling of complaints. This procedure usually starts at the grass roots level in a discussion between the worker, his union shop steward, and the department foreman, who is the management representative at the first step. If the grievance is not resolved at this level, it usually proceeds through two or three additional steps with higher officials dealing with the question for the union and the company.

If it is still not resolved, the moving party, typically the union, may then make a demand for arbitration of the issue. An impartial third party is se-
lected (in one of several ways) to hear the case. He holds a hearing modeled to an extent on court-room procedures, but somewhat less formal, and issues a final and binding award.

In our illustration, however, the workers elected to disregard both the no-strike clause and the grievance procedure ending in arbitration. As soon as the company is aware of the wildcat strike, company representatives typically notify the local union officials (if they are not already aware of it) and also the international union representatives. Usually the latter, and often the former, officials will immediately notify the workers that the walkout is in violation of the no-strike clause of the agreement and will attempt to get the stoppage ended at once.

Frequently the company will then mete out discipline (discharge or a disciplinary suspension involving a certain amount of lost work and pay) to the instigators of the wildcat strike. Sometimes the discipline extends beyond the leaders of the walkout to some or all of the workers who participated.

When such discipline is imposed by the company, the union may then file a grievance concerning the propriety of the discipline and carry the matter to arbitration. The arbitrator may sustain the discipline, revoke it entirely, or (if he is permitted to do so by the terms of the agreement) he may modify it: for example, he may reduce a discharge to reinstatement without back pay for time lost.

**Strikes During the Life of Agreements**

There are no comprehensive figures concerning the number of wildcat strikes which occur in the United States annually. But the United States Department of Labor did report on the total number of work stoppages in the United States during 1968, and also the number of stoppages during the term of a collective bargaining agreement. The total number of stoppages was 5,045; these involved 2,649,000 workers and 49,018,000 man days lost. Of this total, 1,585 stoppages occurred during the life of an agreement; this was 31 percent of the total number of stoppages. Stoppages during the life of an agreement involved 724,200 workers (27 percent of the total) and 4,875,800 man days lost (9.9 percent of the total).

Not all these stoppages during the life of an agreement, however, were wildcat strikes. A number of agreements have limitations on the no-strike clause and the arbitration clause. In some major automobile agreements, for example, grievances over production standards are not subject to arbitration and, therefore, are not subject to a no-strike clause. If a grievance over

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4. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 1646, ANALYSIS OF WORK STOPPAGES, 1968, 47-48 (1970). It should be noted that these BLS statistics cover only walkouts involving six or more workers.
a production standard is not settled in the course of the grievance procedure, it is a "strikeable" item; such a stoppage, of course, is not a violation of the agreement. There is no way to determine precisely from the Bureau of Labor Statistics figures how many of the stoppages during the life of an agreement are unauthorized, and how many are legal strikes over non-arbitrable grievances.

Some indication, in a very general way, may be secured indirectly from the fact that in agreements covering 5,000 workers or more in 1970, 108 agreements covering 1,555,550 workers had complete bans on all stoppages during the life of the agreement. There were contract provisions which prohibited stoppages, except under given circumstances or for specific issues, in 116 agreements covering 2,261,875 workers.5

Arbitrator's Awards in Wildcat Cases

To obtain a broad sample of arbitrator's decisions in cases of discipline meted out for wildcat strikes, the authors studied the awards and opinions reported in Labor Arbitration Reports, Volumes 31 through 55, published by the Bureau of National Affairs, Washington, D.C. These volumes cover the awards reported from September, 1958 through February, 1971. Two hundred and twenty cases dealing with discipline for wildcat strikes were covered by this reporting service during this period of time, and these cases form the basis for the following statistical and analytical material.

This article now turns to the question: to what extent have arbitrators supported the disciplinary action taken by employers against workers involved in wildcat strikes? It should be noted initially that the discipline taken by employers falls generally into three categories: employees may be discharged (often after a suspension pending investigation); employees may be given suspensions or disciplinary layoffs, the length of which varies greatly from a day or two to a period of months. Finally workers may be given written reprimands (the lightest penalty, of course) and these warnings are noted in their personnel records.

The following tables show, both for cases and for individuals involved in cases, what the disciplinary action taken by employers was, and whether the action taken by employers was sustained, modified, or revoked entirely when the propriety of the employer's action was ruled upon by an arbitrator.

As discussed in detail below many factors influence the decision of the

5. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 1686, CHARACTERISTICS OF AGREEMENTS COVERING 5,000 WORKERS OR MORE 66 (1970). The BLS also analyzed in greater detail, no-strike, no-lockout provisions in 1717 collective bargaining agreements, 1966. MAJOR COLLECTIVE BARGAINING AGREEMENTS ARBITRATION PROCEDURES, BULL. NO. 1425-6, 83-89 (1966). A summary of these findings is included below in the section which gives examples of these clauses.
arbitrator in sustaining, modifying, or reversing the discipline meted out by an employer. Among these factors are the nature of the no-strike clause, the evidence presented concerning the employee's alleged connection with the wildcat strike, and the authority given to the arbitrator by the arbitration clause in the agreement.

TABLE I
ARBITRATORS' RULINGS ON DISCIPLINE IN 220 WILDCAT STRIKE CASESa

<table>
<thead>
<tr>
<th>Cases Involving Discharge</th>
<th>Number of Casesb</th>
<th>Discharge Sustained</th>
<th>Lesser Penalty Substituted</th>
<th>Workers Reinstated With Full Back Pay</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>133</td>
<td>84</td>
<td>62</td>
<td>17</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cases Involving Suspensions</th>
<th>Number of Casesb</th>
<th>Suspension Sustained</th>
<th>Lesser Penalty Substituted</th>
<th>Worker Given Full Back Pay</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>74</td>
<td>52</td>
<td>9</td>
<td>25</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cases Involving Lesser Penalties</th>
<th>Number of Casesb</th>
<th>Penalty Sustained</th>
<th>Penalty Eliminated</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>19</td>
<td>11</td>
<td>9</td>
</tr>
</tbody>
</table>

a Source: Labor Arbitration Reports, Bureau of National Affairs, Volumes 31-55. All cases indexed under Topics No. 118.6600 to 118.6609, September, 1958 to February, 1971, are included.

b One case may involve more than one type of discipline, and an arbitrator's award for a case may sustain discipline for some employees, while modifying or eliminating discipline for others. For this reason the case count total exceeds 220, and in each type of discipline the distribution of actions by the arbitrator exceeds the number of cases in that type of discipline.

TABLE II
ARBITRATORS' RULINGS ON DISCIPLINE FOR WILDCAT STRIKES IN 146 CASESa INVOLVING 994 WORKERS

<table>
<thead>
<tr>
<th>Discharge</th>
<th>Number of Workers Discharged by Employer</th>
<th>Arbitrators' Rulings</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of Casesb</td>
<td>Discharge Sustained</td>
</tr>
<tr>
<td>-----------</td>
<td>-----------------</td>
<td>---------------------</td>
</tr>
<tr>
<td></td>
<td>117</td>
<td>649</td>
</tr>
</tbody>
</table>
### Suspensions

<table>
<thead>
<tr>
<th>Number of Cases&lt;sup&gt;b&lt;/sup&gt;</th>
<th>Number of Workers Suspended by Employer</th>
<th>Arbitrators' Rulings</th>
<th>Lesser Penalty Substituted</th>
<th>Worker Given Full Back Pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>41</td>
<td>345</td>
<td>308</td>
<td>11</td>
<td>26</td>
</tr>
</tbody>
</table>

<sup>a</sup> Source: *Labor Arbitration Reports*, Bureau of National Affairs. The sample includes all cases under Topics Nos. 118.6600 to 118.6609, Volumes 31-55, for which number of employees disciplined was reported.

<sup>b</sup> One case may involve more than one type of discipline, and an arbitrator's award for a case may sustain discipline for some employees, while modifying or eliminating discipline for others. For this reason the case count exceeds 146.

### TABLE III

**NUMBER OF CASES IN WHICH A GIVEN NUMBER OF EMPLOYEES WERE DISCIPLINED**

<table>
<thead>
<tr>
<th>Number of Workers Disciplined in Case</th>
<th>Discharge Cases Involving Specified Number of Workers</th>
<th>Suspension Cases Involving Specified Number of Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>63&lt;sup&gt;a&lt;/sup&gt;</td>
<td>16&lt;sup&gt;b&lt;/sup&gt;</td>
</tr>
<tr>
<td>1</td>
<td>9</td>
<td>8</td>
</tr>
<tr>
<td>2</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>3</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>4</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>5</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>6-9</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>10-19</td>
<td>9</td>
<td>5</td>
</tr>
<tr>
<td>20-39</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>40-59</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>60-99</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>over 100</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Total Number of Cases</td>
<td>117&lt;sup&gt;c&lt;/sup&gt;</td>
<td>41&lt;sup&gt;d&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

<sup>a</sup> In the 63 cases in which a single worker only was discharged, the discharge was sustained by the arbitrator in 30 cases, modified in 25 cases, and revoked entirely in 8 cases.

<sup>b</sup> In the 16 cases in which a single worker only was suspended, the suspension was sustained by the arbitrator in 11 cases and revoked entirely in 5 cases.

<sup>c</sup> In the 7 cases in each of which more than 19 workers were discharged, there were a total of 313 persons discharged. Of these 313, the arbitrator sustained the discharge for 276 workers, modified it for 36, and revoked it entirely for 1.

<sup>d</sup> In the 5 cases in each of which more than 19 workers were suspended, there were a total of 232 workers suspended. Of these 232, the arbitrator sustained the penalty in 223 cases and revoked it entirely in 9.
The following conclusions may be drawn from the foregoing tables: in the cases which went to arbitration, discharge is the most frequent penalty imposed by employers upon workers who lead or engage in wildcat strikes. In both the number of cases and the number of persons involved in cases which reach arbitrators, discharges are approximately twice as frequent as suspension.

In the majority of cases, arbitrators have upheld whatever discipline has been meted out by employers. When the number of cases is considered, arbitrators upheld discharges in 63 percent of the cases and suspensions in 70 percent. In terms of the number of employees involved, discharges were sustained for 75 percent of the disciplined employees and suspensions were sustained for 89 percent of the disciplined workers.0

**Causes of Wildcat Strikes**

The causes of wildcat strikes are many and varied. There has been discussion in the literature as to whether they are the result of building tensions, whether they are "spontaneous" or led, and if led, whether by union officers and shop stewards, or by one or more aggressive rank and file workers.7

Arbitrators become involved in only a fraction of wildcat strike cases, and when they do, the decisions may be unpublished. Published cases do, however, frequently give information on the incident which triggered the wildcat strike.8 Sometimes they also indicate past events which built up tension. Something of value can be learned from a study of causes cited in some of these cases.

1. Small Incidents the Precipitating Factor.

In a *Ford Motor Co.* case,9 an operator contended that his machine was unsafe. He was replaced with a relief operator whose access to the machine was later blocked by the local union president and four committeemen.

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6. In *The Long Pause*, 14 LAB. L.J. 276 (1963), Attorney Robert Lewis urges that the parties delete arbitration and "no-strike" clauses from collective bargaining agreements because (among other reasons) arbitrators do not uphold the right of employers to discharge persons involved in wildcat strikes. The figures cited above certainly contradict the contention of Mr. Lewis concerning arbitrators' decisions and cast serious doubt upon his proposed elimination of the no-strike clause and the arbitration clause from collective bargaining agreements.


For additional material on discipline see Phelps, *Discipline and Discharge in the Unionized Firm* (1959).


These five workers were disciplined, and their discipline led to a wildcat strike which lasted nine days, idled 47,000 Ford workers in 31 plants, and resulted in loss of production of 33,700 cars and trucks. It was later determined by the Company and the Union that the machine was not unsafe.

In a Masonite Corp. case, a union shop steward was asked to move an employees’ lunch table which had been obtained by going to the third step of the grievance procedure. He refused and was given a suspension. (The Company had wanted to use the space temporarily to clean up a machine before delivery to a customer.) This incident led to a wildcat strike which eventually resulted in the discharge of 30 workers. When these discharges were taken to arbitration they were sustained.

2. Rumors Leading to Wildcat Strike.

In an Acme Boot Co. case, an employee refused to accept a job assignment and said she would rather go home. When she was taken to an office for a conference about this, several employees, believing she was going to be discharged, left their work stations. By mid-morning most of the employees had walked out. The discharge of the shop steward and five others who led the walkout was sustained by the arbitrator.

In an unpublished case related to the authors on condition that it not be identified, a worker at the start of a shift asked his foreman for permission to see his shop steward in order to file a grievance. The foreman reminded the worker that it was the custom in the plant for such business to be transacted during the mid-morning coffee break and the worker agreed that he would follow the usual custom. In some way, however, this conversation was reported through the department as a denial by the foreman of the right of the worker to talk to the steward. This triggered a wildcat strike which eventually led to the discharge of all 50 of the workers in the department. The collective bargaining agreement stated that in case of a wildcat strike the employer could “in his discretion” discharge all participants. In the light of this sweeping power given to management an arbitrator upheld all of the discharges.


In a Philips Industries case, a management consultant spent several weeks studying production records to plan work flows. At the same time there was a controversy over a unilaterally determined incentive scale and the

workers incorrectly thought that the consultant's work would adversely affect their incentive earnings. When the company learned that a wildcat strike over the incentive issue was about to break out, it explained the work-flow study to the union officials. Nevertheless, an eight day strike did occur, and the arbitrator upheld the discharge of 19 workers including some union officials.

Sometimes inaccessibility of a management official at a time when a union officer or shop steward needs information, or a delay in getting a ruling on some point, contributes to a walk-out. Poor communication can also take another form. In one instance a shop steward gave very inadequate reports on the progress of a grievance, and in another the chairman of the shop committee gave completely erroneous information to his fellow committee men, and there were resulting violations of the no strike clause.


In a Bamford Motor Coach Lines case, the union president wanted time off for union business. This was denied by the company. A wildcat strike ensued and the union president was discharged. The arbitrator ruled that the union president had the right to the time off and that, since it was improperly denied him, the company was partly to blame for the strike. The discharged president was reinstated without back pay.

Poor supervision seems to have contributed to walk outs in various other cases. For example, women who had already worked many hours overtime on previous days processing chickens and who complained of fatigue and sore hands finally stopped work at the end of eight hours while there were still some chickens on the assembly line. In still another case, a plant superintendent was said to have used harsh and obscene language in reprimanding women shoe workers. This led to a walkout. Discharges in these cases were modified by the arbitrators.

5. Working Conditions.

In a Donegal Steel Foundry case, a group of workers, who went home when there was no heat in the foundry on a day when the temperature outside was zero degrees were denied pay for the day and were given warning

notices by the company. The arbitrator found that this was not a wildcat strike because there was no concerted action among the men; rather the decision to leave was made by each worker individually. They were awarded call-in pay and the warning notices were rescinded.

In an *Insulrock Co.* case, the arbitrator upheld the discharge of a group of workers who participated in a wildcat strike in protest of unhealthy and unsafe working conditions. The arbitrator conceded that conditions were bad but held that this was not a reason for a strike in violation of the agreement. He stated that it would be hard to find a more serious breach of the agreement than a wildcat strike.

6. Employee Unrest Because of Discipline of Workers.

There are many instances of work stoppages called to protest discipline already meted out to workers. The leaders of the walkout frequently receive much more severe penalties than were given to those for whom the protest was made. In a *Pittsburgh Steel Co.* case, two workers refused a work assignment contending it was not in their job description. The two workers were given a disciplinary suspension which was later converted after the walkout to discharge. In response to the initial suspension almost the entire work force in the shipping department walked out in protest, and later all the workers in the tube department refused to come to work. The 36 workers who participated in the walkout were given a six month suspension. The arbitrator reinstated without back pay the two men discharged and also the 36 who were suspended. At that time they had been off work about two months. The arbitrator wrote forcefully about the failure of the strikers to use the grievance procedure. He found, however, that the two men who were discharged were treated too severely in view of good work records and in view of the fact that both admitted their error in not accepting the work assignment.

In an unreported case given to the authors with the understanding the parties would not be identified, a worker was given three days off for failing to report that he was going to be absent on a certain day. The reason for his absence was that his daughter was in critical condition in the hospital. When the fellow workers learned of this three day suspension, they felt that it was most unjust in view of the problem with his daughter's health, and they walked out asking that the penalty be rescinded. The company discharged two union officers on the grounds that they instigated the strike.

Since the evidence persuaded the arbitrator that the two discharged workers had, in fact, been the leaders, their discharge was sustained.


In a Drake Manufacturing Co. case, an important factor in precipitating a wildcat strike, in the words of the arbitrator, was the following:

Testimony indicated that for at least several weeks prior to the meeting there was a good deal of unrest because of employees' dissatisfaction with Management's handling of grievances, seniority, incentive and disciplinary matters.

8. Past History of Illegal Strikes.

When there have been a number of walkouts in the past, there appears to be a greater tendency to resort to "self-help" rather than to the grievance procedure when there is a new cause for complaint. This is especially true if there have been no penalties or relative light penalties in the past. There can also be ignorance of the possibility of severe penalties.

9. Difficulties Arising From a First Agreement.

After a first agreement between a company and union is signed, the stresses and strains of the new relationship may lead to wildcat strikes. In a Way-cross Sportswear, Inc. case, the first contract stated that a union representative could visit the plant on a "bi-monthly" basis. The newly established union believed that this gave the representative of the international union the right to visit the plant twice a month. When the representative was ejected from the plant on one of his visits, a wildcat strike was triggered.

In one sense, of course, every wildcat strike is "caused" by the workers' disregard of the no-strike clause and of the grievance procedure as the proper way to get action on complaints. Precisely why there is this disregard is not always clear. The foregoing "causes" do, however, shed some light.

Views Concerning the Seriousness of Wildcat Strikes

As discussed above the arbitration clause is commonly considered as a quid pro quo for the no-strike clause. Employers value very highly the guarantee of uninterrupted production contained in the no-strike clause. A violation

21. 41 Lab. Arb. 732, 733 (1963). There are a number of other instances of complaints of the slowness of the grievance procedure.
of this clause is, therefore, looked upon with great severity by employers. Many union officials and virtually all arbitrators share this view.

Typical of the union officials' views are the following:

Mr. James Hoffa, then International President of the Teamsters Union, on August 29, 1963, sent a letter addressed to all officers and stewards of Teamsters Local Union 804. This local at the time was engaging in a wildcat strike against United Parcel Service, Inc. in New York City. Mr. Hoffa's letter read in part as follows:

These unauthorized stoppages are not only in violation of the contract, but they also represent an exercise of authority by stewards which is beyond their power under the contract and which subjects them to removal from office under Article 9, Section 2 of your Local Union Bylaws.

. . . I feel it is my duty to warn all officers and stewards that a continuation of this type of unjustifiable activity cannot be tolerated by the International Union and should not be tolerated by the Local Union.

Additionally, of course, the members and stewards who are involved in these unauthorized contractual violations must be aware that neither the Local Union nor the International Union are in any position to protect their jobs, their job rights or their seniority when they engage in these unlawful activities.

It is my request that . . . duplicate copies of this letter be . . . posted on all union bulletin boards so that the stewards and the membership may be informed of the seriousness of the situation and the possible consequences of any further unauthorized work stoppages in the future.25

A statement containing the views of a well known arbitrator and of one of the leading trade union officials in the United States is contained in the A. M. Byers Co. case. In this case Arbitrator Clair V. Duff stated in his award:

In essence, a Labor Agreement is a part of a system of industrial self-government. Where the parties have mutually agreed that there shall be no strikes or work stoppages and that no employee shall participate in any such activities, an employee who acts contrary to such contractual provision commits a serious offense. On July 15, 1947 the late Philip Murray, then U. S. W. President, publicly issued this apposite statement:

"I regard the collective bargaining agreement we have with our companies not only as a bond but also as a sacred commitment * * * There should not—there must not—be any evasion of sacred obligations * * *"26

Pertinent Contract Clauses

Whether a work stoppage during the life of a collective bargaining agreement is a wildcat strike can be ascertained in any individual case only by studying one or more of several clauses of an agreement. Although the pertinent provisions may appear in different clauses in different agreements, the usual governing clauses are the strike and lockout bans and the grievance and arbitration procedures. In addition, it may be necessary to examine the management's rights clause, the discipline clause, and sometimes supplementary rules. Since refusal to work overtime, slowdowns, union meetings called during working hours, absences especially during the existence of a picket line, and concerted reporting of lateness or illness have also been construed to be work stoppages, a number of other clauses in the agreement may need study.\(^{27}\)

Whether a work stoppage is in violation of the agreement depends not only on interpretation of these clauses, but also on other factors such as lack of authorization by the union, allegations of unfair labor practice, etc.

1. No-Strike, No Lockout Clauses.

In general, the no-strike clause applies to the area covered by the grievance and arbitration procedure. In some cases there are complete bans on strikes and lockouts for the life of the agreement. In other cases there is no specific no-strike clause, but it is implied from the existence of a grievance

and arbitration procedure. Examples of these and other types are shown in a Bureau of Labor Statistics' study.\textsuperscript{28}

No-strike clauses can vary greatly. Some are very brief, while others define work stoppages in detail and specify procedures to be followed in the event of a work stoppage. Some define the responsibilities and liabilities of the union, and have detailed penalty clauses. Clauses may ban all stoppages during the life of the agreement (an absolute ban), or they may permit stoppages under certain conditions. An example of an absolute strike ban is:

\begin{quote}
There shall be no strikes, lockouts, or stoppages of work during the period of the agreement.\textsuperscript{29}
\end{quote}

Questions may arise about the interpretation of brief clauses such as the one quoted above from \textit{Atlantic Gulf Coast Companies}, concerning what is covered by "work stoppage," and what are the responsibilities of individual union members and the officers under a no-strike clause.

More detail, for example, is given in the following agreement:

\begin{quote}
Article XXII Provisions Against Work Stoppages

1. It is the understanding of the parties hereto that all grievances shall be settled promptly in accordance with the Grievance Procedure and that the parties hereto not resort to strikes,
\end{quote}

\textsuperscript{28} The Bureau of Labor Statistics of the U.S. Dep't of Labor analyzed 1,717 collective bargaining agreements (1966) and found restrictions on strikes or lockouts during the life of the agreement in 1,537 of these. Of these 757 specified an absolute ban; all but nine provided for arbitration. The other 780 agreements had some limitations on the strike ban. These limitations took a variety of forms.

In 285 of these contracts there was allowable strike action because a number of areas were excluded from the arbitration procedure. Among these excluded areas were the following: establishment of rates of pay for new work, adjustment of incentive rates, and production standards. In 92 of the 780 contracts the strike ban was in force only until the grievance procedure was exhausted. These contracts either did not include arbitration or provided for it only by mutual agreement.

Strike bans were also lifted in 333 contracts if an employer violated the agreement. Situations permitting the union to strike included an employer's failure to abide by an arbitrator's award, an employer's failure to make proper wage payments, failure to make agreed upon contributions to health and welfare funds, violation of union security provisions, and the committing of unfair labor practices as determined by outside parties.

Clauses which permitted termination of the contract in the event of contract violation were included in 101 contracts with some concentration in transportation and equipment industries. Substantial or continued violation of the no-strike clause was frequently specified as the basis for allowable contract cancellation.

For this analysis see U.S. \textit{BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-6, MAJOR COLLECTIVE BARGAINING AGREEMENTS: ARBITRATION PROCEDURES 83-94} (1966).

\textsuperscript{29} Atlantic Gulf Coast Co. & Agents, & Marine Eng'rs (1965) \textit{cited in BUREAU OF LABOR STATISTICS, id. at 85}. For a discussion of limited strike ban, see note 28 \textit{supra}, summarizing Bureau of Labor Statistics study.
slowdowns, or walkouts as a means of settling any grievances, demands, or disputes during the term of this Agreement.

2. No strike, walk-out, picket, boycott, or other individual or collective action to slow down, interrupt or terminate the work or employment of any employees, whether conducted by the International Union, Local Union, or any of their officers or agents as such, or by any individual employee, and no lock-out by the Employer shall occur during the term of this Agreement, or any extension thereof.\(^3\)

The agreement continues with a provision for the union to disavow any unauthorized strike, and to direct the employees to return to work, and stipulates that discipline for an employee participating in such a work stoppage will not constitute a grievance unless the union claims the disciplined employee did not participate in the activity or was disciplined in a discriminatory fashion.

Some clauses direct the union to furnish the employer with a letter or telegram disavowing the work stoppage which can be posted on the bulletin board within a given time, and add that if the local union fails to do so, the international should supply such notification.\(^3\)

Some no-strike clauses specify that there shall be no discussion of grievances or referral to arbitration until normal operations are resumed.\(^3\)

Unions that are particularly concerned about liability for damages in the event of an unauthorized work stoppage have accepted clauses giving management very extensive control of the discipline in return for removal of liability for such damages. One such contract, along with a typical no-strike, no lock-out clause, and the usual provisions for the local and international union officers to publicly disavow the strike and get the strikers back to work, specified:

\[\ldots\] there shall be no financial liability on the part of the signatory International Union, Local or Officers thereof \ldots\ [provided designated steps to end the work stoppage are taken.] The Company may impose at its sole discretion, disciplinary measures including discharge, in the case of any or all employees who have


32. Moraine Mfg. Co., 40 Lab. Arb. 1161, 1162 (1963). The subject of selective discipline for union officials instigating wildcat strikes is discussed in detail infra; accordingly, references to clauses on this topic are not included here.
engaged in . . . any of the unauthorized acts described above. Such disciplinary acts shall be final and binding upon the Union and the employees covered hereby.\textsuperscript{33}

In contrast to this, in \textit{Dresser Industries, Inc.}, the parties agreed to cooperate in disciplining "up to and including discharge any employee or employees who [interfered with the operation of the company in violation of the agreement]; however, this will not be construed to limit the Company's right to seek legal remedies through court action."\textsuperscript{34}

In another instance the union was freed from financial obligations for unauthorized acts of its members or agents, which the union could not control, while retaining the right to have discipline for such acts subject to grievance and arbitration procedure.\textsuperscript{35}

3. Discipline Clause

As is evident from the preceding section, the discipline for a wildcat strike may be included in the no-strike clause. Alternatively, it may be a special section in the discipline clause.

The other portions of the general discipline clause are important in establishing the rights of a grievant and in indicating the powers of the arbitrator in the event that the protest of discipline for a wildcat strike comes to an arbitrator.

An example of a discipline clause which gives the arbitrator considerable latitude is quoted below:

\begin{quote}

**Discipline**

A. The Employer retains the right to discharge or discipline any employee for just cause. Discharge and disciplinary action shall constitute cases which come under the method of adjusting grievances herein above provided and shall be subject to arbitration if not amicably settled. . . .

C. In justifiable cases, the arbitrator shall have the power to reinstate a discharged employee to his former position, with unbroken seniority and back pay, either partial or entire, to the extent to which the circumstances indicate.\textsuperscript{36}

3. Arbitration Clause

From the foregoing it is apparent that the no-strike discipline, and grievance-

\begin{footnotes}
\end{footnotes}
arbitration clauses are all interrelated. They delineate the areas within which an arbitrator works if an unsettled case comes to him for determination.

In many cases any unresolved grievance can be taken at the request of either party to arbitration. An example of a wide grievance and arbitration clause is: "During the term of this agreement, all disputes, grievances, complaints and adjustments * * * shall be settled in accordance with the grievance and arbitration procedure."37

There are other contracts in which the no-strike clause is limited to the time during which the grievance procedure is operating; thereafter a strike is permissible on an issue still unsettled at the conclusion of the grievance procedure, unless the parties mutually agree to arbitration of that particular case.38

Arbitration clauses customarily state that the arbitrator has "no authority to add to, subtract from, alter or modify the terms of this agreement."39

Frequently the question put before the arbitrator in a disciplinary case is phrased as follows: "Did the company have good cause for disciplining the employee, and if not, to what remedy is he entitled?"

In some agreements the arbitrator is restricted closely in his assessment of guilt or determination of the penalty. For example, in a Warren Co. case,40 the arbitration clause stated in part:

It is the intention of the parties that the arbitrator's authority is narrow and "no common law of the plant" nor any "common law of industry and labor relations" be the basis of any decision * * *

Because of this contractual restriction the arbitrator did not consider portions of the company's post hearing brief.

Sometimes the company retains sole discretion for the discipline of an employee who violates the no-strike clause.41 In such cases the arbitrator has only the power to determine if the employee engaged in a wildcat strike. The arbitrator cannot alter the discipline.42 Only if he found that the employee had not violated the no-strike provision of the contract could he eliminate the penalty.

Occasionally some contracts will specify the terms for an award of payment of back pay in the event of reinstatement, saying that it shall be limited to the amount of straight-time pay which

he otherwise would have earned from his employment with the Company, less any earnings, compensation, or other benefits by the employee, which he was not required to return. . . .

Cases in Which Arbitrators Upheld Company Discipline

Detailed company testimony concerning their frequent observance of striking workers on the picket line was sufficient in a Continental Can Co. case to persuade the arbitrator to uphold the discharge of eight workers. Two other workers whose presence on the picket line was brief, who attended no planning sessions for the strike, and who expressed regret to the company for their participation were reinstated without back pay.

The discharge of a union steward was upheld by the arbitrator in a Wellman Bronze and Aluminum Co. case because he walked out and became the spokesmen for a group who went out on a wildcat strike. The triggering incident was a dispute over the propriety of a discharge of a worker for leaving his workplace 45 minutes early. The same arbitrator heard both cases and reinstated the man who walked off the job early after a 30 day suspension. It is not unusual to have the penalty on the triggering case modified or reversed but to have the penalty for the wildcat strike upheld.

In a dispute over a changed incentive rate, the president of a union made threats on three occasions that a walkout would occur unless the old rate were restored. Later he called a meeting of union officers, and still later blew a whistle which was a signal for the walkout to begin. The arbitrator upheld his discharge because he was clearly the instigator of the walkout. The arbitrator reinstated two other discharged union officers on the grounds that they had not been instigators of the walkout and that their degree of guilt was substantially different from that of the president.

While the evidence was somewhat in conflict (as is usual in such cases) the arbitrator in a case involving Pneumatic Products Co. found that a union grievance committee chairman had been an instigator of an unauthorized walkout. His discharge was sustained. One important piece of evidence, in the arbitrator's view was the fact that the chairman did nothing to stop the walkout and immediately hired a hall in which to hold a union meeting.

Misrepresentation of facts by a leader of the union has been a factor in

47. 38 Lab. Arb. 986 (1962).
determining responsibility for an unauthorized walkout. In *E. B. Wiggins Oil Tool Co., Inc.*, the arbitrator found among other things that the chairman of the shop committee had advised union members that the union had ordered them to refuse to work overtime. The reason given was that the grievance procedure had broken down. The arbitrator found that there was no evidence that the grievance procedure had broken down and sustained the discharge of the chairman.

In a case given to the authors on condition that it not be identified, leadership of a wildcat strike was established to the satisfaction of the arbitrator by the fact that two union officers were the first to punch out the time clock when the walkout began. The discharge of the two officers was sustained.

In other cases photographs taken of picket lines and notes taken at the time by supervisors concerning picket line activity have been used by companies to establish leadership activity in wildcat strikes.

Cases in Which the Discipline Was Held to be too Severe and the Penalty Was Modified by the Arbitrator

When arbitrators find that the evidence is inconclusive that the worker committed the act for which he is disciplined, the penalty is often modified or rescinded.

In a case involving *Bourbon Cooperage Co.*, a newly elected shop steward was discharged for allegedly encouraging a slowdown. The arbitrator indicated there was considerable doubt in his mind as to whether the steward actually advised employees to slowdown or whether he advised them to work more carefully to avoid discipline for poor production. The arbitrator ordered the steward reinstated with back pay but with a warning against any attempt to interfere with production.

In an *Ohio Brass Co.* case, a union president was discharged after a wildcat strike started. The arbitrator found that the president had made a good faith effort to end the stoppage. He had called a union meeting to urge return to work, but the crowd would not listen and the meeting broke up in disorder. The arbitrator ordered reinstatement. The union president had lost no pay since the union had made up his lost wages during the period of his discharge.

In a rather unusual award involving the Butler Manufacturing Co., the arbitrator reinstated an employee who had been discharged for leading a wildcat strike. There had been a series of such walkouts, earlier. The employee was ordered reinstated after a six month disciplinary layoff during which he would receive no pay and accumulate no seniority. The individual was also ordered to cease and desist from engaging in any future work stoppages in violation of the agreement. The arbitrator thought that his award would be more effective in ending wildcat strikes than upholding the discharge would. The worker's presence in the plant after the end of his suspension "will be a symbol in the plant that wildcat strikes and violations of the contract do not pay and that employees are punished therefore."  

Complete Reversal of the Discipline by the Arbitrator

As discussed above, arbitrators may revoke entirely the discipline imposed when they find that a worker whom the employer has disciplined as an instigator of the strike was not, in fact, a leader in the walkout.

In a case involving National Lead Co. of Ohio, the late Carl R. Schedler reversed a somewhat novel penalty that a Company had invoked for a wildcat strike. The unauthorized stoppage began on May 28, 1959 and continued over the Memorial holiday. The union did not grieve the three day suspension which the company imposed on participants but did bring to arbitration the propriety of the company action in denying holiday pay for Memorial Day to which the workers were otherwise entitled. Arbitrator Schedler ruled that it was not proper for the company to withhold this holiday pay. He reasoned:

It seems to me that to deny these employees, as a disciplinary measure, holiday pay which they have qualified for under the terms of the contract is in the nature of a fine and not in the nature of a disciplinary penalty. To fine a person is to impose a pecuniary punishment. I do not believe that either the labor contract or the working rules contemplate or permit the fining of an employee as a disciplinary measure for misconduct.

To complete the record on this point it should be noted that in a virtually identical case another arbitrator, the late Milton H. Schmidt, ruled in an exactly opposite fashion. In a case involving Continental Can Co., Inc. a wildcat strike was in progress over the July 4th holiday. Again the holiday pay was withheld as a penalty for the strike. The agreement specified that

55. Id. at 868.
an employee engaging in a wildcat strike "may be discharged or disciplined." In his award the arbitrator ruled:

The word "discipline . . . is not defined or particularized. . . . The withholding of holiday benefits from workers on strike when the holiday occurs is, in my judgment, a type of penalty which comes within the definition of discipline.\(^57\)

In a case involving *Westinghouse Electric Corp.*,\(^58\) a group of first-shift employees were asked if they would work overtime and a number of them refused. The company then instructed a group of second shift employees to work overtime and all refused. All of the employees on both shifts who refused were given a one day disciplinary lay-off. The arbitrator ruled that amounts of overtime, concerted refusal by employees when instructed to work constituted a wildcat strike. He sustained the penalty for the second-shift workers who had been ordered to work overtime but revoked the penalty for the first shift workers on the ground that they (unlike the second shift men) had simply been asked, not directed, to work the overtime. In the past it had been customary to permit workers to decline overtime without explanation or penalty.

**The Leadership Issue**

In the vast majority of cases studied, disciplinary action by employers was either (1) taken only against the leaders of the wildcat strike or (2) more serious disciplinary action was taken against the leaders and relatively minor discipline was meted out to the workers who walked out as "followers."\(^59\) The leaders in some cases were stewards or union officers; in other cases the leaders were rank and file workers who in effect became leaders at the start of the strike. In some cases the latter were employees whose grievances were the cause that led to the walkouts.

In many awards arbitrators write extensively and eloquently concerning the duty of the officer or the steward to prevent or to stop the unauthorized stoppage. Typical is the following written by Arbitrator Eric Schmertz in a *United Parcel Service Co.* case:

> If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to faithfully adhere to all the provisions of the Collective Bargaining Agreement and to actively instruct each employee to

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57. *Id*. at 560.
59. Only infrequently is there severe discipline for a large group of employees as in *American Air Filter Co.*, *47 Lab. Arb.* 129 (1966), where 132 first shift employees were discharged.
do so. * * * It is the obligation of the steward to set an example for all Union members within his jurisdiction by demonstrating his loyalty to the terms and conditions of the contract negotiated by his Union with the Employer. Hence it is inconsistent in the extreme, for a shop steward to lead, or support, or participate in a work stoppage in violation of a "no-strike" clause. . . . Indeed, a shop steward's duty in the face of an unauthorized work stoppage is well settled. Not only should he make a determined effort to prevent the stoppage before it begins, but upon its development must actively and unequivocally attempt to bring an end of the stoppage at the earliest possible moment. Moreover, he must set an example by either reporting to work himself or by clearly indicating a willingness to work if his Employer wishes him to do so.60

In that case the arbitrator upheld the discharge of eight stewards, finding there was just cause for their dismissals.

If a union membership votes to call or to continue a wildcat strike, does this change the responsibilities falling upon the stewards or officers as indicated in the preceding quotation? The answer is clearly negative. In a case involving Homer Laughlin China Co.,61 the arbitrator upheld the discharge of five union officers. He found that the company had adequate grounds for considering these five to be the principal leaders of the walkout and he further held:

It is no defense to the leaders of an "illegal" strike to say that they were merely acting at the request of the membership of the union as expressed in an affirmative vote of the body. The affirmative vote of the body cannot make legal that which is illegal. Nor can such vote infuse legality into the action of the strike leadership undertaken in reliance upon such vote.62

It is often argued in defense of disciplined union officers that their failure to return to work during a wildcat strike or their failure to induce others to return to work was due to their inability to get through a picket line or to their fear of personal violence and harm if they elected to go through a picket line. In such a case the arbitrator's ruling will turn, in large part of course, on his finding of fact. In some cases the arbitrator is persuaded that there was actually no fear of violence, that the argument is a sham, and then the argument is disregarded.

In a Serrick Corp. case,63 the arbitrator found that the discharged union officers made a good faith effort to enter the plant on the first day of the

62. Id. at 1219.
strike but were barred by mass picketing and some violence. He found that on subsequent days the officers made only token efforts to enter the plant when police officers were present to assure access. In this case discharge was changed to reinstatement without back pay.

A Minority View Concerning the Responsibility of Union Leaders

One of the nation's well known arbitrators, the late Whitley P. McCoy, for a time held a theory concerning the responsibilities of union leaders in connection with wildcat strikes which differed substantially from the commonly accepted view. As indicated above it is frequently held that leaders have a positive responsibility to prevent or end a stoppage and that if they fail in this responsibility they are liable for disciplinary action by the employer. In a case involving *Pittsburgh Standard Conduit Co.*, he found as a fact that two discharged union committeemen had neither incited nor led the wildcat strike which preceded their discharges. He also found that they made at best only very half-hearted attempts to prevent the walkout. The Company contended that the two committeemen because of their position had a special duty to prevent the walkout and, when they failed in this duty, the discharges were justified.

It is in disagreeing with the Company on this point that Arbitrator McCoy parted company with most arbitrators. In his award he wrote:

Conceding, for the purpose of argument, that they failed in their duty, it must be asked "duty to whom?" Undoubtedly to the employees who elected them, to the local Union of which they were officers or agents, and to the International Union which they served. Their breach of duty might have rendered their principals liable to damages. But I cannot agree that election or appointment to Union office creates any privity between the Union's agent and the Company so as to give rise to duties to the latter. The principal, the Union, undoubtedly owes duties to the Company, created by the collective bargaining Agreement, and the inaction of its agents may constitute a breach of such duties on the part of the Union. But the inaction of the agents, the breach of duties owed to the principal, creates no cause of action in a third party against the other party's agent. These are elementary principles in the law of agency and of legal liability.65

In short in this case it was Arbitrator McCoy's view that discharge of union leaders for inaction in stopping a wildcat strike was improper. He

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64. 33 Lab. Arb. 807 (1959).
65. *Id.* at 808.
Wildcat Strikes

reinstated the grievants without loss of seniority rights, but without back pay, because of picket line activity after their discharge.

In another somewhat unusual point of view, related to the principle advanced by Arbitrator McCoy, Arbitrator Herman Gray held that union officers, acting as such, should not be penalized for advising employees to refuse overtime work. Two union officers posted on the bulletin board a notice over their signatures as union officers, in which they stated that the president of the local requested all members not to perform any overtime. Warning notices were given by the company to the two union officers. Arbitrator Gray vacated the warnings, stating that regardless of the propriety of the union-requested ban on overtime the two men were simply functioning as union officers and could not be penalized for this. He stated:

An employee of the Company who at the same time is a Union officer serves in two capacities. Each carries with it its own duties and responsibilities, but they are separate and distinct. The fact that he is a Union officer does not excuse him from the faithful performance of the obligations he owes the Company as its employee and if he fails in that respect he is subject to discipline as every other employee is. On the other hand, if he misconducts himself only as a Union officer, it would be decidedly unfair to punish him in his status of employee. Furthermore, it would imperil the administration of Union affairs if its officers were subject to such liability.

He added that if the company believed the notice injurious to its rights, it should have recourse to the grievance procedure against the union.

In view of the very considerable body of cases in which arbitrators have upheld discipline against union officers for encouraging refusal to work overtime Arbitrator Gray's view must be considered a minority position.

In a case already cited, the union argued the point of view advanced by Arbitrators McCoy and Gray in an effort to secure reversal of the discharge of the union president. In this case, Arbitrator Robert G. Howlett cited in a footnote cases by a number of leading arbitrators who had held that union leaders have a duty to act affirmatively to prevent or end an unauthorized stoppage and sustained the discharge.

Union Claims of Discrimination

In arbitration cases dealing with discipline imposed for unauthorized work stoppages the union has often raised a claim of discrimination. It is pointed

67. Id.
69. Id. at 77, n.3.
out that some persons have been disciplined and that others have not. It is contended, therefore, that those who have been penalized are the victims of discrimination.

What appears to be the prevailing view concerning this point has been summed up by Arbitrator Harry Platt in a Ford Motor Co. case. He upheld the discharge of a local union president and eleven rank and file workers on the grounds that these twelve had been the leaders of the strike. Concerning the union's contention of discrimination, he wrote:

Inequality of treatment in disciplinary matters does not amount to unjust discrimination if there are rational grounds for distinguishing between those to be disciplined and those not to be disciplined. It is only where the grounds for distinction are irrational, arbitrary or whimsical that disciplining of some employees and not others may be looked upon as unjust and discriminatory. In these cases there is no proof that any other employees were guilty to the same extent and of the same misconduct as the aggrieved.

In Todd Shipyards Corp., the union contention of unfair discrimination was upheld by the arbitrator. A union steward with 21 years service was discharged for leading a refusal to work overtime. The others involved in the work stoppage were given only disciplinary warnings. The disparity of treatment was held by the arbitrator to be so great as to constitute discrimination. The steward was reinstated without back pay.

Similarly, in Moraine Manufacturing Co., the arbitrator found that the employer did not have just cause to discharge a union committee chairman for leadership in a wildcat strike. He was ordered reinstated without back pay. The arbitrator found that he was young and inexperienced in union office and that another committeeman with more union officer experience had provided at least as much leadership in the walkout. The arbitrator found that the difference between the two week suspension given the other committeeman and the discharge of the chairman was too disproportionate under the circumstances to be consistent with the contract's requirement of just cause.

Justifiable differentiation in the severity of the disciplinary action taken against different employees has been approved in many cases.

In Mack Truck, Inc., where the contract required "uniformity in penalties assessed for the same class of acts," the arbitrator approved more severe

71. Id. at 616.
73. 40 Lab. Arb. 1161 (1963).
discipline for those who had participated in an earlier wildcat strike. In the same case he also approved more severe penalties for those who engaged in more than one overt act in connection with an illegal work stoppage as compared with those who had committed only one.

Procedural Issues Involved in Wildcat Strike Disciplinary Action

The reported arbitration cases dealing with discipline for wildcat strikes bring to light a variety of procedural issues.

How quickly must wildcat strikers return to work if they are to avoid disciplinary action? In *American Air Filter Co.*, the contract provided that employees engaging in any work stoppage must be given a "reasonable time" to resume work. The arbitrator held that the company had complied with this provision when the first act of discharge (removal of the time cards from the rack) occurred one hour after the chief steward had at the beginning of the walk out ordered the men back to work.

How does "forgive and forget" agreement operate? In a *Borden Ice Cream Co.* case, a wildcat strike in the hardening room caused the ice cream to pile up over the floor and continuation of the stoppage could have involved a much larger loss of product. In a hastily called meeting of company and union representatives with a federal mediator and a state mediator an agreement was reached covering various points in controversy which had led up to the walkout. It was agreed that all persons would immediately go back to work. Nothing was said in this agreement about any penalty against any individuals. Shortly thereafter the Company discharged an employee involved in the walkout. The arbitrator ordered his reinstatement with full back pay on the grounds that the agreement made to get the workers back precluded any disciplinary action.

In another case involving a "forgive and forget" agreement the company was able to show to the satisfaction of the arbitrator that the agreement did not include one worker who was subsequently disciplined. The arbitrator reinstated the worker, but without eight weeks' back pay.

Can a company take summary action to dismiss a worker or must the company file a grievance? A novel defense of a disciplined worker was raised by the union in a case involving *Union Tank Car Co.* A worker was given a suspension for leading an improper work stoppage. In addition to denying that he was the leader, the union also maintained that the com-

78. 38 Lab. Arb. 1144 (1962).
pany should have filed a grievance rather than disciplining the worker at once. The arbitrator rejected this argument, pointing out that under the management clause of the agreement the company had the right to discipline workers.

Does the failure of some grievants to testify in their own behalf in an arbitration hearing mean that they must lose their case? In a case involving Ingersoll-Rand Co., the company argued that since some of the workers who were given time off for participating in a wildcat strike did not appear and testify at the hearing, they had forfeited any rights to redress that they may have had. The arbitrator, however, ruled against this contention holding that "silence cannot be considered as a basis for any reliable implication of involvement."

Can a company suspend a large number of workers a few at a time to avoid seriously hampering its production? It appears to be not uncommon in some industries for short suspensions given a large number of workers to be staggered over a period of time to avoid serious disruptions to production. An arbitrator sustained such action in United States Steel Corp., ruling that if the employer were required to penalize all employees at once, it would create the same sort of situation as that for which it sought to penalize.

Within what sort of time limits must discipline be imposed? It is generally accepted as a principle of industrial discipline that it must be imposed promptly, not long after the event leading to the disciplinary action. Within what time limits must the company act? In M. S. L. Industries, Inc., it was ruled that the time limit should be determined by the time required to investigate and evaluate the strike and to restore orderly production. Penalties imposed three weeks after the strike ended were held to be within reasonable time limits.

If the agreement calls for written notice to a worker of reasons for disciplinary action being taken, is the worker denied due process if the notice of reasons is given orally? In Mead Corp., the arbitrator held that the oral notification was sufficient since under it the worker was advised of the reasons for the discipline, and the failure to give written notice was a procedural oversight in the rush of attempting to get the work stoppage settled.

Can an employer unilaterally change a rule providing for progressive discipline in case of wildcat strikes? In Armstrong Rubber Co., the employer

82. Id.
had proposed to the union and the union had accepted a rule that for the first wildcat strike in which an employee participated he would be given a written warning. For the second offense there was to be three days off. The penalty was to be discharged for participation in a third walkout.

Subsequently, the company without consultation with the union announced that the rule had been changed to provide a three days' suspension for the first offense. Some time thereafter a wildcat strike occurred and the company gave workers a three days' suspension for a first offense. The arbitrator ruled that the Company had not lost its right unilaterally to establish rules by mutually agreeing with the union on the first set of rules. He reversed the penalty against the employees, however, on the grounds that the jointly-agreed upon rules were still in effect. He indicated that in the course of the arbitration hearing the union had become fully informed concerning the new, unilaterally established rules and that henceforth such rules would be in effect.

The Role of Warnings in Connection with Wildcat Strikes

The "common law" of discipline in industrial relations says that for minor offenses—such as absenteeism—warnings are needed before more serious types of discipline are imposed.\footnote{Id.} Wildcat strikes, however, are typically regarded as major offenses permitting discipline for the first offense. As discussed above, no-strike clauses frequently give management the right to administer discipline, including discharge, for work stoppages by employees. Mention of warnings or progressive discipline in no-strike clauses is extremely rare.\footnote{The Armstrong Rubber Co. case discussed above (52 Lab. Arb. 501), which had originally provided for a system of warnings, prior to suspension, was very unusual.} Employers who have meted out discipline without previous warnings under strong no-strike clauses have usually had the discipline sustained, if it was considered just on other grounds.

In \textit{Westinghouse Electric Corp.},\footnote{39 Lab. Arb. 299 (1962).} the arbitrator did not accept the union argument that disciplinary layoff could come only on the third offense, since the discipline clause provided for progressive discipline. He held that the discipline clause referred to individual employees, while refusal of the second and third shifts to work scheduled overtime was a concerted work stoppage under the no-strike clause. The company could not be expected to stand by impotently during two successive work stoppages, before imposing discipline for a third. He sustained 2-day suspensions for 92 second and third shift workers.
Frequently, however, managements, operating under strong no-strike clauses, may choose not to impose penalties for brief work stoppages. As developed in more detail below, they choose more informal methods of getting workers back on the job. If, however, after tolerating a series of wildcat strikes with no official comment or with a mild general warning they suddenly impose discipline, unions often argue that they should have been warned of impending change in discipline policy. In *American Host & Derrick Co.*, 88 the union charged the company with entrapping the employees into thinking they could engage in a wildcat strike over grievances and receive no more than a reprimand citing a past policy of no suspensions or discharges in previous wildcat strikes. The arbitrator referred to the clear language of the no-strike agreement and sustained four out of five of the discharges and 22 one-week suspensions.

In at least one case, however, an arbitrator was influenced by a past lenient policy. A laborer was discharged for leading a wildcat stoppage. The arbitrator reinstated him without back pay because he found that the company had for a long time given only a few days suspension for leadership in work stoppages, and workers had the right to expect that this pattern would continue. 89

If on the other hand the company does choose to tighten discipline for work stoppages and gives a warning that discharge would result from any repetition of a wildcat strike, this may have a bearing on the arbitrator's decision in a subsequent stoppage. In *Insulrock Co.* case, 90 the discharge of 24 workers who walked out and set up a picket line was sustained in part because they had been warned that discharge would follow any repetition of an earlier walkout. 91

Warnings also play a part in dealing with wildcat strikes in other ways. Employers sometimes issue them to "followers" as opposed to "leaders." In *Ingersoll-Rand Co.*, 92 a number of employees were discharged, others given disciplinary suspensions, and 191 employees were given letters of warning for leaving the plant prior to the end of the shift and not returning. These letters of reprimand were sustained by the arbitrator.

Promises of removal of warnings can also have a deterrent effect. In one case a company had discharged the instigator of a wildcat strike and issued written reprimands to 5 "followers." The case of the discharged worker was taken to arbitration. Even before this case was heard the company agreed to

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expunge the warnings from the records of the five workers if at the end of the year they had not become involved in any more unauthorized work stoppages.\(^9\)

*Wildcat Strikes for Which No Discipline is Imposed*

Lest the reader be misled by the foregoing extensive discussion of discipline imposed by employers following wildcat strikes, an important point should be emphasized. There are many wildcat strikes which lead to no imposition of discipline. This is clear from interviews the authors held in the course of this study with company officials, union officials, and others. There is no way to quantify this or to determine in what percentage of the cases some discipline is handed down and in what percentage none is meted out. It is clear, however, that there are many cases in which no discipline results.

In some cases union officers will make an agreement with an employer that if the company will promise not to mete out any discipline, the officials will be able to get the workers back to work at once. In other cases, often when the work stoppage involves only a few workers (who perhaps have simply sat down in their department and refused to work for a few hours until some remedial action which they seek has been brought about), the employer feels that the matter is not serious enough to involve disciplinary action. Occasionally the company may recognize that the grievance concerning which the job action arose has merit, and that while the workers have elected the wrong method of getting action on their grievance, the company has contributed to the problem that gave rise to the grievance. The company may decide therefore, that no discipline will be taken against anyone as a result of the work stoppage.

*Cases in Which Arbitrators Were Asked to Award Monetary Damages for Wildcat Strikes*

As indicated at length above, the most common action taken by employers against leaders or participants in wildcat strikes, is some form of personal discipline. In a smaller but considerable number of cases, however, the employer has chosen another course of action. He has filed a grievance against the union because of the wildcat strike and has asked the arbitrator for monetary damages.\(^9\) (In some cases employers have both imposed discipline on instigators of a wildcat strike and have asked an arbitrator for an award of damages.)

\(^{93}\) Rexall Chemical Co., 38 Lab. Arb. 705 (1962).
\(^{94}\) The employer has the possible alternative of filing in the courts for damages under Section 301(a) LMRA. The right of employers to collect damages for a breach
Does an arbitrator have power, however, to award monetary damages in a wildcat strike case in the absence of a specific clause in the contract giving him this power? In a number of such cases, arbitrators have held that they do have this power. In Publishers' Association of New York City (New York Times), arbitrator Peter Seitz found that nothing in the contract prevented him from granting compensatory damages when it was determined that the agreement had been violated by a wildcat strike. He awarded compensatory damages of $1,838.90. The demand of the publisher for punitive damages was denied.

Similarly, in PPG Industries, Inc., arbitrator James C. Vadakin held that he had the power to award damages. He stated:

Unless the machinery for enforcement of the contract includes damages or other affirmative remedies for the benefit of an injured party, . . . the contract becomes a nullity.

He assessed compensatory damages of $448.59 against the Glaziers and Glass Workers Local Union No. 1928 for a wildcat strike. Both this case and the preceding one cite parallel cases where the arbitrators ruled that they had the power to assess damages, even though there was no specific damage provision in the agreement.
Not all arbitrators, however, have so construed their powers. In *Waycross Sportswear, Inc.*, a group of workers were discharged for participating in a wildcat strike. The strike was triggered by the employer's change of a practice concerning the frequency of plant visits by a union representative. The union sought damages for the company's alleged violation of the agreement as well as reinstatement of discharged workers. The arbitrator denied the damages sought by the union on the grounds that the arbitrator has no jurisdiction to decide any matters other than those involving an interpretation or application of the agreement.

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99. Illustrative of cases in which arbitrators have awarded damages in cases growing out of wildcat strikes are the following:

1. In *Master Builders' Ass'n of Western Pennsylvania, Inc.*, 48 Lab. Arb. 865 (1967) there was a three day strike over a union claim that a union worker should man an automatic elevator. The arbitrator found that it was a wildcat strike and awarded damages of $562.70 to the company.

2. In another case involving *Master Builders' Ass'n of Western Pennsylvania, Inc.*, 50 Lab. Arb. 1018 (1968), damages were awarded in the amount of $2,772 against the Carpenters' District Council of Western Pennsylvania.

3. In *Forest City Publishing Co.,* 50 Lab. Arb. 683 (1968), there had been earlier wildcat strikes and the company had warned that they would seek damages if the unauthorized stoppages continued. A chapel meeting, which, by contract, was to last only 30 minutes, was continued for six and a half hours. The president of the local union made no effort to adjourn the meeting. In the light of these facts, damages of $7,956.80 were awarded to the company, to be paid by Local 53 of the International Typographical Union.

4. A rather novel situation is presented in *American Pipe and Construction Co.*, 43 Lab. Arb. 1126 (1964). Because the Boilermaker-Blacksmith Lodge No. 10 was found by the arbitrator to have engaged in a wildcat strike, the employer was awarded $1,035.46 damages. In another grievance before the arbitrator at the same time, it was ruled that the company had violated the agreement by not having a sufficiently large crew on the job for safe handling of some rigging work, and for this the union was awarded damages of $299.83. This latter sum was offset against the larger sum which the union was required to pay to the company.

5. It was ruled in *S.J. Groves & Sons Co.*, 52 Lab. Arb. 74 (1969) that one day was a reasonable time in which the union should bring a wildcat strike to an end. Since the arbitrator found that the union had failed to end the strike in this period of time, and since the strike continued for three additional days, damages of $16,828.98 were awarded to the company.

6. A union steward who called a wildcat strike was held, in *Foster Grading Co.*, 52 Lab. Arb. 197 (1968), to be a responsible agent of the union and therefore the union was liable for damages growing out of the walkout at a construction site. The arbitrator awarded the company $3,010.00.

7. In *Vulcan Mold & Iron Co.*, 52 Lab. Arb. 396 (1969), the arbitrator ruled (as in the cases cited in the first part of this section) that the award of damages was proper even though the contract does not specifically provide for it, since the arbitrator has the power to provide an appropriate remedy in the absence of contract language barring such an award. The United Auto Workers International Union was found not to be liable for damages but the local union was ordered to pay damages of $20,334 to the company for a wildcat strike.

8. In *Mercer, Fraser Co.*, 54 Lab. Arb. 1125 (1970), the arbitrator found that, because of a wildcat strike, the Company was entitled to damages for out-of-pocket expenses and lost profit on the ready-mix concrete it was obligated to buy from other sources to supply its customers, and to a reasonable portion of its claim for overhead
There have been a number of cases where requested damages have been denied. In contrast to the *New York Times* case, *Merchants Frozen Foods Divisions* requested damages from a wildcat strike were denied to the employer by the arbitrator. He found that damages should not be paid because there was no evidence that the union, through its designated officers, was in any manner involved in instigating, encouraging or approving the contract violation.

Similarly, in *Booth Newspapers, Inc.*, an employer's request for damages was denied because the arbitrator found that there was no evidence that the union officials encouraged, directed, or prolonged the unauthorized stoppage.

In contrast to the *Foster Grading Co.* case, in which the acts of a shop steward were held to bind the union, in *Wallace-Murray Corp.* the arbitrator viewed the role of the steward very differently. In this case there was a concerted refusal by workers to fill out cards as ordered by the company. The steward indicated that he took part in the non-compliance with company instructions. The arbitrator found that although the concerted refusal to fill out the cards violated a ban on "self-help," the steward's action was "the individual action of [a member of the union]." The local union was not to be held responsible for his actions. The request for damages was denied.

expenses and general loss of profits. Damages were awarded in the amount of $402.60.

(9) In another case, *Publishers Ass'n of N.Y.C.*, 39 Lab. Arb. 564 (1962), involving the *New York Times*, a stoppage was called without the knowledge or consent of the Newspaper and Mail Deliverers Union and the union business agent attempted to end the wildcat as soon as he heard about it. Because the walkout was in violation of the agreement, the arbitrator awarded actual damages of $1,029.00. He denied requested liquidated damages.

(10) A somewhat novel award was issued in *Belmont Smelting & Refining Works, Inc.*, 50 Lab. Arb. 691, 696 (1968). Local union officers had called a wildcat strike after a worker was given an indefinite suspension for striking a plant guard. The company sought both punitive and compensatory damages for the losses suffered because of the walkout. The arbitrator ruled that the stoppage was a clear violation of the no-strike clause. The requested damages were "denied without prejudice to a renewal thereof during the term of the collective bargaining agreement of the parties in the event that the Company is subjected to any further violations" of the no-strike clause. He ruled that the denial of the requested damages would be final at the end of the contract period if there were no further unauthorized stoppages during the life of the agreement. In explaining the reason for the award, the arbitrator stated: "In plain and blunt language, it is the purpose and intendment of this award to have the memory of August 15, 1967 [the date of the beginning of the wildcat strike] like Banquo's Ghost, long persist—so that it just doesn't happen again."

100. 34 Lab. Arb. 607 (1960). In this case the arbitrator, although denying damages, sustained the discharge of the union steward for failure to report for scheduled pre-shift overtime after the employer had sent him a telegram informing him of overtime and advising him he would be held responsible and subject to discipline for failure of the crew to report.


103. *Id.* at 1175.
As is illustrated in some of the preceding cases, arbitrators who have been asked to award damages have quite frequently not awarded damages because they felt the company failed to prove damages, or that there was divided responsibility for the wildcat strike. An additional example is *H. J. Madore, Inc.*,\(^{104}\) where the arbitrator held that the employer was not entitled to damages, since the violation of the contract by management had contributed to the strike.

Conversation with arbitrators has disclosed a number of instances in which employers who have initially sought damages, have subsequently waived these, feeling that this would best serve the long term interests of the company. One example is the *Ingersoll-Rand Co.* case\(^ {105}\) where the Company originally advanced a damage claim for $60,000 a day for a three day period but subsequently withdrew this claim. The *Bell Bakeries* case\(^ {106}\) also concerns waiver of damages.

### Unfair Labor Practice Charges: The Roles of the NLRB and the Arbitrator

Since wildcat strikes are often triggered and sometimes prolonged by failure to get an agreement on a disputed point, the union often alleges that the employer is not bargaining in good faith under Section 8(a)(5) of the NLRA.\(^ {107}\) The union may appeal formally to the NLRB, or simply make the allegation to an arbitrator (assuming that the triggering case or the discipline for wildcat strike case goes to arbitration). In appealing to the NLRB unions often allege unilateral change by the employer of incentive rates, or working conditions, or disregard of past practice. Sometimes the employer is charged with failure to furnish information.\(^ {108}\) In protesting selective discipline, unions sometimes allege violation of Section 8(a)(3).

The objective of the unions in asserting that the work stoppage is a protest over an unfair labor practice by the employer is to prove that the stoppage is not a violation of the no-strike clause. Unions find support for this position in *Mastro Plastics Corporation v. NLRB*,\(^ {109}\) in which it was ruled that even a no-strike clause was no bar to unfair labor practice strikes, unless it specifically includes such strikes.\(^ {110}\)

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107. *Id.* at 609.
108. Such appeals could be made also in the absence of a wildcat strike, but we are concerned here with those associated with a work stoppage. Samoff, *The Case of the Burgeoning Load of the NLRB*, 22 Lab. L.J. 625 (1971).
110. In subsequent cases, the Board found that strikes over some unfair labor practices were not protected where the grievance could be settled by the grievance and ar-
Employers may also appeal to the NLRB alleging unfair labor practices by unions during the wildcat strike sometimes citing Section 8(b)(1) or Section 8(b)(4) of the NLRA.

If the same case is under consideration by both the NLRB and an arbitrator, and the arbitrator has not rendered his award, the Regional Director of the NLRB may await the ruling of the arbitrator, although he is not bound to do so. He may issue a complaint and the trial examiner may make his decision after a hearing. The NLRB may then decide whether it wishes to make its own determination or wait. If the NLRB issues its decision before the arbitration award, the arbitrator may or may not find the award pertinent in his case. If the arbitrator makes his award in advance of the NLRB disposition of the case, the NLRB retains power to examine the statutory implications and also to interpret the contract in the case as it relates to unfair labor practices. However, the Board may decide to defer to the judgment of the arbitrator.111

The right of the NLRB to refuse to defer to an arbitrator's award is supported by the courts.112 Usually, however, the NLRB will honor an arbitrator's award if it meets certain standards set forth in the Spielberg Manufacturing Co. case,113 which said that the proceedings were to be fair and regular, all parties were to agree to be bound, and the decision was not to be repugnant to the purpose and policies of the NLRA.114

In the sample of arbitration cases analyzed only a very small number mentioned unfair labor practice charges or consideration by the NLRB of some aspect of the case. In most of the cases the NLRB had either dismissed the arbitration procedures of the contract. Arlan's Department Store, 133 N.L.R.B. 802 (1961); Mid-West Metallic Products, Inc., 121 N.L.R.B. 1317 (1958), are cited in F.E. Olds and Sons, 54 Lab. Arb. 30, 35 (1969). See also Thadeus Suski Prod., Inc. v. Vola, 59 L.R.R.M. 2431 (1965).

111. There is an extensive literature on the subject of deferral, and on the broader issue of whether arbitrators should remain strictly within the confines of the collective agreement, or should consider also all levels of law as well. The literature covers the roles of the NLRB and the arbitrator in all kinds of arbitrable disputes, not just those arising out of wildcat strikes.


112. See Steve's Sash and Door Inc. v. N.L.R.B., 430 F.2d 1364 (5th Cir. 1970).
114. This policy was amplified in International Harvester Co., 138 N.L.R.B. 923 (1962). The general principle of deferral to arbitration is further supported by Collyer Insulated Wire, 192 N.L.R.B. 150 (1971), discussed in U.S. DEPARTMENT OF LABOR, MONTHLY LABOR REVIEW, Vol. 94, No. 11 at 64-66 (1971).

An arbitrator with long experience in arbitration reports that he has had relatively few cases in which there was an allegation of an unfair labor practice and in every one of these the NLRB has sustained his decision.
unfair labor practice charge or held the case awaiting the arbitrator's decision. In none of the cases did the arbitrator find that an unfair labor practice had been committed. Some arbitrators ruled that the charges pending with the NLRB were not before them. In one somewhat different case involving a damage claim for a wildcat strike, the arbitrator ruled that a prior NLRB decision awarding a disputed job to another union in the plant could be disregarded in his deliberation since the Board considered outside factors that were not before him.¹¹⁵

Injunctions and Arbitration

Through a series of cases beginning with Lincoln Mills,¹¹⁶ the federal courts were charged, in connection with Section 301 of the NLRA, with responsibility for developing and enforcing a "common law of the shop." The Steelworkers Trilogy¹¹⁷ subsequently specified the role of arbitration and resolved most questions of conflict between the arbitrator and the courts in favor of the arbitral process. For example, an arbitrator's award, though it must be based on the collective bargaining agreement, must be enforced by the courts, even if the arbitrator's interpretation of the contract would differ from the court's or be ambiguous.¹¹⁸

On the basis of the foregoing decisions unions were able to seek injunctions to compel a reluctant employer to submit disputes arising during the term of the agreement to arbitration, assuming the disputes involved an area subject to the arbitration clause.

Employers confronted by an illegal work stoppage felt that they should have an equivalent right to seek an injunction to compel the union to abide by the no-strike clause and end the stoppage. While they did have the right to seek damages in the courts after the fact, they thought this was not a satisfactory substitute for an immediate halt to an illegal strike. Sometimes employers were able to get injunctions in state courts, depending on the law of the particular state, but for a long period of time, three important Supreme Court decisions stood in the way of such injunctions. In the Lucas Flour case¹¹⁹ the court ruled: "Incompatible doctrines of local law must give way to principles of federal labor law."

¹¹⁸. A.B.A., Section on Labor Relations Law, supra note 111, at 482, has further discussion and citations.
¹¹⁹. 369 U.S. 95, 102 (1962). As asserted below this case is significant also be-
Shortly afterward, in the *Sinclair* case, the Court held that the anti-injunction provisions of the Norris-LaGuardia Act precluded a federal court from enjoining a strike in breach of a collective bargaining agreement which contained a binding arbitration clause and an explicit no-strike clause. The majority opinion in *Sinclair* held that this decision was not in conflict with congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes because the employer's right to obtain and order compelling arbitration was unimpaired.

Employers still wanted to supplement orders to arbitrate with injunctions to end illegal work stoppages immediately. However, if they brought suits in state courts, the union under the *Avco* decision of 1968 could have them removed to the federal courts, where they could be set aside by the *Sinclair* ruling.

During the period in which the *Sinclair* decision governed some use was made of "quickie arbitrations" in which the arbitrator was asked, if he found a breach of the no strike clause, to direct the strikers to cease and desist. The arbitrator's award could be enforced in the courts.

**Boys Markets**

In 1970 the Supreme Court, reversed *Sinclair*, in a 5-2 decision. In *Boys Markets, Inc. v. Retail Clerks, Local 770*, the Court held that a federal district court could issue an injunction against a strike where a collective bargaining agreement contained a mandatory grievance adjustment or arbitration procedure.

The background of the case is as follows: A dispute arose between a supermarket's frozen-foods supervisor and a union representative as to whether cause it implied the existence of a no-strike clause, from the presence of an arbitration clause. It should be noted that this case involved damages rather than an injunction. The quotation from the Lucas Flour case continued:

> The dimensions of Section 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute.

*Id.* at 103. See Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502 (1962).


work in frozen foods cases was bargaining unit work. The complaint came within the grievance and arbitration provisions of the contract. Under the agreement either party could demand arbitration. The union went on strike over the issue and refused arbitration. The company sought a temporary restraining order in a California court. Through the union’s removal to the federal courts and appeals by the employer, the case eventually reached the Supreme Court. The Supreme Court upheld the lower court’s injunction and order to arbitrate. In so doing the Supreme Court emphasized the fact that the employer was ready to proceed to arbitration at the time he asked for the restraining order, and that the district court had found that the employer had suffered and would continue to suffer irreparable damage.124 The Court said:

Our holding in the present case is a very narrow one . . . We deal only with the situation in which a collective bargaining contract contains a mandatory grievance adjustment or arbitration procedure.126

The Court set forth principles for the guidance of district courts in deciding whether to grant injunctive relief. The district court was not to issue an injunction against concerted activity “. . . unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act.”126 It had to determine whether the strike was over a grievance which both parties were contractually bound to arbitrate. The Court specified that the employer should be ordered to arbitrate as a condition of obtaining the injunction, and that the court should consider the ordinary principles of equity: the breaches threatened or occurring, the extent of irreparable injury to the employer, and “. . . whether the employer will suffer more from the denial of the injunction than will the union from its issuance.”127

The Supreme Court’s opinion explained its reasons for overturning the Sinclair decision and for accommodating the seemingly absolute terms of the Norris-La Guardia Act with Section 301 of NLRA.

The Court reviewed the past history of the Norris-La Guardia Act and indicated that the Act was directed at a different type of situation. The injunctive relief allowed in the Boys Markets case is

. . . a remedial device that merely enforces the obligation that the union freely undertook under a specifically enforceable agreement to submit disputes to arbitration.128

124. Id. at 253-54.
125. Id. at 253.
126. Id. at 254.
127. Id. at 254.
128. Id. at 252.
The decision was expressed in terms of encouraging the use of arbitration:

*... Sinclair stands as a significant departure from our otherwise consistent emphasis on the congressional policy to promote the peaceful settlement of labor disputes through arbitration.*

*... [I]n light of developments ... it has become clear that the Sinclair decision does not further but rather frustrates realization of an important goal of our national labor policy.*\(^{129}\)

It was for this reason that it was reversed.

1. Scope of Boys Markets Decision

Commentators on the Boys Markets decision emphasize that a number of issues remain unsolved.\(^{130}\) The first is the respective roles of federal and state courts in relation to injunctions for work stoppages in violation of an agreement. In the opinion this question is discussed largely with respect to the effect of the A\(v\)co and Sinclair decisions, although Lucas Flour and its implied uniformity is mentioned. However, the opinion also says that Congress evidently took into account “a certain diversity [which] exists among the state and federal systems.”\(^{131}\) In a footnote the opinion also refers to the existence of “little Norris-La Guardia Acts” in 14 states\(^{132}\) but is silent as to the influence of this decision as a precedent in state courts.\(^{133}\)

Commentators seem to expect an increase in the number of injunctions against wildcat strikes granted in state courts. Information obtained from interviews also shows that an increasing number of injunctions have been granted since the Boys Markets decision, particularly in coal industries.\(^{134}\)

2. Scope of the Clauses

Commentators also stress the importance of the terms of the grievance and arbitration clauses. The Boys Markets decision specified the presence of "mandatory grievance adjustment or arbitration procedures," and said the district court could not issue an injunction unless it finds that the strike "is over a grievance which both parties are bound to arbitrate."\(^{135}\) It is not clear whether both parties must be able to initiate grievances, as they were in the Boys Markets case.

\(^{129}\) Id. at 241.
\(^{130}\) Id. at 249.
\(^{131}\) Id. at 246.
\(^{132}\) Id. at 247 n.15.
\(^{133}\) Id.
\(^{135}\) 398 U.S. 235 at 253.
The “adjustment and arbitration” clause in *Boys Markets* was very broad, covering:

any and all matters of controversy, dispute or disagreement, of any kind . . . in any way involving the interpretation or application of . . . this Agreement.\(^{196}\)

There was also a strong no strike clause.

The decision does not deal with a situation where the area covered by the grievance or arbitration procedure is narrower, and certain subjects are excluded.

If a no-strike clause was omitted, it seems probable that the precedent of *Lucas Flour Co.*\(^ {137}\) would be followed. In this case it was held that if disputes are being arbitrated, the agreement:

gives rise to an implied promise by the union not to strike during the period of the contract in response to these arbitrable disputes.\(^ {138}\)

It seems clear that both unions and management will give increasing attention to the coverage of these important clauses and consider the effect they have on availability of injunctions for breaches of the agreement when they bargain on a new agreement.

### 3. Effect of the *Boys Markets* Decision on the Role of the Arbitrator

Some arbitrators with whom the authors talked said that they approved the *Boys Markets* decision. They agreed with the reasoning given in the opinion that *Sinclair* had frustrated arbitration while the *Boys Markets* decision ended the work stoppage which was delaying the arbitration and made arbitration a condition of granting the injunction.

Other arbitrators focused their attention on the possible impact of the decision on procedural aspects of arbitration in those relatively few cases in which injunctions are issued under the *Boys Markets* case. Since injunctive orders are extraordinary relief, they predicted that the courts would require immediate and expedited arbitration. This would put pressure for speedy hearings on arbitrators, many of whom already have crowded calendars.

Some of the principles laid down for the federal district court to follow in granting injunctions might lead to closer examination by courts of the contract terms and the facts of the case which triggered the stoppage than has been customary since the *Trilogy*.

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136. *Id.* at 238 n.3.
Some arbitrators have also said that if the arbitration is being conducted in conjunction with a pending court proceeding, it might be expected that the courts would be much more willing to scrutinize the arbitral process. They predict that there will have to be accommodation between courts and arbitrators so that each process does not intrude on the other.\(^\text{139}\)

**Minimizing the Incidence of Wildcat Strikes**

From the arbitration cases studied and from interviews conducted in connection with the preparation of this article, a number of points emerge concerning reducing the number of wildcat strikes. Those will be analyzed from the standpoint of the union, on the one hand, and the company on the other.

In many international unions, international officers are strongly in support of observance of the no-strike clause. The same is true of many local union officials. (In certain unions, the United Mine Workers for example, there is not the opposition to "self-help" that there is in many other unions. As noted above, there is increasing use of the injunction to end wildcat strikes in cases involving these unions.)

What have unions at the national and local level done to encourage observance of the no-strike clause? In an interview with a retired official of the United Cement, Lime and Gypsum Workers International Union, the importance of international union control of strike funds was stressed. Strike benefits may be paid only when approved by the international, and this approval is withheld when there is a wildcat strike. The official stated that this was of considerable importance in discouraging wildcat strikes, which have virtually disappeared in the cement industry. Officials in the union stress with rank and file workers the danger to the union of damage suits, if they hear rumblings concerning possible wildcat strikes. Education of shop stewards through classes and handbooks is also important in inculcating respect for no-strike clauses. At local union meetings, the importance of observance of the no-strike clause is also stressed.

On the company side, much can be done to minimize the possibility of unauthorized work stoppages. An official at the corporate level in the indus-

\(^{139}\) Martin Markson, a lawyer, writing in the *LAB. L.J.* deplores the putting of the courts back into the business of enjoining strikes, even in the limited area of strikes in violation of the no strike clause. He believes that *Boys Markets* sacrifices the "core purpose" of the Norris-La Guardia Act. He says that courts are ill suited to the role of being administrators, even when the issue is breach of the no-strike clause, citing *Warrior & Gulf* on the need for expertise. He foresees a great deal of litigation as to whether or not a contract has a "mandatory grievance adjustment or arbitration procedure." He would have preferred to retain the *Sinclair* prohibition, having it operative at both federal and state levels, and to have "quickie" arbitrations.
trial relations department of a large industrial firm stressed in an interview the importance of good communications between top union and top company officials. He stated that on occasion an international union officer would advise him that in one of the company plants a situation was developing which might well lead to a wildcat strike. The company official would investigate and not infrequently find that local management was creating the problem which might lead to a stoppage. Since the situation was brought to the attention of top management early, remedial steps could be taken promptly.

The causes of wildcats, indicate a number of areas where management can reduce the possibility of violations of the no-strike clause by taking corrective action. Poor working conditions, delay in the handling of grievances, faulty communications between company and workers leading to the circulation of unfounded rumors, and poor quality of supervision (including unnecessarily harsh or profane language) have all been important factors triggering wildcat strikes.

Summary

Prevention of wildcat strikes depends in considerable measure on improved communication so that the tensions which frequently trigger wildcat strikes will not mount. Workers who believe in immediate self help need to accept the advantages of the grievance procedure which is already available to deal with disputes. While the work stoppage lets off emotional steam and dramatizes grievances, it can result in excessive loss to the company, very severe penalties to the workers, and damage claims against the union, which were not contemplated by the initiators of the walkout.

Observers of the disruption which results when wildcat strikes are a frequent occurrence assign a high value to the grievance and arbitration procedure. The workers who secured the early agreements containing these provisions considered them a great gain for labor and in return they were willing to accept the no-strike clause. It is significant that the British, who have for many years experienced large numbers of wildcat strikes which have seriously affected production, recently passed legislation designed to curb such strikes by strengthening the collective agreement.\textsuperscript{140}

The general view of companies, unions, and arbitrators is that a violation of the no-strike clause is a serious offense.

\textsuperscript{140} The British Industrial Relations Act 1970 makes it an unfair labor practice to break a legally enforceable written agreement and provides a limited scale of damages which could be awarded by a special court for such violation. It is still possible however, for the parties (following a traditional British pattern) to agree that their contract, in whole or in part, is not intended to be legally enforceable, but is an agreement only between themselves.
If one does occur, the employer has several options. He may choose not to invoke the disciplinary aspects of the no-strike clause at the outset, but try instead to work out with the union leadership an immediate return of the workers without penalty. If the employer decides to impose discipline, he may assess penalties against the leaders of the walkout and also against the followers, if he chooses. When large losses result from the strike the employer may seek damages either from an arbitrator or from a court. He may also seek an injunction against the strike in a state court if the state law permits or, following the Boys Markets decision of 1970, in a federal court.

The union officials can help their cause by taking immediate action to end the stoppage and by using the grievance procedure. If steps of the grievance procedure have been completed and the employer is reluctant to take the case to arbitration (although provided in the contract), the union can seek an order compelling arbitration. If an apparent impasse develops in solving the triggering dispute, and it is covered by the grievance procedure, the union sometimes files an unfair labor practice charge with the NLRB. The NLRB, however, may delay action and wait for an arbitration decision. The steps taken by both employer and union will depend both on the circumstances of the case and also on the terms of the collective bargaining agreement.

An arbitrator may be brought into the picture in various ways, but most commonly either to rule on the triggering dispute if it is still unsettled, or to review the penalties imposed for the wildcat strike. Much less often is he asked to award damages. Since the Sinclair decision was reversed in 1970, there is little need for "quickie arbitrations" seeking cease and desist orders to end wildcat strikes.

The power of the arbitrator varies greatly between cases because of the differences in the agreements under which he operates. In discipline cases, for example, he is sometimes given wide latitude, while in others he is narrowly circumscribed in what he can do.

Although there is no principle of stare decisis, and each case stands by itself, there are certain patterns which emerge from arbitrators' decisions. For example, if the arbitrator finds that the disciplined employee did in fact lead the work stoppage, there is a strong likelihood that the discipline (whatever its nature) will be upheld. Penalties have been modified or revoked when arbitrators find that the disciplined employee was not in fact an instigator of the strike. While there have occasionally been exceptions to this, in general it has been held by arbitrators that the union official has a greater duty than the rank-and-file worker to prevent or to stop wildcat strikes.

Various procedural matters have been the subject of arbitration awards and tend to establish procedural precedents.
A study of some 220 arbitration awards issued between 1958 and 1971 and dealing with discipline for wildcat strikes shows that in the large majority of cases the discipline meted out was supported by the arbitrators. There was a wide variety in the severity of the discipline handed down by the employer. It ranged from warning notices through disciplinary layoffs for varying periods of time to discharge. While only one or at most very few workers were disciplined in most cases, there have been some cases in which large numbers of workers have been discharged or otherwise disciplined.

In connection with these statistics, it should be pointed out that only a portion of the cases in which some question about discipline for the work stoppage is raised come to arbitration. Not all arbitration cases are submitted to reporting agencies, and not all submitted cases are published. Nevertheless, the authors feel that the sample of 220 cases over a period of about 13 years is reasonably representative of the awards of arbitrators in general. The high percentage of awards supporting the company discipline arises, in considerable part, from the fact that arbitrators, since they deal with interpretation of contracts, necessarily believe in the sanctity of contracts and so view wildcat strikes as serious contract violations. Such violations are usually considered by arbitrators as “just cause” for whatever discipline the company has imposed. When company-imposed discipline is modified or reversed, it is usually because (1) the arbitrator has found as a fact that the disciplined worker was not guilty of the offense with which he was charged, or (2) that there has been inconsistent discipline imposed on the worker, and the penalty is too severe.

In a considerable number of cases arbitrators have awarded monetary damages for wildcat strikes, most frequently in newspaper and construction industries in our sample.

The Boys Markets case decided by the Supreme Court in 1970 appears to have increased the use of injunctive relief as a way of dealing with wildcat strikes. In this decision the Court accommodated the Norris-La Guardia Act and Section 301 of the NLRA to permit federal courts to issue such orders when they find that the dispute “is over a grievance which both parties are contractually bound to arbitrate,” and that the contract contains “a mandatory grievance adjustment or arbitration procedure.” Because of these specified conditions management and union will find it important to give increased attention to the language of the pertinent clauses and the area which they wish to cover by these procedures in their agreements.

It is to be hoped that greater understanding between the parties will reduce the number of wildcat strikes and, when any occur, union leaders will cooperate to end them and to resolve differences by the machinery already provided in the agreement.