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The Law of Agency and the National Union

By Roger K. Evans

Any deterrent theory for imposing liability on one person for the acts of another is based on the premise that only those who are in a position of control should be held liable for the unlawful conduct of others. In applying this theory to conduct within the American labor organization the courts consider both whether the national union has actual control over the conduct of one of its subordinate organizations and also whether the imposition of liability for the conduct of the local might encourage the development of responsible national union conduct. The difficulty of attempting to achieve a balance between union responsibility and union power by this latter means is reflected in the history of the law of agency in the field of American labor law.

During the nineteenth and the early part of the twentieth centuries some courts employed theories of proximate cause, conspiracy, and agency to hold the union liable for the acts of its officers and members. The proximate cause theory which related an act to its foreseeable consequences, coupled with a presumption that violence was a foreseeable consequence of any authorized strike, was used to hold the union liable for any unlawful conduct by its members during the strike. The conspiracy doctrine was used to hold unions "responsible not for acts of agents who had authority to act, but for every act committed by any member of a union merely because he was a member, or because he had some relation to the union." The agency theory was used to hold the union liable on the ground, that inasmuch as the members of the union were to some extent its agents, a union which did not disavow the acts of its members by expelling them

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1 See, e.g., United States v. Debs, 64 Fed. 724 (C.C. Ill. 1894).

2 United Bhd. of Carpenters and Joiners v. United States, 330 U.S. 395, 419 (1947) (Frankfurter's dissenting opinion).
would be deemed to have ratified their conduct.\(^3\) Other courts, however, refused to hold a union liable unless the unlawful conduct were authorized, ratified, or within the scope of an agent's authority.\(^4\)

The chief difficulty facing the courts at this time was the fact that at common law the union, unlike a corporation, could not be regarded as an entity apart from its members. To say that the union was liable was to say that each member of the union was individually liable even though the individual member was not ordinarily in a position to control decisions governing the conduct of the union or its agents. The union, a functioning and autonomous unit, generally retains such controls among its officers as a delegation from the members, much as a board of directors is delegated authority by the shareholders. A proper allocation of responsibility commensurate with the distribution of operating control would hold the union members liable only for conduct authorized, participated in, or ratified by them. The union and its officers would not be "agents" of each member. It would, however, be liable both for conduct which it ratified and for the acts of agents functioning within the scope of their authority.

To reflect this distribution of control in the allocation of liability, procedural devices for reaching the assets of the union were needed. Section 301(b) of the Labor-Management Relations Act,\(^5\) by allowing the union to be treated as an entity apart from its members overcame the obstacles to suit in the federal courts for violations of the collective bargaining agreement and for unlawful secondary boycotts:

Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

\(^3\) E.g., Great Northern Ry. v. Local Great Falls Lodge of IAM, No. 287, 233 Fed. 557, 560-61 (D. Mont. 1922); Alaska Steamship Co. v. ILA, 236 Fed. 964, 972 (W.D. Wash. 1916).


State statutes recognizing this principle have been so widely adopted that the common law rule prohibiting suit against an unincorporated association in its own name now prevails in only five states, and even in these states there is recourse to the class suit, a suit brought in equity by or against representatives of a group of individuals who have a common right or liability. Although the laws of several states still impose liability on the members of the union as principals, for example, by authorizing suit against the members on the judgment obtained against the union, and although the class suit may not always be a successful

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6 The five states are Illinois, Louisiana, Massachusetts, Missouri, and West Virginia.
7 Although the laws of several states still impose liability on the members of the union as principals, for example, by authorizing suit against the members on the judgment obtained against the union, and although the class suit may not always be a successful

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9 E.g., N.Y. Gen. Associations Law §13, 16. An action may be taken against the members only when the judgment has been returned unsatisfied. Flagg v. Nichols, 307 N.Y. 96, 120 N.E. 2d 513 (1954).
means of surmounting the diversity of citizenship requirement in the federal courts, a sufficient procedural foundation for reaching the assets of the union now exists in most states to support agency rules appropriate for the union as distinguished from its members.

In addition to these statutory attempts to overcome procedural obstacles to suits against the union, a substantive standard of agency requiring proof of actual authorization, participation, or ratification was enacted by Congress as section 6 of the Norris-LaGuardia Act. In 1947 this provision was held by the Supreme Court of the United States to relieve the union of liability for all acts which it had not authorized even though such acts might have been done by agents of the union acting within the scope of their authority. Congress immediately responded to this limitation on union liability by providing in the amended National


No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of such acts, or of ratification of such acts after actual knowledge thereof.

This provision reflects the rule adopted in United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922). There the national union was held not to have ratified the conduct of the local union even though the national president expressed sympathy with the strike.

Labor Relations Act\textsuperscript{14} and the Labor-Management Relations Act of 1947\textsuperscript{15} that

\begin{quote}
[\textit{I}]n determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.
\end{quote}

These latter acts restored the common law rules of agency in proceedings against labor unions before the NLRB and the federal courts and thereby restricted the application of section 6 to situations in which union members and not the union are sought to be held as principals.\textsuperscript{16}

Theoretically the restoration of the common law rules of agency might seem to accord with the distribution of authority within the union; but in practice one finds a continuing shift of power from the local to the national union as well as an emerging group of intermediate union bodies. Thus, the broad outlines of the law defining the nature of the relationship between the national union and its subordinate bodies have by no means been finally drafted. Clarification is needed concerning the burden of responsibility toward union members, employers, and the general public which the national union should sustain for the conduct of its subordinate organizations and officers. May the national

\textsuperscript{16} Section 6 precludes denial of reinstatement to any employee after a strike in which unfair labor practices are committed unless it can be shown that he participated, authorized, or ratified the unfair labor practice. NLRB v. Marshall Car Wheel and Foundry Co., 218 F. 2d 409 (5th Cir. 1955). Compare Louisville & N. R.R. v. Brown, 253 F. 2d 149 (5th Cir. 1958) (conspiracy doctrine applied to railroad employees who fomented unauthorized strike).

The instances in which §6 might be applied to unions in labor disputes not falling under the Taft-Hartley Act are few. Diversity jurisdiction between employers and unions has been reduced because a corporation is now regarded as a citizen of its principal place of business under §1332. 72 Stat. 415, 28 U.S.C. §1332(c) (1958). An argument can be made that §6 is not jurisdictional and hence should not be applied at all in diversity actions. Although the injunction sections of the act are expressly jurisdictional, Senator Taft has pointed out that §6 has nothing to do with injunctions. 93 Cong. Rec. 6521 (1947). In Sisco v. McNutt, 209 F. 2d 550 (8th Cir. 1954), failure by the union to raise the defense of §6 at the trial level did not deprive the court of jurisdiction to the extent that the section could not be raised on appeal. Similarly, although the Supreme Court in United Bhd. of Carpenters and Joiners v. United States, 330 U.S. 395, 403 (1947), declined to decide whether §6 was evidentiary or substantive, if an agency rule is not substantive, it is difficult to find a rule of law that would be. If §6 is neither jurisdictional nor evidentiary it would arguably be unconstitutional under the \textit{Erie} doctrine if applied in diversity litigation,
union escape responsibility for the acts of a local union by simply disavowing those acts? Should the national union be obliged to supervise the internal relations between local unions and their members? Such questions confront us in our attempt to clarify the role to be played by the national union in the American industrial relations system.

Since the law of agency has traditionally provided criteria for determining when one party should be held responsible for the acts of another, this branch of the law shall be our principal guide. Our course shall be as follows: to consider first the national union's liability for authorized conduct, and second, its liability for unauthorized conduct. In the first section the extent to which a national union can be deemed to have authorized conduct for which it can be held liable will be outlined. The principles governing authorized conduct will be distinguished from those which govern the liability of the union for unauthorized conduct, and then the specific problem of actual authorization, ratification by silence, and ratification by acceptance of benefits will be discussed. In the second section an attempt will be made to formulate a satisfactory theory for the imposition of responsibility upon the national union for unauthorized conduct. The relevance of the doctrine of respondeat superior to this problem will be considered and then the doctrine will be applied to officers and members as agents of the local union and to the local and intermediate unions as agents of the national union.

I. Conduct Authorized by the National Union

The law of agency provides two theories for holding a union responsible for the unlawful conduct of its subordinate organizations and members. The first is a principle of consent, recognized in the form of authorization, participation, or ratification. The second is the doctrine of respondeat superior. This doctrine provides generally that a master is liable for the physical acts of his servant which are performed in the scope of the servant's employment.

A. The Principle of Consent

Consent and respondeat superior perform essentially different functions. The principle of consent simply provides a basis for holding a union bound to a relationship which it manifestly
intended to create, whereas *respondeat superior* effectuates factors such as control by the union or benefit to the union which justify the imposition of strict liability. To put this distinction more succinctly, the unlawful conduct must be authorized by the union in order to find liability on the basis of consent, whereas the authorization of lawful conduct to which the unlawful conduct can be closely related is all that is required by the doctrine of *respondeat superior*. For example, if a union authorizes a lawful strike and picket line, and a steward is guilty of assault while preventing a nonstriking employee from crossing the picket line, liability can be imposed on the union for the assault on the basis of *respondeat superior*, but not on the basis of consent, because the steward's conduct was unauthorized. If, however, the union authorizes an unlawful picket line, then liability for the damage caused to the nonstriking employee by the picket line could be imposed on the union on the basis of consent.

In order to effectuate the policies underlying each theory neither should be used to perform the other's function. For example, if the measure of the union's liability for unlawful conduct is whether the conduct foreseeably follows from the union's initial grant of authority, the limitations imposed by the policies behind the doctrine of *respondeat superior* should be applicable because the union has probably not consented to the unlawful conduct. Conversely, if the union has consented to unlawful conduct, it is not necessary to inquire whether the conduct is within the scope of the agent's authority. Since the principle of consent is limited to situations in which actual authorization of unlawful conduct can be shown, the question whether liability...

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17 Sunset Line and Twine Company, 79 N.L.R.B. 1487, 1508 (1948), the leading case in the law of agency in NLRB proceedings, lays down the following rule:

Agency is a *contractual relationship*, deriving from the mutual consent of principal and agent that the agent shall act for the principal. But the principal's consent, technically called authorization or ratification, may be manifested by conduct, sometimes even passive acquiescence as well as by words. Authority to act as agent in a given manner will be implied whenever the conduct of the principal is such as to show that he actually intended to confer that authority.

18 E.g., Selby-Battersby & Co. v. NLRB, 259 F. 2d 151, 156 (4th Cir. 1958), *cert. denied*, 359 U.S. 952 (1959): The Council, at the time, may have thought there was nothing illegal in such a strike, but since it was the natural consequence of the course of events it initiated, it cannot escape responsibility for it.

should be imposed on a local or national union is largely one of fact. The following discussion, therefore, necessarily will be limited to a brief summary of the evidence required to support a finding of authorization and to the related questions of whether the union's silence or its acceptance of benefits can constitute consent.

B. Actual Authorization

Authorization may be established by showing that the officers or agents of the union participated in or instigated the unlawful conduct.\(^9\) Circumstantial evidence is often sufficient. Mere presence of a union official at the scene of unlawful conduct, for example, does not constitute authorization,\(^{20}\) but presence followed by a sympathetic article in a union paper does.\(^{21}\) Similarly, an inference that the union sanctioned an unlawful strike is permitted when all the members of the union simultaneously leave work, stating that they are quitting.\(^{22}\) The union may also grant its consent by express ratification, for example, by the payment of strike benefits\(^{23}\) or by the refusal to disavow conduct when requested to do so by the management.\(^{24}\)

C. Ratification by Silence

Whether ratification can be inferred from silence is a more difficult question. If the cause of action is for injuries resulting from an automobile accident involving a union business agent, there would clearly be no duty to disaffirm the conduct.\(^{25}\) If the


\(^{21}\) Sunset Line and Twine Co., 79 N.L.R.B. 1487 (1948).


\(^{25}\) Ford v. United Bhd. of Carpenters and Joiners, 315 P. 2d 299 (Wash. 1957) (automobile accident):

We are not here concerned with the principles of apparent agency, which apply when an alleged principal has held out another

(footnote continued on next page)
driving which caused the accident were within the scope of the agent's authority, the union would be liable. If the driving were beyond his scope of authority, the union would not be liable. If, on the other hand, the members of a local union are conducting an unlawful picket line and national union representatives who have played a prominent role in local union affairs and in the conduct of local negotiations are present, the prior conduct of the national representatives would be sufficient to impose a duty to disavow the unlawful conduct. From these examples it may be concluded that only if there is a prior course of conduct on the part of the union which imposes upon it the duty to act will silence constitute evidence of ratification where the cause of action is grounded in tort.

If, however, it is clear from other evidence that the union has authorized the unlawful conduct or that such conduct is within the scope of authority of an agent of the union, neither a disavowal nor a good faith attempt to settle the dispute should be permitted to relieve the union from liability. Otherwise disavowal would become a convenient device for the union to escape liability. If, for example, the president and secretary of a local

(footnote continued from preceding page)

as his agent and induced a third person to rely on the existence of the agency, when in fact none existed. There is no element of reliance involved in a case such as this.


27 Sunset Line and Twine Co., 79 N.L.R.B. 1487 (1948) (ratification where international union did not disavow conduct of local leaders during strike sponsored by international), supra note 17. Compare ILGWU v. NLRB, 237 F. 2d 545, 552 (D.C. Cir. 1955): "[W]e think they [employees] were under no obligation to disavow misconduct which they did not initiate and with which they are not shown to have been connected . . ." with United Elec., Radio & Machine Workers v. NLRB, 223 F. 2d 338, 343 (D.C. Cir. 1955) (ratification by silence by individual employees when the membership authorized strike resulting in unfair labor practice). Cf. Jay-K Independent Lumber Corp., 108 N.L.R.B. 1323 (1954) (no duty to disavow unless there is opportunity to disavow).


29 United Hbd. of Carpenters and Joiners v. United States, 330 U.S. 395, 421 (1947) (Frankfurter's dissenting opinion objecting to proof of actual authorization):

The teaching of the present case can hardly fail. To come under the Court's indulgent rule of immunity from liability for the acts of its officers, unions will, . . . doubtless in good conscience, have

(footnote continued on next page)
union, assisted by several lesser officials, call a strike, the fact that the remaining officers disavow the strike and take every step within their power to end the dispute should not be a valid defense.

If the duty to disavow the strike is imposed by an implied or express no-strike clause rather than by the union's prior conduct, the union's failure to disavow or to make a good faith attempt to settle the strike should not necessarily be conclusive evidence of ratification. There are two reasons why failure to disavow an unauthorized strike under an implied or express no-strike clause should not be deemed conclusive. First, the courts have been unwilling to hold the union liable in damages where the union has not expressly assumed liability for strikes it has not authorized, even though an unauthorized strike permits the employer to terminate the contract with the union. Secondly, circumstances surrounding the strike may be such that a disavowal or an attempt to get the striking union members to return to work would be of no avail. If in the example above there were a no-strike clause imposing a duty on the national union to disavow the strike, but the remaining local union officers were unsuccessful in their attempt to terminate the strike, it would seem anomalous to hold the national union liable for failing to disavow or to attempt to settle the strike. On the other hand, since national intervention may succeed where local efforts fail, in the absence of proof by the national union that an attempt to settle the strike or to disavow it would have been useless, it would not be unfair to find that the national had breached the contract by failing to disavow the strike.

A more workable rule than one which holds that failure to disavow is conclusive evidence of ratification would be one which shifts the burden to the union to show that it did make every

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standing orders disavowing authority on the part of their officers to make any agreements which may be found in violation of the Sherman Law.

30 United Elastic Corp., 84 N.L.R.B. 768, 772 (1949):

We believe that this complete failure by the Union to attempt to end the strike, or even to renounce it, during the three days following the walk-out, constituted a clear violation.


32 United Elastic Corp., 84 N.L.R.B. 768 (1949).
reasonable effort to end the dispute or that any effort at all would have been useless. The union, which has voluntarily assumed the duty to discourage strikes that violate the agreement, is in the best position to bear the burden of proof.

D. Ratification by Acceptance of Benefits

The benefit from which a ratification can be inferred must be distinguished from the benefit which a union derives from ratifying unlawful conduct. The latter might consist of furthering its interest in the outcome of the unlawful conduct or merely of preserving its political standing with its members and subordinate organizations. If long run advantages such as these did not outweigh the short run disadvantages, the union would not ratify unlawful conduct. Because such benefits justify the imposition of liability on the union there is no need for the application to the union of the common law rule that a principal cannot ratify acts unless they are intended or purported to be performed on his behalf.\(^3\)

In the former instance the ratification is inferred from the acceptance of the benefit. Ratification through acceptance of benefits should be compared to ratification by silence. Both arise from a failure to discharge a similar duty. The duty which provides a basis for ratification by silence arises from union conduct prior to the unlawful conduct or from an employer-union contract. The duty to act in the case of a ratification through acceptance of benefits should arise when the unlawful conduct makes a substantial contribution to the achievement of a clearly defined union policy.

This definition of ratification through acceptance of benefits can be best illustrated through example. The first example may define "substantial contribution" more precisely. If a picket strikes a bystander during a lawful strike in the course of negotiations by a local union, the fact that the president of the national union ultimately signed the contract would not be sufficient to bind the national union.\(^4\) The picket's conduct would not be a


\(^{34}\) Adamson v. UMWA, 3 Utah 2d 37, 277 P. 2d 972, 975 (1954):

[T]here is no implied agency by ratification, even though John L. Lewis... ultimately signed the agreement... and... the International Union received some benefit from the bargain. This is

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factual cause of the success of negotiations. "Substantial contribution" should be at least a factual cause making possible the success of the union's policy.

The second example shows that the union should not be required to abandon pursuit of a legitimate policy, such as the attempt to reopen a contract, in order to avoid responsibility for unauthorized and unlawful conduct which contributes to the success of the policy. A strike by a local union occurred in one of the Ford Motor Company's plants. The UAW international union had been unsuccessful in persuading Ford to reopen its contract for negotiations. The local strike caused shortages of parts at other plants which eventually caused Ford to reopen the national agreement for negotiation. Had Ford as a practical matter been able to bring suit for breach of contract, the benefit received by the international union and its members through the assistance provided by the strike would have justified a finding of ratification. The unlawful strike was not only a factual cause but also a proximate cause for the achievement of a clear and immediate policy of the national union.

If, however, the UAW had tried to stop the strike but its success in persuading Ford to reopen the agreement had been attributable in part to the effect of the strike, the UAW's attempt to settle the strike should nevertheless have been regarded as a rejection of the benefit afforded by the strike. Even though the unlawful conduct may make a substantial contribution to the achievement of a clearly defined union policy, the union must be given the opportunity to disavow the conduct in order to prevent ratification through acceptance of the benefits from being a broader base for liability than ratification by silence.

The third example is concerned primarily with the meaning of "clear and definite policy". Assume that a national union is

(Footnote continued from preceding page)

true since the plaintiff did not sustain the burden of introducing some substantial evidence tending to show the facts upon which a ratification must be predicated.

35 Detroit News, May 23, 1953, §1, p. 20, col. 3. This type of strike raises an interesting question about the status of employees who are laid off as a result of the strike. In dealing with the question whether the laid-off employees are in the same plant or establishment, e.g., Nordling v. Ford Motor Co., 231 Minn. 68, 42 N.W. 2d 576 (1950), the court in United States Steel Corp. v. Wood, 114 So. 2d 533 (Ala. Ct. App. 1959), rejected an argument that members in one local should be deemed to have authorized a strike in another local by reason of the fact that the national union was in control of the strike.
vitaly interested in local negotiations involving production standards because the outcome of these negotiations could well set a precedent in other plants in the industry. In the course of the negotiations a strike occurs during which the local union establishes an unlawful picket line around one of the employer’s supplier plants. The unlawful picket line in fact contributes substantially to the success of the strike. The contract is then submitted to the national union and approved. Unless the local negotiations can be found to further a clearly defined national policy the ultimate signature of the national union on the contract would not be a ratification by acceptance of benefit. Although it is difficult to determine when local union conduct benefits national union policy, the fact that the national union signed the contract and its concern in the outcome of the strike would probably be sufficient to justify holding it responsible in this case.

The definition of “clear and definite union policy” is relevant also to the issue whether an agency relationship can be found on the basis of respondeat superior. If in the above example the national union had been shown to have a right of control or actual control over the local in the conduct of negotiations, the fact that the negotiations concerned a “clear and definite” national policy would be sufficient to create an agency in the local union for the purpose of conducting the negotiations. If the unlawful picketing were within the scope of authority of an agent of the local, then the national union would be liable. Although a solution common to both the agency and ratification questions may blur the distinction between liability based on the principle of consent and that based on respondeat superior, two factors remain to preserve the distinction. First, although it may be sufficient to show that the act is within the scope of an agent’s authority to establish liability on an agency theory, liability on a theory of acceptance of benefit can be established only through demonstrating that the unlawful conduct is a factual cause of the success of the policy attributable to the national union. Thus, if the unlawful picket line in the third example were not a factual cause of the success of the union policy, no liability could be imposed under the theory of ratification even though the picket line would be within the scope of authority delegated to the

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36 E.g., Chicago Typographical Union, 86 N.L.R.B. 1041 (1949).
pickets by the local union. Secondly, if an agency relationship is established, the national union may not escape liability by attempting to terminate the unlawful conduct, whereas a good faith attempt to settle the dispute would always be sufficient to preclude liability on the basis of ratification by silence or by acceptance of the benefits.

The underlying policies which justify the imposition of responsibility on the union are thus subordinated to limitations designed to preserve the principle of consent. These limitations insure that consent can only be found in justifiable inferences from fact. Authorization thus should not be predicated on a theory of proximate cause. Ratification by silence or acceptance of benefits can be imposed only when the union fails to discharge a duty established by a prior course of union conduct, by an employer-union agreement, or by unlawful conduct which makes a substantial contribution to a clear and definite union policy. Since these rules can only indirectly reflect the basic problem of reaching a balance between the freedom of the national union and the liability and responsibility commensurate with its power, the major part of this task must be performed by a theory for holding unions liable for the unauthorized conduct of their subordinate organizations and members.

II. CONDUCT UNAUTHORIZED BY THE NATIONAL UNION

The imposition of liability on a union for the unauthorized conduct of its agents derogates from the principle that there can be no liability without fault. In the light of the fairness demanded by this general principle, the scope of this section of the article will be to determine the effectiveness of the technical agency doctrine of respondeat superior as a device for holding the national union responsible for the unauthorized conduct of its subordinate unions and members. After describing the doctrine of respondeat superior and pointing out its relevance to individual officers and members as agents of the union, the major task of this article will be commenced, namely, an analysis and exposition of a theory of agency applicable to the relationship of local and intermediate union bodies with the national union.
A. The Doctrine of Respondeat Superior

Technically the doctrine of respondeat superior refers to the imposition of liability on a master for the physical damage caused by the torts of his servants within the scope of their employment\(^\text{37}\) and for the pecuniary loss caused by the unauthorized fraud, defamation, or malicious prosecution within the scope of authority of an agent who is not a servant.\(^\text{38}\) Its scope is broad enough to cover all of the ordinary activities of the labor union.\(^\text{39}\) Although much of the damage inflicted by the wrongful acts of labor unions is pecuniary rather than physical, the manner in which such damage is inflicted is not dissimilar from defamation and other misrepresentations. In defamation the damage to the plaintiff's reputation is caused by public reliance on the validity of the agent's representations. The damage caused by a picket line or consumer boycott, for example, also turns on reliance upon the acts and representations of the agents of the labor union. Because such tortious conduct by agents of the labor union may also constitute a breach of contract, the doctrine of respondeat superior should also be applicable in litigation resulting from breaches of a contract signed by the national union.\(^\text{40}\)

Wholly apart from its technical requirements there can be no doubt that the general policies which justify the application of the doctrine of respondeat superior are present in many situations involving unions.\(^\text{41}\) The fact that the union is in a position of control or that it derives benefit from the agent's conduct may be sufficient to warrant a finding of liability. Justification may also be found in reliance on the authority of the agent or in the superior position of the union to pay or to spread the cost of the

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39 Ibid. See Restatement, Agency §8 (A), comment b at 37 (1958), which classifies the principle of respondeat superior under the general heading of "Inherent Agency Power." Although fraud, defamation, or malicious prosecution are not expressly covered by section 8 (A), the fact of reliance by the third party also binds the principal for these tortious acts of a non-servant agent. See Restatement, Agency §§161, 216 (1958).
41 See Seavey, "Speculation as to Respondeat Superior," Harvard Legal Essays, 433 (1934). In this article, Professor Seavey gives six policies underlying the doctrine of respondeat superior: reliance, benefits, determent, difficulty of proving negligence, and the deep pocket and insurance principles.
injury. The presence of interests such as these may prevent the application of respondeat superior to the union from being unfair.

Two analogies suggest that the doctrine of respondeat superior cannot be applied to the relationship between a local and national union. First, a national-local union relationship may be compared to that of a parent to a subsidiary corporation. Subsidiary corporations are usually subject to the degree of control necessary to find an agency in fact, but because of the limited liability characteristic of the corporate entity, an express agency must be found in order to bind the parent corporation for the acts of the subsidiary. If this analogy were applied to labor unions, a national union could be held liable only upon a finding of agency created by express consent. In the case of labor unions, however, there is no necessary connection between the principle of limited liability and the union's status as an "entity". A union is an "entity" only because it can be sued in its own name. The fact that it can be sued in its own name does not limit in any way the liability of the members of the union in actions brought against them individually.

Even if limited liability for the labor union were to be accepted as a desideratum, the corporate-subsidiary analogy still cannot provide assistance because the courts have been unable to work out an adequate rationale to determine when a parent corporation should be held liable as a matter of substantive law for the acts of its subsidiary. Procedurally service of process on a subsidiary has generally been held insufficient to subject a parent corporation to the jurisdiction of the court.

This procedural aspect of the corporate-subsidiary analogy has been carried over to the relationship between the national and local union in a few cases which have held that service of process on the local union could not subject the national union

42 Cox, supra, note 39, at 312.
43 Powell, Parent and Subsidiary Corporations 89-102 (1931).
44 Sturges, "Unincorporated Associations as Parties to Actions," 33 Yale L.J. 383, 404 (1924).
46 In Cannon Mfg. Co. v. Cudahy Packing Co., 287 U.S. 333 (1925), the Supreme Court held that a corporation could not be subjected to jurisdiction on the basis of the activities of its subsidiaries. See "State Court Jurisdiction," 73 Harv. L. Rev. 909, 933, nn. 149-51 (1960), for a collection of the few cases deviating from the Cudahy rule.
to the jurisdiction of the court.\(^{47}\) However, the majority of cases dealing with the service of process question, usually in connection with "doing business in a common name" or "substitute service" statutes, have held that the national union is doing business within the jurisdiction by reason of the activities of its local union.\(^{48}\) Since the parent-subsidiary corporation analogy provides no rationale for dealing with substantive liability nor for explaining most cases involving the service of process question, it should be rejected.

Secondly, the relation of local unions to the national union may be compared to the municipal-state government relationship:

Local unions are mere subdivisions of the national organizations whose constitutions provide for their government as a state does for its counties, cities, towns, and villages. The amount of home rule they enjoy is determined by the national, and they are bound by the laws of their national governments.\(^{49}\)

The degree of home rule retained by each local may be reflected in the constitution of the national union.\(^{50}\) In *Di Maio v. Local 80-A, United Packinghouse Workers of America*,\(^{51}\) for example, a libel action against a national union arising out of a local election was dismissed on the ground that the local unit possessed constitutionally an independence and autonomy which negated the existence of any relationship which would make it the general agent of the national union. The court emphasized: "This is clearly so with respect to the local's conduct of its internal affairs, the election of its officers, the maintenance of its purely administrative offices and the conduct of its ordinary affairs."\(^{52}\) There

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\(^{47}\) Dean v. Int'l. Longshoremen's Ass'n, 17 F. Supp. 748 (D.La., 1936); Christian v. Int'l Ass'n of Machinists, 7 F. 2d 481 (W.D. Ky. 1925).


\(^{49}\) Leiserson, American Trade Union Democracy 87 (1959).

\(^{50}\) For a general discussion of constitutions and the local union, see Lahne & Kovner, "Local Union Structure: Formality and Reality," 9 Ind. & Lab. Rel. Rev. 24 (1955).


\(^{52}\) *Id.* at 29 N.J. Super. 343, 345, 102 A. 2d at 482.
can be no doubt, Professor Leiserson has suggested, that local unions do govern their own affairs:

[T]he specific authority of local officers flows from the membership meeting. Formal authorization or approval at a meeting is required for nearly every item of the local's business, from the payment of bills and answering of letters to the settlement of grievances and the negotiation of working contracts with employers.\(^{53}\)

On the other hand, the local-state government analogy cannot be carried to its logical extreme. Local unions vary greatly in size and sovereignty. There are between sixty and seventy thousand locals in the country.\(^{54}\) Most locals have less than two or three hundred members, but some, for example, Ford Local 600, representing the River Rouge area in Michigan, may have as many as 40,000 members. Some locals have only a loose affiliation with the national union, paying only a per capita tax, and can withdraw from the national union at will.\(^{55}\) Others are merely subordinate units of the national union. These the national unions regulate with varying degrees of supervisory control. Most national unions provide that a local union's charter may be revoked under some circumstances\(^{56}\) and that the local union and sometimes its members may be disciplined by the national union.\(^{57}\) Many require national approval of strikes,\(^{58}\) contracts, or changes in the constitution or by-laws of the local union.\(^{59}\) Two

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\(^{54}\) Forkosch, A Treatise on Labor Law §111 (1953).


\(^{56}\) E.g., IBEW Constitution, Art. IV, §3(8) (1956):

The I.P. is empowered as follows:

\[\ldots\]

Either to suspend or revoke the charter of any L.U., or have the I.S. reject the per capita tax from any L.U. that fails or refuses to observe the laws and rules of the I.B.E.W.

\(^{57}\) National Industrial Conference Board, Studies in Personnel Policy No. 150, Union Government Structure and Procedure, Table 22, points out that 51 or 41.7% of 194 union constitutions surveyed, covering 17½ million union members, contained provisions permitting members to be disciplined.

\(^{58}\) Id. at 42. Of the 194 constitutions surveyed above, only 10 allow local unions to strike without international approval. Thirteen constitutions of government workers, however, prohibit strikes, and 29 constitutions have no provisions regarding strikes.

\(^{59}\) Id. at 49-54. Of the 194 constitutions surveyed, only 11 allow locals to make contracts on their own authority. Thirteen constitutions, covering over two million employees, grant the international union the sole power to make all collective bargaining contracts or state that the international may assume this power where necessary. Eighty-three constitutions give the international union the power to authorize collective bargaining contracts.
less obvious but equally effective means of national control are the stipulation that a local cannot withdraw from the national union as long as five or seven members object.\(^6\) and check-off procedures that provide for payment directly from the company to the national union. Whether constitutional provisions such as these can yield standards susceptible of judicial application in order to resolve the conflict between home rule and centralized control will be the task of the following analysis.

B. Officers and Members as Agents of the Union

A member of a labor union is not, merely by reason of his membership, an agent of a labor organization, even when his conduct may implement or be intended to implement the policies of the union.\(^6\) The president, vice-president, secretary-treasurer, and business agent of the local union are regarded as general agents for the conduct of the union's business,\(^6\) as are the officers and representatives of the national union.\(^6\)

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\(^6\) E.g., IBEW Constitution, Art. XVII, §23 (1956):
No L.U. shall withdraw from the I.B.E.W. or dissolve as long as five members in good standing object thereto. Before withdrawal, written notice must be given to the I.P. and all books, papers, charters, funds and all property are to be forwarded to the I.S.

\(^6\) 93 Cong. Rec. 4022 (1947) (Remarks of Senator Taft):
I do not think there is anything in the fact that a union is an unincorporated association which would bring about a condition in law that the act of every member is necessarily charged to the labor organization. No; I think not.
I think that the word 'agent' as used here, as used in the contract section, and as used in other places in the bill, means an agent under the ordinary rules of agency, an agent of the labor union, the organization, as such. The fact that a man was a member of a labor union in my opinion would be no evidence whatever to show that he was an agent. 93 Cong. Rec. 4435 (1947).

\(^6\) Sunset Line and Twine Co., 79 N.L.R.B. 1487, 1510 (1948) (business agent of local):
[The record does not otherwise show how Vail's duties are defined, or what are the limitations of his authority; but neither is there any evidence to rebut the inference, which we might well draw from his title alone, that he was, at the time of the events involved in this case, vested with the powers of a general agent to conduct the Local's business.]

\(^6\) Accord, Amalgamated Meat Cutters and Butcher Workmen, 81 N.L.R.B. 1052 (1949). Cf. Lewis v. Benedict Coal Corp., 259 F. 2d 346 (6th Cir. 1958), modified on other grounds, 361 U.S. 459 (1960) (affirms jury instruction that authorization is not required). See cases Note, 49 Colum. L. Rev. 884, 387 n.29 (1949) (collecting cases). A member of the union, or even a foreman who performs the function of a union officer with the knowledge of the union, will be deemed an agent of the union with respect to acts similar to those he ordinarily performs. Teamsters Local 294, 117 N.L.R.B. 1401, 1411 (1957) (employee); NLRB v. Teamsters Local, 153, 228 F. 2d 83 (2d Cir. 1955) (employee); IBEW Local 5, 121 N.L.R.B. 143 (1958) (foreman).

\(^6\) E.g., Garmeada Coal Co. v. UMWA, 122 F. Supp. 512 (E.D. Ky. 1954), aff'd, 230 F. 2d 945 (6th Cir. 1956) (field representative); UMWA v. Patton, 211 230 F. 2d 945 (6th Cir. 1956) (field representative);
The status of stewards is less clear. In *NLRB v. P. R. Mallory & Company*, the Seventh Circuit Court of Appeals held:

> With no obligation on the part of the union to compensate, with no right to appoint or discharge and with very limited authority or control, we discern no basis for a ruling under a general law of agency that the stewards were agents of the union.

These stewards had led a strike to compel the discharge of an employee in violation of not only section 8(b)(2) of the NLRA, but also a no-strike clause in the collective bargaining agreement and express orders from the president of the local union. In a later opinion holding another local union liable for the enforcement of an unlawful “hot cargo” clause by its stewards, the same court distinguished and amplified its *Mallory* opinion on the ground that it was “based largely on the undisputed fact that the stewards were acting contrary to Union policy and to the express directions which they had received from the Union.”

The Seventh Circuit’s difficulty in finding an adequate rationale suggests that its conclusion that the stewards were not agents might have been erroneous. Because the steward is the bottom link in the chain of union command, his leadership is just as essential to the union and its operation as that of higher officials. The fact that he may be closer and hence more responsive to his constituents makes him no less an agent. Although stewards and other officers are elected and to this extent derive their authority from the members of the union, the structure of the local union and collective bargaining in operation rest on a premise that the power to conduct bargaining and to run union affairs on a day-to-day basis is not a proper subject for membership action. To this extent the power given to the local union must be deemed irrevocable. If, for example, the members of a union decide that a grievance should not be arbitrated after the

(Footnote continued from preceding page)


64 237 F. 2d 437 (7th Cir. 1956).

65 Id. at 442.

66 NLRB v. Teamsters Local 135, 267 F. 2d 870 (7th Cir. 1959).

67 Id. at 873,
leaders of the union decide to arbitrate it, the employer, in an action by the union for specific enforcement of the arbitration clause, should not be able to avail himself of the attempted revocation of authority by the employees. To abandon this premise would unduly favor union democracy at the expense of labor union strength and collective bargaining stability. The fact that local leaders in practice ordinarily submit many of the specific details of local union affairs to the membership for approval in no wise relieves them of their responsibility to conduct these affairs in the best interests of the union. It makes these leaders no less agents of the union.

This approach to the local union was tacitly assumed in *Jay-K Independent Lumber Corporation*. In that case the union authorized picketing only at the situs of a primary employer. Some of the members followed one of the primary employer's trucks to a situs of a secondary employer; the steward followed a second truck to another secondary situs; in both places the unloading of the truck was prevented. On the assumption that the union should be under a greater obligation to control its stewards than to control its members, the Board properly attributed the steward's conduct, but not that of the members, to the union.

Once the steward is deemed an agent, a basis is present for an analysis of the scope of his authority by considering such conventional factors as the time, place, and purpose of his actions, and whether the unauthorized conduct is similar in quality to authorized acts. Perhaps the most important criterion is whether the

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70 Restatement, Agency §229 (1958) provides:

(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

(a) whether or not the act is one commonly done by such servants;
(b) the time, place and purpose of the act;
(c) the previous relations between the master and the servant;
(d) the extent to which the business of the master is apportioned between different servants;

(footnote continued on next page)
“act is one commonly done by such servants.” 71 Although the local union president and vice president develop and administer local union policies, it is not common for committeemen and stewards to engage in policy-making activities. 72 Their activities are usually confined to the implementation of established union policies. 73 Contract negotiations, for example, would not be within the scope of a committeeman’s or steward’s authority in the absence of an express delegation of authority from the union, whereas the administration of a contract clearly would be. The enforcement of policies pertaining to union membership and intra-union discipline would be within the scope of authority of a committeeman or steward because they are customarily performed and must necessarily be policed at the lower levels of union command. Although the secretary-treasurer of the local union may be charged with the administration of the check-off machinery, he must rely on committeemen and stewards to see that new members join the union and sign check-off authorizations. On the other hand, activities designed to expand the jurisdiction or power of the union, whether through organization of employees in new plants, through recognition by employers, or through representation and work assignment disputes with other unions, are not commonly conducted by stewards or committeemen in the absence of express direction from the officers of the local union or clear statement of union policy in the union constitution, by-laws or employer union agreement. One illustration

(Footnote continued from preceding page)

(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
(f) whether or not the master has reason to expect that such an act will be done;
(g) the similarity in quality of the act done to the act authorized;
(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
(i) the extent of departure from the normal method of accomplishing an authorized result; and
(j) whether or not the act is seriously criminal.

71 Ibid.

72 The term “committeeman” is sometimes used interchangeably with that of steward. See, e.g., Ford-UAW National Agreement. In this article it shall be used to designate an intermediate union official who stands between the officers of the local and the steward. See, e.g., Chrysler-U.A.W. National Agreement.

73 See, e.g., Clarkson v. Laiblan, 202 Mo. App. 682, 216 S.W. 1029 (1919) (strike threat to exclude nonunion men within steward’s authority); Teamsters Local 249, 116 N.L.R.B. 399 (1956) (insistence that member wrongly be kept from work within steward’s authority). The former case was predicated on an express union policy, whereas the latter was deemed to be incidental to the steward’s normal administration of membership matters.
of such a clear statement of policy is the “hot cargo” clause mentioned above.\(^7^4\) If the activity is one commonly conducted by committeemen and stewards, the fact that it is disavowed by the union or that it is contrary to an express union policy should be of no consequence. On the other hand, if the activity is not commonly done by committeemen and stewards, the fact that the conduct is contrary to orders from the local union or to union policy should have a direct bearing on whether that conduct will be attributable to the union.

A second criterion looks to the time, place, and purpose of the act.\(^7^5\) For example, if a steward were to lead employees out on strike in a district which he did not represent, he would be acting beyond the scope of his authority. Similarly, if members of a union authorized to conduct a picket line assault a non-striking employee in a town several miles away,\(^7^6\) this conduct cannot be attributed to the union. If, however, an officer of the union accompanies the members when they commit unlawful acts at a distance remote from the picket line,\(^7^7\) the union becomes liable. Although time and place are concrete factors, the test of purpose is more difficult to apply. If a steward is acting on his own behalf when he refuses to unload a truck rather than as a union leader,\(^7^8\) his conduct is not attributable to the union. Stewards who participate in a strike, although subject to greater discipline than other employees,\(^7^9\) are not necessarily acting in their capacity as union leaders.\(^8^0\) The strike might have occurred without their participation or leadership. If a higher union official becomes involved, there is greater likelihood that his conduct constitutes an incentive to the strikers; hence acts less than

\(^7^4\) Supra note 66 and accompanying text.
\(^7^5\) Restatement, Agency §229 (1958), supra note 70.
\(^7^6\) United Furniture Workers, 84 N.L.R.B. 563 (1949).
\(^7^7\) Ibid. The United Furniture case, supra note 76, also presents an interesting study of the overlapping authority of the national and local unions in the strike. The Board found that the establishment of the picket line by the national representative was within his scope of authority, and hence made the picketing and the physical restraint incidental to it attributable to the national. But the conduct away from the picket line in which the local committeeman participated was not charged to the national union, even though it was within their scope of authority as agents of the local.
\(^7^8\) NLRB v. Lumber Drivers Local 522, 35 CCH Lab. Cas. $71,906 (D.N.J. 1958).
\(^7^9\) See Note, “Considerations in Disciplining Employees for Participation in Violations of the No-Strike Clause,” 106 U. Pa. L. Rev. 999, 1017-20 (1958).
actual participation may be sufficient to constitute an authorization of the strike by the union.\textsuperscript{81}

If the plant management should discharge the secretary of a local union for falsification of his employment application and thereafter the secretary distributes a leaflet to employees, urging them to bide their time until an advantageous moment for a strike occurs, and the employees walk out at the first opportune time and refuse to return to work until the secretary is reinstated, the fact that the officer was promoting his reinstatement and the fact that he did not actually participate in the strike should not be sufficient to place the conduct beyond his scope of authority. Ordinarily the protection of discharged officers is of considerable concern to the union. Similarly, when the president of the union indicates that he sympathizes with a strike, but does not participate in it, the strike should be attributed to the union.\textsuperscript{82}

A final criterion is whether the methods chosen by the union representative are reasonable and incidental to the conduct authorized.\textsuperscript{83} A steward, in the course of handling a grievance which alleges a management speed-up caused by undermanning an assembly line operation, may instruct employees to limit their production by riding down the assembly line beyond the point where the next employees should begin. These instructions should be deemed incidental to the steward's power to settle grievances, because the steward is generally regarded as having authority to request his constituents to meet the standard set by management if he becomes convinced that management is correct. The use of other pressure tactics such as refusal to work overtime, or the refusal of other employees to perform work assignments would seem equally incidental to the steward's power to administer the contract through the settlement of grievances. If, however, the steward had called his constituents out on strike and had put up a picket line, a more difficult question would have been presented. Since the steward represents the union when he acts in an official capacity, the union should be held responsible for his conduct even though the methods he uses may seem unreasonable in view of the availability of the grievance procedure. In this respect the

\textsuperscript{81} \textit{E.g.}, \textit{Oil Workers Int'l v. Superior Court}, 103 Cal. App. 2d 512, 230 P. 2d 71 (Dist. Ct. 1951) (speechmaking by president).

\textsuperscript{82} \textit{Ibid}.

\textsuperscript{83} Restatement, Agency §229(1) (1958), \textit{supra} note 70.
office of steward is no different from that of a committeeman or higher union officer. The status of a union officer has no bearing on the reasonableness of the method chosen. His status should be relevant only to the determination of the kinds of acts which the union official ordinarily performs. Thus, if the above strike were for the purpose of negotiating a wage increase, it would be beyond the steward's scope of authority, but not for the reason that the method chosen was unreasonable. Most of the conduct which characterizes the field of labor relations—strikes, picket lines, and other concerted activities—should ordinarily be considered reasonable. There is no reason why a local union should be less responsible for activities such as sit-down strikes or "quickie strikes" merely because these activities are considered reprehensible by current standards of industrial mores. If, however, the conduct of the agent of the union goes beyond the limitations set by the test of excessive criminality, the local union should be relieved of liability.

From this study of the officers and members as agents of the union it can be seen that the principle of respondeat superior readily applies. The officers, committeemen, and stewards, but not the members, are agents of the union. Authorization for a union official's conduct may be inferred from the fact that union officials of like rank engage in similar conduct. The officers of a local union commonly conduct negotiations and organizational activities; committeemen and stewards commonly administer the employer-union agreement and enforce membership and disciplinary policies. Authority may also stem from an express grant of power by the union or from a clear statement of policy in the union constitution, by-laws or employer-union agreement. The scope of this authority can be defined by looking to the time, place, and purpose of the unauthorized conduct.

C. Local and Intermediate Unions as Agents of the National Union

At the national level a more extensive analysis will be required to find standards which accurately reflect the distribution of union power, the interests of employees and employers, and the

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84 E.g., see cases collected in Note, "Union Responsibility for Acts of Officers and Members under the LMRA", 49 Colum. L. Rev. 384, 386 nn.41-44 (1949), and cases cited supra notes 62, 63, 73, and 77.
interest of the public. The doctrine of *respondeat superior* is used to hold the national union liable when it is in a position of control over the local union or when it derives benefit from local activities. In the following discussion, therefore, a theory will first be formulated which can adequately account for these interests of the national union but still achieve a fair correlation between union power and union responsibility. Then the interests of other parties to the litigation and the public which might require modification of the theory will be considered.

1. The Interests of the National Union.

The interests of the national union which concern us here are its interests in the activities of its local and intermediate organizations which can justify holding it responsible for those activities. The policies underlying the doctrine of *respondeat superior* which have traditionally reflected the interests of the defendant include control and benefit.86 In this section the relationship between the local, intermediate, and national unions in terms of benefit and control will be analyzed in order to formulate a theory which will be applicable both to the local and the intermediate union as agents of the national union.

a. Control.

One of the requirements of an agency relationship is that the agent be subject to the control of the principal. “Control”, according to Professor Seavey, means “the legal coercion capable of being exercised by the principal through his power of revoking, diminishing or enlarging the powers granted the agent.”87 In our discussion of the relationship between a local union and its members the fact that the stewards, committeemen and officers of the local union occupied a defined status in the hierarchy of union command was sufficient to provide the requisite degree of such control to support a finding that these officials were agents. No such hierarchy of command ordinarily exists between the local and national union. It therefore becomes necessary to determine the extent to which right of control and actual control can support a finding of an agency relationship between the local and national union.

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86 *Supra* note 41.
1) Right of Control.

Right of control is found in the constitution and by-laws of the national union. Mr. Chief Justice Taft, in a dictum from the leading case of United Mine Workers v. Coronado Coal Company,\(^8\) characterized the relationship between the national and local union as one of actual agency, which "the constitutions of the two bodies settle conclusively."\(^8\)

Although the union constitution may provide a general indication of the relationship between a local and national union, the court may choose from a group of provisions common to most present-day union constitutions only those which support its decision. For example, the court, in DiGiorgio Fruit Corporation v. NLRB,\(^9\) relied on the following features of the union constitution to deny that the local union was an agent of the national union:

The constitution of the National Union shows that the basic unit in the organization is the local. Each local has its own offices and its own executive committee. The supreme governing body of the National is a convention composed of delegates elected by the locals. Initiation fees and dues are collected by the local, and designated portions of such collections are forwarded to the National. The locals enter into collective bargaining, and the contracts negotiated by their representatives are submitted to the "vote of the membership affected by the contract."\(^1\)

Compare this use of constitutional provisions with the use of constitutional provisions in two cases involving the question whether service of process on the local union may subject the national union to the jurisdiction of the court. In Moran v. Int'l Alliance of Theatrical Stage Employees,\(^2\) the court sustained service of process on the ground that:

The constitution is declared to be the supreme law of its members and of each Local . . . and Locals hold their charters only on condition that they recognize the supreme jurisdiction of the International and accept its constitution as its fundamental law . . . . Thus through the constitution

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\(^8\) 259 U.S. 344 (1922).
\(^9\) Id. at 395.
\(^1\) Id. at 647.
\(^2\) 139 N.J. Eq. 561, 52 A. 2d 531 (Ch. 1947).
a centralized supervision and control of its members and Locals is maintained by International. . . . The constitution authorizes the following activities (among others) in which the International and its officers claim the right to engage in dealing with and affecting the affairs of Locals established in this state and their membership. The International president may try charges against members in certain cases and also charges against Locals and he is empowered to interpret the International constitution and his decisions are binding on members and Locals. He may order any Local to exhibit its books and records to him . . . and [may] suspend or revoke a Local's charter.93

In the second case94 service was quashed:

I have considered carefully the constitution and by-laws of the different International Unions made defendants herein . . . and I find nothing in them that justifies the position that any individual member of any of these unions, if there be such, or of a local union, or an officer or agent of a local union, represents the International Union to the extent that service of process on him will bring it before the court.95

The inadequacy of reliance upon general constitutional provisions indicates difficulties imposed by inherent limitations in the provisions themselves. The power of a national union to revoke a local charter, impose a trusteeship on the local, or discipline its members for conduct detrimental to the union is subject to the ultimate political limitation of assent by the members of the local to the authority of the national union. These remedies and devices can be effectively invoked as a practical matter only when it has become clear that the conduct by the local or its members is indefensible. Consider, for example, the power to place the local under an administrator and see how it has been used in the following example to resolve a wildcat strike problem created by a dissident local union.

Local 122 of the UAW was born in 1957 when Chrysler Corporation and the United Auto Workers agreed that the United Auto Workers could represent employees at the newly built stamping plant at Twinsburg, Ohio. Members of the new

92 Id. at 563-64, 52 A. 2d at 533.
94 Christian v. IAM, 7 F. 2d 481 (E.D. Ky. 1925).
95 Id. at 482.
local consisted both of recruits from the Ohio countryside, many of whom were not accustomed to working in a unionized plant, and of employees who had been transferred from the Detroit area. Many of the Detroit employees came from two of the most militant UAW local unions in Detroit. Strong and radical leaders quickly appeared. As they took over, communications with the international union in Detroit became weak and relations with the local plant management began to deteriorate. Although there had been only one unauthorized strike at the Ohio Stamping Plant in 1957, three occurred in 1958. In 1959 six of the forty unauthorized strikes at Chrysler were called by the leaders of Local 122. These six strikes caused a loss of 141,998 manhours, forty per cent of the total manhours lost due to unauthorized strikes in Chrysler Corporation plants in 1959.

The international union remained in good faith with the company throughout this crisis. During the 1958 negotiations the director of the UAW Chrysler Department became ill. Walter Reuther, President of the UAW, placed two of his assistants in charge of the negotiations, thereby bringing his personal prestige and the status of his office to bear on the negotiations. These representatives and the Chrysler negotiators reached an understanding concerning production standards and unauthorized strikes which brought a reduction in the number of unauthorized strikes throughout the corporation from 512 in 1958 to 40 in 1959. Despite this good faith, lack of information regarding the actual state of affairs at the Ohio Stamping Plant and a personality clash between the Regional Director for Ohio and central staff representatives made difficult any effective action short of the installation of an administrator over the local.

The problem was brought to a head when the local management discharged the president of the local, the vice-president and five others for leading a walk-out. The employees walked out again in protest and refused to work until the officers were reinstated. After the exhortations of the remaining local officers

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60 During the no-contract period from June 1 through October 22, 1958, seven other strikes occurred at the Ohio Stamping Plant. These statistics and those in the following three notes have been obtained from the Chrysler Corporation Labor Relations Department.
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
failed, the international union finally persuaded the employees to return to work, but only on the condition that a strike would be authorized. After the authorized strike was settled, the international union placed the local under an administrator.

Although the consistent pattern of unlawful conduct by the local union made clear to all concerned that it was generally indefensible, the point at which the UAW should have exercised its right of control cannot be precisely defined. In this case the UAW should not have been penalized for waiting until the company exercised its right to discipline its employees, at least not by the company which had not until this point exercised its own right of control. Moreover, the public interest in permitting local unions to administer their own affairs might be thwarted by a frequent exercise of the national union's trusteeship provision. This case study illustrates the practical limitations on general control provisions which limit their value as a source of the right of control.

If, on the other hand, the court places its reliance on provisions of the constitution which establish specific controls over local union conduct, a stronger argument can be made for the use of these provisions as a basis for finding an agency relationship. National union constitutions are particularly explicit and detailed with respect to the discipline of members by the local union. In *International Printing Pressmen & Assistants' Union v. Smith*¹⁰⁰ the court sustained a damage judgment against a national union for the expulsion of a member by the local union, noting among other controls the following:

The laws of the international union provide the mode of trial to be followed and the manner in which a member may be fined, suspended, or expelled. . . . It prescribes the circumstances under which members may be suspended or expelled, and requires the secretary of the local union to make a monthly report of all such suspensions, as well as a report of those in good standing from whom dues are being collected, and reserves the right to discharge the secretary and to expel him from the union for a failure to perform his duties.¹⁰¹

¹⁰⁰ 145 Tex. 399, 198 S.W. 2d 729 (1946).
¹⁰¹ Id. at 406, 198 S.W. 2d at 733.
Before concluding that a right of control sufficient to support a finding of agency can be found in specific constitutional provisions, it should be noted that other union activities also may be regulated in a more or less specific way by the union constitution. The Labor Management Reporting and Disclosure Act of 1959 requires every labor organization to adopt a constitution and by-laws and to file with the Secretary of Labor a copy, together with a report which shows the provision made and procedures followed with respect to, inter alia, "(J) authorization for bargaining demands, (K) ratification of contract terms, (L) authorization for strikes. . . ."102

Similarly, detailed provisions for the regulation of local union conduct may also be provided in the national employer-union agreement. The local union may be charged with the detailed administration of a supplemental unemployment benefit plan, of a pension plan, or of a labor market pool for the recall of laid-off employees. The most obvious example of a delegation of detailed authority is in the authority of the local union to comply with the grievance procedure at the plant level.

Since it seems clear that a national union could not reasonably be held liable for the strikes of a local union merely because it retains a right to authorize strikes in the national constitution, nor for breach of contract for every failure of the local union to comply with the grievance procedure, the fact that a procedure governing local union conduct is spelled out in detail should not alone be sufficient to justify the finding of an agency relationship. Of course, if the detailed course of local union conduct is imposed by statute or by contract rather than by the union constitution, it can be argued that no agency relationship should be inferred because the local union has not consented to the right of the national union to enforce such detailed provisions. But the difficulty posed by specific provisions concerning local union bargaining activities would still remain.

This difficulty can be resolved only by concluding that specific constitutional provisions cannot alone determine whether an agency exists, notwithstanding the Coronado case dictum of Mr. Chief Justice Taft.103 If specific provisions are not conclusive,

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103 Supra note 88 and accompanying text.
then it follows first that the courts are not bound by express disclaimers of responsibility by the national union for the acts of the local,\textsuperscript{104} and secondly that the court can look behind constitutional provisions providing for a centralized right of control to find that in fact actual control rests in the local union.\textsuperscript{105} Since neither general nor specific constitutional control provisions provide an adequate basis for determining whether the local union is an agent of the national union, we must now turn to actual control.

2) Actual Control.

The problem of defining the scope of actual control recently arose in \textit{Morgan Drive Away, Inc. v. Teamsters Union}.\textsuperscript{106} The plaintiff alleged that the International Brotherhood completely dominated and controlled the local unions, joint councils, and conferences through power over membership, discipline, officers, grievances, business and finance. The court held that, however sympathetic it might be with such a characterization, judicial notice could not be taken.\textsuperscript{107} Of course, if it were shown that the national union had placed the local union under the control of a trustee, the national would be responsible for the conduct of agents of the local union just as if it were itself the local union.\textsuperscript{108}

The court in the \textit{Morgan} case correctly required the plaintiff to show that the national union dominated the specific local whose activities were the basis of the complaint because the degree of general domination sufficient to warrant a finding of agency cannot be reduced to a test susceptible of judicial application. On the other hand, the actual existence of a trusteeship should not be required to establish an agency on the basis of

\textsuperscript{104} E.g., Teamsters Constitution, Art. XII, §11(c) (1946):
Approval or disapproval by the general president of wage scales or other agreements is not intended to impose any liability on the international or its officers; and the international does not assume any liability of any nature to any person or persons for such approval or disapproval.

See National Industrial Conference Board, supra note 57, at 49-54, which points out that of 194 constitutions surveyed, 19 constitutions, covering a total membership of 2,417,452, have “disclaimer of liability” clauses.

\textsuperscript{105} See Farnsworth & Chambers Co. v. Sheet Metal Workers Int'l Ass'n, 125 F. Supp. 830 (D. N.M. 1954).

\textsuperscript{106} 268 F. 2d 871, 876 (7th Cir. 1959), cert. denied, 361 U.S. 896 (1959).

\textsuperscript{107} Id. at 877.

\textsuperscript{108} Teamsters Local 612, 121 N.L.R.B. 1571 (1958); Teamsters Local 294, 117 N.L.R.B. 1401, 1411 (1957). But see Becker v. Calnan, 313 Mass. 625, 48 N.E. 2d 668, 671 (1943): "But it does not appear that Jennings, although he had been appointed 'trustee' of the Local, was an officer or agent of the International within the scope of this policy. . . ."
actual control, because the union may control the local union in fact with no formalities whatever. If the national union is charting the course of local conduct, it should be held responsible for activities of the local and its agents which are reasonably related to that control. Thus actual control, like actual authorization, becomes a question largely of fact in each case.

All that will be done here is to suggest what facts might be sufficient to justify a finding of agency in connection with one category of local union conduct. Since local collective bargaining activities are subject to a wide variety of national controls, such activities may serve as an example. If the participation by the national union in the local negotiations extends only to the giving of advice, the national union does not control the local negotiations. If the national requires and obtains approval of contract demands and the final settlement agreement, or if the international representatives participate in the local negotiations, an inference should be permitted that the national is controlling the negotiations. Finally, if it can be shown that the national union is using the local as an instrumentality to further national objectives through local negotiations, an agency should be found.

With each degree of participation in the collective bargaining at the local level, the unlawful conduct of the local which can be reasonably attributed to the national union will vary. If, for example, the national representatives are participating in the local negotiations, the torts of union members on the picket line might be attributable to the national union, whereas if an agency were established on the basis of national approval of contract demands and of the ultimate contract settlement, the scope of national control would not subject it to liability for such conduct.

Since actual control is limited to cases of factual control and since right of control cannot provide a sound basis for the imposition of liability on the national union, the control rationale alone is inadequate.

b. Benefit.

The shortcomings of the control rationale seem to lie primarily in the fact that home rule precludes the inference that the local

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110 E.g., Chicago Typographical Union, 86 N.L.R.B. 1041 (1949).
is exercising an agency power merely because the national union has reserved a right to control certain aspects of its conduct. Since the local has home rule and therefore cannot be regarded as commonly engaging in any of its activities on behalf of the national union, it is necessary to consider together the closely related question of agency and scope of authority. In the former, an authorization is construed as a limitation or reservation of control. In the latter, an authorization is construed as a grant of power. A grant of power is illusory, however, unless it can be construed to confer some benefit on the grantor. To illustrate this point, consider the following example: A authorizes B to engage in an activity for B's benefit. This grant of authority is illusory. Suppose that A had also reserved the right to approve or disapprove of B's conduct. Although A derives a benefit from this reservation of control, it is submitted that no agency relationship has yet been created because B is still acting on his own behalf. It is only when the right reserved by A is exercised that B can be said to be acting on A's behalf. Since the control theory thus presumes a grant which confers a benefit upon the national union, our next step will be to define "benefit" and to determine the extent to which it can provide a basis for the application of a control rationale to create an agency relationship.

The concept of a benefit has appeared thus far only in connection with ratification by acceptance of benefits and the conduct of a local union official which furthers a stated union policy but is not conduct in which he customarily engages on behalf of the national union. The Moran case, from which a quotation has already been taken to demonstrate reliance upon constitutional provisions, provides an example of a concept of benefit:

The existence of the International as an organization depends on its several units or agencies called Locals which are created by and coordinated under the government of

111 See Restatement, Agency §200(1) (1958):
A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. [Emphasis added].

112 See text accompanying notes 34-35 supra.

113 See text accompanying note 74 supra.

114 Moran v. Int'l Alliance of Theatrical Stage Employees, 199 N.J. Eq. 561, 52 A. 2d 531 (Ch. 1947).

115 See text accompanying notes 92-93 supra.
the International and through whom and the membership whereof the International has being and acts in the achievement of its and their stated objects. I am of the opinion that an association which grants rights and imposes duties on its individual members wherever located and which claims every state of the Union as its field of operation through the establishment in those states of component parts of its organization, by which units or agencies it engages in activities designed to further the objects for which it was organized, which objects can be achieved only through the operation of its units, should be regarded as voluntarily submitting itself to the jurisdiction of those states when duly served with process and should not be permitted to say that it is amenable only to the courts of the state in which it maintains its headquarters.\textsuperscript{116}

According to this court, the delegation inherent in the charter confers sufficient benefit upon the national union to subject it to the jurisdiction of the court when a local union is served on its behalf. Although the beneficial interest of the national union in the existence of the local may be sufficient to support service of process, it would be unfair to the national union to use such a broad test for the imposition of substantive liability.

The concept of ratification by acceptance of benefits is more useful. The fact that a local may confer a benefit on a national union is not alone sufficient to impose liability on the national union, but if the conduct benefits a clear and definite policy of the national union, the national union has the duty to disavow the conduct. If, however, activities of the local union furthered a clear and definite policy where the national union had a right to control the local union, the combination of benefit and control might be sufficient to create an agency relationship which would impose liability on the national union without regard to whether it has disavowed the conduct of the local union. It is upon this basis that a steward can bind a local union for acts which further an expressly stated policy of the local union but which are not acts that he commonly does. The steward is subject to the control of the local union. His conduct in furtherance of a clearly defined purpose of the local union comes within his authority. Because he is subject to the control of the union and hence is an

\textsuperscript{116} Moran v. Int'l Alliance of Theatrical Stage Employees, 139 N.J. Eq. 561, 52 A. 2d 531, 533-34 (Ch. 1947).
agent, his conduct need not be a "substantial contribution" to the local policy in order to bind the union.

Since the local union may be subjected to varying degrees of control by the national union, both control and benefit must be weighed together to justify holding the national union responsible. Although elements of both control and benefit must be present, a substantial benefit would reduce the degree of control required. Conversely, as the elements of control increase, the furtherance of less specific and less immediate policies would provide sufficient benefit.

This approach can be illustrated by a consideration of two cases, each involving a violation of section 8(b)(3) of the National Labor Relations Act.\textsuperscript{117} Section 8(b)(3) prohibits the bargaining representative from refusing to bargain collectively with an employer. In *Westmoreland Coal Company*,\textsuperscript{118} a local union went on strike. The company contended that the failure of either the international or local to file a statutory strike notice with the Board pursuant to section 8(d) of the act constituted a violation of section 8(b)(3). The Board held that since the international union, the certified bargaining representative, had "delegated" the administration of the local grievance procedure and seniority arrangements to the local union, and since the strike arose in connection with a seniority dispute, it was within the scope of authority of the local union as agent of the international. The Board went on, however, to relieve the international because of its good faith attempt to settle the strike.

In this case, if the local union were actually an agent, acting within the scope of its authority, the international's attempt to settle the strike should not have relieved it of liability for the acts of the local union. The delegation of bargaining functions was illusory because the local union would have engaged in grievance handling and administration of the seniority arrangements on its own behalf in the absence of any delegation. The fact that the employer-union agreement may have spelled out the grievance procedure in some detail would not have been sufficient to attribute the strike to the national union since the contract could

\textsuperscript{118} 117 N.L.R.B. 1072 (1957), modified on other grounds, sub nom. Local Union 9735, UMWA v. NLRB, 258 F. 2d 146 (D.C. Cir. 1958).
establish no right of control over the local. Assuming, however, that the UMW constitution contains adequate provision to obtain local compliance with the grievance procedure, there still should have been no declaration of agency in the absence of any indication that the local union's administration of the seniority program was making effective a policy in which the national union was interested. Seniority arrangements have been traditionally local in nature.

In the *Chicago Typographical Union*,\(^\text{119}\) on the other hand, the Board found that the national union had violated section 8(b)(3) through local negotiations which implemented the ITU 1947 "Collective Bargaining Policy" in a manner that avoided "the making of any bilateral agreement, written or oral, with respect to any matters properly the subject of negotiation and agreement."\(^\text{120}\) The constitution of the national union required and the national in fact obtained approval of contract demands and of the negotiated contracts. Here, although the ITU had not participated in any local negotiations, the finding that it had refused to bargain in good faith was justified by the implementation of its policies and its retention of control.

From these two cases it can be seen that the determination of what degree of national interest is sufficient to hold the national union responsible for the conduct of its local unions is essentially one of policy. The principles of control and benefit merely provide tools for the expression of the policy. Control provisions vary from general provisions for the discipline of employees and for imposition of trusteeships to specific provisions requiring approval of contracts and demands in connection with collective bargaining or compliance with a specified procedure in the discipline of employees.

The beneficial interest of the national union can also vary widely. In the collective bargaining area, for example, the interest may be express and clearly stated, as in the *Chicago Publishers* cases, or it may be indirect, as in the case where the local strike at the Ford plant forced the reopening of the Ford-

\(^{119}\) 86 N.L.R.B. 1041 (1949).
\(^{120}\) Id. at 1042. See United Bhd. of Carpenters & Joiners v. NLRB, 41 CCH Lab. Cas. 816,658 (D.C. Cir. 1961) (mere reservation of right to approve work rules held insufficient to subject the national union to liability for unlawful application of rule where no national program could be found).
UAW national contract. Although there are some issues which are clearly of national importance because of their novelty, such as the pension issues prevalent in 1950, the supplemental unemployment benefit plans of 1955, and the shorter work week and profit sharing plans of 1958 in the auto industry, other issues rise and fall in importance to the national union with the ebb and flow of collective bargaining in the industry. Presently questions of subcontracting, severance pay, moving expenses, and other methods of accommodating the work force to the impact of automation are becoming increasingly important. The recent battle over work rules in the steel industry and the nationwide struggle over production standards during the past few years have given increased importance to disputes arising over time study and work assignment methods. Although seniority arrangements have long been of primarily local concern, even these may become nationally significant as schemes are devised to protect the technologically unemployed worker by providing him with a companywide and perhaps even an industrywide seniority base.

The application of these control and benefit factors to the cases is difficult because the status of the national union is ill-defined. The foregoing discussion does at least suggest an approach to the problem. We should start with the presumption that the local union is acting on its own behalf and not on behalf of the national union. Such a presumption not only takes account of the fact that the local union does in fact run its own affairs but also reflects the public policy encouraging union democracy and hence local control. In order to establish an agency relationship the national union should be shown to have actual control over the local union or to have a right to control and a clearly defined beneficial interest in the activities of the local.

Although it may be impossible to conclude abstractly when the pattern of control and benefit should impose liability on the national union, situations like those presented in the Chicago Typographical Union case on the one hand and the Chrysler-UAW strike problem on the other can be quickly decided. In addition to providing an approach to the gray area between these clear cases the control-benefit analysis may provide a basis for considering the role of the intermediate union as an agent of the national union.
c. Intermediate Unions as Agents of the National Union.

The growth of national industries and concomitant growth of the national union have made necessary the development of intermediate bodies. Although some of the larger unions do not charter more than one local in each city, most national unions have created intermediate bodies.

The intermediate union organization may perform a variety of functions. Its usual duty is to handle collective bargaining for a geographical area or industrial group; it may take over the function of organizing the unorganized; it may play an important role in the union's disciplinary procedure, or perform service functions, such as the administration of company and union welfare plans or the representation of union interests in local politics. In order to obtain a more complete picture of the types of intermediate unions and their functions, it should be helpful to note briefly their role in the building trades, auto, mining, clothing and transportation unions.

The building trades unions are usually compelled to join the local district trades council. The district trades council is not an intermediate organization because it is formed by local unions which are members of different international unions.121 These councils ordinarily conduct local political and public relations activities. The Carpenters, Painters, and Hod Carriers have strong intermediate unions.122 These organizations function in local areas where a number of local unions require coordination. To a large extent, the intermediate Carpenters and Painters organizations perform this function through areawide bargaining.123 Since the Hod Carriers Union cuts cross industry lines, the intermediate organization is less a coordinating body than a device for securing international control over local unions.

The UAW has established regional district directors, corporation conferences, and central departments for each major corporation represented by the international union. The regional directors do not have authority to intervene in local union affairs.

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They stand solely in an advisory capacity to the international union. The corporation departments play a large role in labor relations at the corporate level. They are charged with the administration of the corporate agreement and with the settlement of problems which become too large for the local unions to handle. These departments also negotiate the bargaining agreements with their respective corporations pursuant to policies established by the corporation conferences consisting of delegates from the local unions and from the central staff.

The United Mine Workers was the first American union to establish strong intermediate bodies. When John L. Lewis became president of the Mine Workers, the structure of the union resembled that of a federation of autonomous districts. He gradually changed it to a highly centralized national administration by exercising his powers under the constitution but without changing the constitution. He suspended either the charters of the districts or the requirement that district officers be elected by their membership and then appointed officers until he gained complete control over the board and the districts.

The International Ladies Garment Workers' Union has established joint boards and district councils in the concentrated industrial areas. All local unions in the same branch of the industry in an area are required to become allied with the joint board. All of the local unions in any given area which are not members of the joint board may join district councils, which cut across the divisions in the trades.

The Teamsters are presently going through a process of centralization of power like that of the Mine Workers. Concentration of decision-making power has become particularly pronounced in the western and central states conferences. Under the present trend the joint councils are assuming the largest part of the bargaining and organizational authority traditionally exercised by the local unions.

The variety of intermediate organizations and their functions tends to defy judicial classification. An intermediate body can be acting either as principal in furtherance of objects for which

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124 *Id.* at 243.
125 *Id.* at 307.
126 Leiter, The Teamster Union 72 (1957).
it was established or as agent for either local or national unions. District trades councils are not agents of a national union because they are not in any way involved in the chain of national union command. Intermediate bodies like those in the skilled building trades which perform the function of removing the possibility of wage competition between local unions of the same trade in a local market area do not usually act at the direction of or on behalf of the national union. However, where the intermediate organization is used primarily to obtain national control over the local unions, as in the Hod Carriers, or when the leaders of the intermediate body are on the payroll of the national union, the intermediate body should be regarded as an agent of the national union.

The status of the intermediate organization in the United Mine Workers, Ladies Garment Workers, and Teamsters Unions is made more clear by the cases. The districts of the Mine Workers have generally been considered to be agents of the international. One exhaustive opinion has held a joint board of the Ladies Garment Workers to be an agent of the international union. These cases emphasized the fact that these particular intermediate organizations have no independent constitutions and the fact that the heads of the intermediate bodies are appointed by the international union. The joint councils and conferences of the Teamsters, on the other hand, have been held not to be agents of the International Brotherhood.

Although these cases have drawn a bright line around constitutional right to control and the actual control manifested in

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128 Mile Branch Coal Co. v. UMW, 266 F. 2d 919, 921 (D.C. Cir. 1959); UMW v. Meadow Creek Coal Co., 263 F. 2d 52 (6th Cir. 1959), cert. denied, 359 U.S. 1013 (1959) (agency for service of process); Lewis v. Benedict Coal Corp., 259 F. 2d 346 (6th Cir. 1958), modified on other grounds, 361 U.S. 459 (1960); Garmaida Coal Co. v. UMW, 230 F. 2d 945 (6th Cir. 1956); UMW v. Patton, 211 F. 2d 742 (4th Cir. 1954); Claycraft Co. v. UMW, 204 F. 2d 600 (6th Cir. 1953) (agency for service of process); United Constr. Workers v. Laburnum Constr. Corp., 194 Va. 872, 75 S.E. 2d 694 (1953), aff'd, 347 U.S. 656 (1954).


the international’s appointment of the heads of the district organizations, these factors alone are not sufficient to achieve a proper redistribution of responsibility for other newer and less mature national organizations which are gaining power and control through the implementation of their policies by intermediate bodies. Constitutional development has not kept pace with the rapid development of intermediate bodies in these organizations. The United Electrical Workers Union, for example, has established full-blown conference boards of which no mention is made in the constitution of the union.

Even in the absence of specific constitutional authorization and control the clauses providing for right of control over local unions may be applied to intermediate organizations. The home rule features which characterize the local union are not present at the intermediate level and there is less danger that public policy demanding the protection of member rights through the preservation of local control will be thwarted. Given these right of control provisions, the benefit derived by the national union from the activities of the intermediate body can readily be identified. Since the activities of the intermediate body are necessarily broader in scope, there is a greater likelihood that the national union’s interest in its day-to-day activities may be sufficient to constitute the intermediate body an agent of the national. The Teamster conferences, for example, might easily be found to be agents of the International Brotherhood. Moreover, the intermediate body is a convenient device for the achievement of uniform administration of national policies. Whenever the activities of the intermediate organization are directed to this end, the unauthorized conduct of the representatives of the intermediate body incidental to such activities should be deemed within the scope of authority conferred by the national union.

The ease with which a benefit-control approach can be adapted to the intermediate union suggests that it may be a valid and perhaps useful technique for determining when the national union should be held responsible for the acts of its subordinate organizations. Where the national union does in fact have actual control or when a clearly defined national union policy is

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131 Lahne, supra note 122, at 177-78.
furthered by local union activities over which the national has a right of control, liability should be imposed. In these situations the national union should not be permitted to benefit from unlawful conduct resulting from its failure to perform its obligation to exercise its right of control. There may, however, be other sources of the obligation of the national union to control the activities of its subordinate organizations. For example, the national union would not seem to derive in fact any greater benefit from the administration of disciplinary provisions of the national constitution by the local than from other local activities which may be equally circumscribed, such as the right of a local to strike without obtaining approval from the national union. Yet the courts find that the local union is an agent of the national for the purpose of administering disciplinary provisions of the union constitution but not for the purpose of local strike activities. To account for these cases, the national union should be examined from another perspective, that of the public and the parties injured by the wrongful conduct of the agent of the national union.

2. The Interests of the Plaintiff and the Public.

The balance between the interests of the national union and those who litigate against it reflects underlying public policy in the field of labor relations. Because this field is new and volatile, public policy lies close to the surface of labor law. From the viewpoint of the national union the most influential declaration of public policy has been the Wagner Act of 1935. This act, through government recognition and protection of unions and the institution of collective bargaining, has completely reoriented the American labor movement, and with it, the role of the national union. Since the establishment, growth, and power of such national unions as the United Auto Workers, the United Steel-

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132 See cases cited in Int'l Printing Pressmen & Assistants' Union v. Smith, 145 Tex. 399, 198 S.W. 2d 729, 734 (1946); Witmer, "Trade Union Liability: The Problem of the Unincorporated Association," 51 Yale L.J. 40, 48 (1941). But see Madden v. Atldns, 4 N.Y. 2d 283, 151 N.E. 2d 73 (1958), where the court did not hold the national union responsible even though the president of the local union was also president of the national and had failed to act on an appeal from the aggrieved member.


workers and United Rubber Workers can be attributed directly to changes wrought by the Wagner Act, the public might reasonably expect the national union to use its power for the protection of important public interests in the field of labor relations, without regard to the presence of direct and immediate benefit to the national union.

We have noted the public interest in preserving union democracy through local control. Just as this concern is reflected in the control-benefit approach to the relationship between a national union and its subordinate organizations, other public policies may be reflected through the interests of the plaintiff.

The claims of those who sue a national union for the activities of its local union may be classified according to the context in which they arise, as follows:

1) claims not arising in a context of labor relations activity;
2) claims arising out of a labor relations activity not incidental to an established collective bargaining relationship;
3) claims arising out of an established collective bargaining relationship; and
4) claims arising out of union membership.

Claims against the union may also be classified according to the purpose or means of the local activity. Labor law history teaches us, however, that lawful and unlawful purposes cannot readily be distinguished by judicial tribunals. The "objectives test" has long been controverted because it permits the court to articulate as a basis of decision policies upon which there is no substantial agreement among the public. That the means employed by the union can no more than its purposes be subjected to discerning judicial or quasi-judicial analysis has been recently pointed out by the United States Supreme Court in NLRB v. Insurance Agents' International Union. This case held that the NLRB did not have the power to find union work tactics designed to harass the management into conceding to union demands during the negotiation of a collective bargaining agreement in

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violation of the union's duty to bargain in good faith. Because of these difficulties in the application of a means and purpose classification, the objective-means approach must be rejected.

a. Non-Labor Relations Activities.

Returning then to our original classification, the first category of claims would include negligence, contract claims, or other causes of action not peculiar to the field of labor relations. For example, the plaintiff may be injured by an automobile accident involving a business agent of the local union acting within the scope of his employment\(^{138}\) or he may be litigating to recover for a refusal to compensate him for legal services rendered to the local union\(^{139}\). These activities of the labor union only fortuitously involve the union. No greater public interest is involved than in similar cases arising in other contexts; hence there is no need to apply broader rules to the national union in this category of cases.

b. Labor Relations Activities.

The second category of cases includes common law torts which arise in a labor relations context and violations of sections 8(b)(1), 8(b)(4) and 8(b)(7) of the NLRA.\(^{140}\) These activities may be directed at employers, employees, or misdirected at innocent third parties. The plaintiff may be a nonstriking employee who is roughed up on the picket line, an employer whose dry-cleaning establishment has been bombed by an agent of the local union, or an employer who has suffered loss through an unlawful picket line in front of his store. The harm may be physical injury to the plaintiff, damage to his property, or loss to his business. The activity which causes the injury may arise from a strike, picket line, or boycott made unlawful either because of its purpose or because of the manner in which it has been conducted.

Within this category several distinctions may be suggested as a basis for formulating a different agency rule applicable to the national union. First, physical injury or threat of injury to the person or his property could be ranked higher in the public

\(^{138}\) Ford v. United Bhd. of Carpenters and Joiners, 315 P. 2d 299 (Wash. 1957), \textit{supra} note 25.

\(^{139}\) FitzSimmons v. IAM, 125 Conn. 490, 7 A. 2d 448 (1939).

interest than economic damage to the employer's business. Other concerns falling within the police power of the state might warrant consideration, for example, state interest in minimizing strikes in quasi-public industries. Secondly, the fact that different remedies are made available to the injured parties may reflect a similar public concern, for example, the availability of damages to the employer for violations of section 8(b)(4) of the National Labor Relations Act.\footnote{Ibid.}

Of these, the distinction based on the quality of injury sustained by the plaintiff seems the most tenable. Federal law has recognized this distinction by preserving state jurisdiction over activities of state concern, even though violations of section 8(b)(1), e.g. mass picketing,\footnote{UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949) (Briggs-Stratton Co.). But see NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 493 n.23 (1960), citing San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 (1959), as having overruled the Briggs-Stratton approach to pre-emption. The state court, under Frankfurter's majority view in Garmon, would have jurisdiction only when it is clear that the activity is neither prohibited nor protected. Id. at 244-45. But since four judges concurred only on the ground that the peaceful picketing therein was arguably protected, whether the Court would apply Garmon in situations presenting a stronger state interest is uncertain. In any event, the Frankfurter opinion still recognizes that the state may retain jurisdiction to prevent violence and imminent threats to public order. Id. at 247-48.} may be found. Although the recognition of both state and federal interests may reflect the need for local and direct control over conduct which threatens the public peace or injury to person or property, it does not support the conclusion that the national union should provide this control. First, the public interest in threats, violence, and other conduct coming within the police power of the state has long been reflected in tort and agency rules. The fact that such conduct occurs in a labor relations context should not increase state concern. On the other hand, if the state were concerned with the economic impact of the strike rather than the danger posed to public peace by physical conduct, another objection becomes apparent. If liability were made commensurate with the state interest, an unequal and unfair burden would be imposed on the union. National unions in the power industry, for example, are no more capable of preventing strikes than are other unions. Secondly, whether the state concern is with damage to person or with the economic impact on the community, to make a dis-
tinction based on the scope of the state police power would introduce complex problems of federalism into the law of agency.

Apart from particular considerations given to state interests, it is difficult to see any distinction between violations of section 8(b)(1) and violations of section 8(b)(4). Section 8(b)(4)(ii) similarly makes it an unfair labor practice to "threaten, coerce, or restrain any person engaged in commerce" for the purpose of accomplishing one of the objectives proscribed by section 8(b)(4).\textsuperscript{143} If threats or coercion cannot be employed, it would follow that no distinction should be made where the union violates section 8(b)(4)(i) by inducing or encouraging "any individual employed by any person" to engage in a strike or refusal in the course of business to handle the goods of another.\textsuperscript{144} Since an employer's plant can be shut down and his employees put out of work in violation of section 8(b)(7)\textsuperscript{145} just as quickly by "signal picketing" for recognition as by unlawful strikes and boycotts under section 8(b)(4), such picketing should be placed in the same category as violations of sections 8(b)(1) and 8(b)(4). The fact that damages are available for violations of section 8(b)(4) but not for violations of sections 8(b)(1) and 8(b)(7) does reflect a distinction in remedial policy, but this would seem to be outweighed by the advantage of formulating uniform rules of agency to govern the primary conduct.

If it is conceded that the interests of the union and those of employees, employers, and third parties are of the same general quality with respect to this category of labor union activities, it follows that no particular consideration should be given to the individual interests of the plaintiff in terms of the law of agency to be applied to the national union. Moreover, since these activities encompass such a large proportion of the activities of the local union, any exception would cut deeply into the control-benefit analysis suggested above. Although this may not be a valid objection, the fact that no particular interests can be singled out for special treatment would make difficult, if not impossible, the formulation of any other limitation on the liability of the

\textsuperscript{144} Ibid.
\textsuperscript{145} Ibid.
national union in the area of strikes, picketing, and boycotts, whether directed at employers or employees. Thus the control-benefit approach should suffice in this second category of labor union activities.

c. Activities Incidental to an Established Collective Bargaining Relationship.

The third category of labor union activities include violations of the employer-union contract, sections 8(b)(2), 8(b)(3), 8(d), and the duty to provide fair representation implied from section 9(a) of the act. The established bargaining relationship which creates these duties is one in which the union has been certified as bargaining representative by the NLRB or one in which an employer has granted de facto recognition to the union for the purpose of representing his employees in collective bargaining, even though neither party has sought a certification.

The interests of the employer and the employees vis-à-vis the union may be clearly differentiated in the collective bargaining relationship. The employer and the union are placed in an arm's length position to create their own private law of industrial relations. The union, on the other hand, is a fiduciary vis-à-vis the employees it represents.

A common violation of the employer-union contract by the local is a breach of a no-strike clause. If the contract is signed only by the local union, the employer cannot recover against the national union. On the other hand, if the contract is signed by the national union, the employer can recover on the contract for a breach by a local union if he can establish that an agency


148 Steele v. Louisville & N.R.R., 323 U.S. 192, 202-03 (1944). We hold that the language of the Act ... expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."

The contract itself does not establish the agency relationship but merely places upon the national union a duty to act. The union's failure to act becomes an authorization of the conduct by the local union and hence a breach of the national contract. There are two reasons why the employer-union contract should not be deemed to create an agency relationship by operation of law in the absence of an express assumption of strict liability by the union. First, since the employer and the union are presumed to have equal standing to bargain, the parties can and should create their own mutual obligations. Secondly, the employer has available the remedy of self-help. He may discipline the members and leaders of local unions who participate in strikes in violation of the contract, because such activities are unprotected by the NLRA. Disciplinary action has long been recognized as the most effective means of controlling such unlawful action, and therefore, the incentive for the employer to discipline should not be reduced by giving the employer a preferred position against the national union.

If the unlawful conduct by the local union takes place during negotiations rather than during the term of a contract, the employer may contend that the local's activities violate sections 8(b)(3) and 8(d) of the NLRA. Section 8(d) requires the employer and representatives of the union to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder." When the local union is the certified bargaining representative and is nominally conducting the negotiations in its own behalf, it would seem difficult to hold the national union liable for refusing to bargain in good faith. The Board has surmounted this difficulty in several ways. In one case it found that the national union was an agent of the local union. In another it

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153 Ibid.

held the national union liable as a principal because its policies were being implemented through the local negotiations.\footnote{Chicago Typographical Union, 86 N.L.R.B. 1041 (1949). Cf. Boone County Coal Corp., 117 N.L.R.B. 1095 (1957). (national union liable for failing to disavow local strike).}

On the other hand, where the national union is the certified bargaining representative, the Board has held in Westmoreland Coal Company,\footnote{117 N.L.R.B. 1072 (1957)} discussed above, that if the local conducts the negotiations, it must do so as an agent of the national union. In the Westmoreland case, however, the Board declined to hold that the national union had refused to bargain in good faith. If any conclusion were to be drawn from these cases, it would be that the statutory certification should be disregarded for the purpose of determining whether an agency exists, since the Board in all of these cases looked to see whether the national controlled and derived a benefit from the conduct of negotiations by the local union before imputing the local's conduct to the national union.

The control-benefit approach adequately reflects the public's concern for the creation of an atmosphere in which an arm's length bargain can be made between an employer and a union. The recent approval in the Insurance Agents' case of the use of harassing tactics such as work stoppages during negotiations point toward a minimal use of section 8(b)(3) to restrict the use of economic power by the union during negotiations.\footnote{NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960).} Although it seems likely that the courts will make more extensive use of section 8(b)(3) to restrict union activities for improper objectives under the section, Professor Cox suggests that the course most consonant with the purposes of the act would be "to reject all new attempts to limit the phrase 'terms or conditions of employment,' thus reading it to embrace every stipulation which management or labor might advance not inconsistent with a federal statute or declared public policy."\footnote{NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960).} Under the construction given to section 8(b)(3) either by Professor Cox or by the Supreme Court in the Insurance Agents' case,\footnote{Cox, "The Labor Decisions of the Supreme Court, October Term, 1957," 44 Va. L. Rev. 1057, 1086 (1958).} the limitations imposed by the section would not seem to require
greater control by the national than that imposed by the benefits-control approach.

Section 8(b)(2) proscribes union efforts to cause an employer to encourage or discourage membership in a labor organization by discriminating in hire, or terms or conditions of employment. It makes equally unlawful union tactics designed to discriminate against employees because of union membership or nonmembership for any reason other than the failure to pay periodic dues and initiation fees under lawful union shop agreements. The Mallory case,\textsuperscript{160} discussed above in connection with the status of stewards as agents,\textsuperscript{161} presents a good example of employer coercion. There, it will be recalled, the local stewards led a strike to compel the discharge of a nonunion employee because of his prior membership in a communist-dominated union. Except for the unlawful purpose of this strike, it was to the employer no different from strikes for other purposes, and hence he should have been entitled to no greater protection by the national union. The fact that a more binding rule in this instance may indirectly protect the employee discriminated against is not sufficient to justify a stronger rule here because other sections of the act, \textit{e.g.}, section 8(b)(4)(ii)(D) (prohibiting restrictive work assignments), also may provide similar indirect protection to employees.\textsuperscript{162}

From the employee's point of view union coercion of an employer to discriminate against the employee constitutes a violation of section 8(b)(1) as well as section 8(b)(2), even though no acts of force or violence are involved.\textsuperscript{163} Whenever the discrimination is with respect to the terms and conditions of employment, the violation of section 8(b)(2) will necessarily involve the employer. Aside from attempting to cause the employer to discriminate, the union alone can discriminate against an employee only with respect to admission or suspension from the union.

Several arguments can be adduced in support of placing a duty on the national union to protect the rights of employees

\textsuperscript{160}237 F. 2d 437 (7th Cir. 1956).
\textsuperscript{161}Note 64 \textit{supra} and accompanying text.
\textsuperscript{163}NLRB v. Philadelphia Iron Works, 211 F. 2d 937 (3rd Cir. 1954).
represented by its local union. First, the union has a duty to provide fair representation for its employees. If there is a duty to provide fair representation in regard to the terms and conditions of employment, it may be argued, a fortiori, that a similar duty exists under section 8(b)(2). Second, the national union is in a better position than any other body to protect employees in an established bargaining relationship from discrimination by the acts of the local union. Third, since the relief sought by the employee consists only of reinstatement and back pay, the cost to the national union would be small.

The arguments against requiring the national union to be responsible for discriminatory local conduct are more persuasive. First, neither the duty of fair representation nor the duty not to discriminate with respect to membership reflect a basic concern of the common law with the rights of the minority employee. At common law an employee could recover from the union for discriminating against him only when membership in the union was not open to him on reasonable terms. The common law rule permitted the union to take steps to remove the threat of the non-union employee to the competitive position of the union and thereby to restrict the fruits of union effort to union members. Despite the statutory certification of the union as the exclusive representative, these economic justifications for action against the non-union employee are still present. Therefore, so long as the employee makes no contribution to the support of the national union and does not desire to become a union member, he should not be entitled to rely on protection of his statutory rights by the national union. If he does want to become a member of the union but the union's discriminatory conduct persists, he should be remitted to the common law where it is arguable that the national union should be held responsible. Assuming that the national union could be held responsible as a matter of state law, the common law should not be extended by the NLRB as a "common law rule of agency" to require relief from the national because of the administrative reasons set forth below.

104 Restatement, Torts §810 (1939).
Second, although the national union may be in a better position than other bodies to protect the employees represented by its local unions, the discrimination against employees in section 8(b)(2) is so closely related to the other types of conduct proscribed by the act that a separate rule could not be adequately administered. Discrimination against employees in many cases will involve coercion concerning employees' terms and conditions of employment. Only the object of this coercion differentiates it from the union activities proscribed by other portions of the act.

The object alone of coercive tactics in violation of section 8(b)(2) is not sufficient to offset the administrative inconvenience of following a more strict rule because the relief which could be obtained from the national union would be little. The fact that there would be little cost to the national union would reduce the likelihood that the union would exercise its control to deter discrimination.

In respect to the duty of the union to provide adequate representation for its employees, the inability of the courts to formulate standards implementing the duty of fair representation in a manner that would vindicate the rights of individual employees arising out of the administration of the collective bargaining agreement limits the utility of any new rule. Since the problem here is one of balancing an undefined employee right against the disadvantages of judicial intervention in the bargaining process, perhaps it would be best not to impose a vicarious responsibility on the national union until the duty could be defined with sufficient clarity to permit effective deterrent action by the national.

On the other hand, if a greater duty were placed on the national union to provide fair representation, this duty could be sufficiently distinguished from other duties imposed by the act to be susceptible of independent administrative application. This duty is imposed upon the union alone, whereas the duty not to discriminate imposed by section 8(b)(2) is also imposed on the employer under section 8(a)(3). Since the policy against judicial intervention in union internal affairs has been substantially

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160 See, e.g., United Bhd. of Carpenters & Joiners v. NLRB, 41 CCH Lab. Cas. ¶16658 (D.C. Cir. 1961) (national union sought to be held for violations of 88(b)(4)(A) and 88(b)(2) as a result of local union activity concerning employment of nonunion employees at common situs).
weakened by Title I of the Labor Management Disclosure Act of 1959,\textsuperscript{167} which permits union members to litigate their rights after four months, the balance probably tips toward holding the national union responsible for the activities of its locals which violate the statutory duty to provide fair representation to its members, but not for activities in violation of section 8(b)(2).

d. Activities Arising Out of Union Membership.

The foregoing arguments against holding the national union responsible for violations of unfair labor practices arising out of an established bargaining relationship do not apply when the employee seeks to enforce a private right against the union for discrimination with respect to his membership in a union. If the local is deemed an agent for the purpose of expelling and suspending its members,\textsuperscript{168} it should be so regarded when membership is unlawfully refused to an employee at common law.

With respect to its members the union has, in addition to the duty to provide fair representation imposed by statute, the fiduciary duty created by the membership status. Although the courts have rejected the notion that the relationship is a status giving rise to an advantageous relationship which will support an action against the union on a tort theory,\textsuperscript{169} the orthodox contract

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\textsuperscript{167} 73 Stat. 522-23, 29 U.S.C. §411(a)(4) (Supp. I, 1959). The fact that federal courts have declined jurisdiction under the act over causes of action arising out of the failure of the union to prosecute grievances on the ground that the act extends only to improper disciplinary actions, Allen v. Teamsters Local 820, 185 F. Supp. 492 (D. N.J. 1960), only points up the need for uniform treatment of the duty to represent employees and duties owing to union membership. The union should not be permitted to accomplish what it could not do by unlawful disciplinary action by failing to provide adequate representation. Thus, if the national union is liable for the former, it should also be liable for the latter.

\textsuperscript{168} See cases cited note 132 supra.


Some American courts have denied recovery on either tort or contract theory on the ground that an employee cannot sue his coprincipals, McClees v. Grand Int'l Bhd. of Locomotive Engineers, 59 Ohio App. 477, 18 N.E. 2d 812 (1938); Howland v. Local 306, UAW-CIO, 331 Mich. 644, 50 N.W. 2d 186 (1951) (held union estopped to plead this argument because it had argued in the trial court that the employee was not a member of the union). However, a recent English case, Bonsor v. Musicians Union [1956], A.C. 104, held a union member was not suing himself when he brought suit against the union. See Wedderburn, "The Bonsor Affair: A Post-Script," 20 Modern L. Rev. 105 (1957). Wedderburn's analysis characterizes the Bonsor agency problem as threefold: first, whether a member of a union who sues a union is suing himself among others; second, whether an agent of the union is an agent of the plaintiff at least as much as of his fellow members; third, whether, if the act be regarded as unauthorized, the other members can be
\end{footnote}
and property theories\textsuperscript{170} cannot provide a cause of action against the national union unless the breach by the local union is imputed to the national union. To this extent even the orthodox theories require that an agency relationship between the national union and the member be found.

The national union is a fiduciary not only in theory but also in practice. Many have review procedures; some grant the member the right of appeal to an impartial tribunal.\textsuperscript{171} These procedures have been reinforced by the safeguards against improper disciplinary action in Title I of the Labor Management Reporting and Disclosure Act.\textsuperscript{172} Thus the national union can protect the union member against both improper disciplinary action and failure to provide adequate representation by the local union.

From the plaintiff’s point of view, therefore, the national union should be particularly concerned to see that its local unions fairly represent employees and fulfill its obligations to union members. Since the primary function for which a national is formed is one of representation and its primary object is to protect its members, the national union can hardly say that these vital interests of its members are not its own. And on this basis these duties can easily be read into the control-benefit approach

\textsuperscript{(Footnote continued from preceding page)}

deemed to have ratified through their acquiescence in the acts of the union officer. He then pursues the possible solutions to these problems suggested in \textit{Bonsor} and concludes that there is no way that recovery can be granted to plaintiff without in fact resorting to some theory of entity. Wedderburn, \textit{supra} at 118. The \textit{Bonsor} solution has had a salutary effect on the American decisions. See Taxicab Drivers Local 859 v. Pittman, 322 P. 2d 159 (Okla. 1957), where the court held that with respect to the first aspect of the \textit{Bonsor} problem, \textit{supra}, the union was estopped to deny it was an entity because it had dealt in its common name with both plaintiff and plaintiff’s employer. With respect to the second and third aspects of the problem the court adopted the \textit{Bonsor} argument that the union officials were not agents of plaintiff member because they were not acting in his behalf.

The doctrine that a union member cannot sue his union because of his status as coprincipal has been limited to rights not incidental to union membership, Fray v. Amalgamated Meat Cutters, 9 Wis. 2d 631, 101 N.W. 2d 782 (1960), but converse reasoning was used in \textit{Di Maio v. Local 80-A, United Packinghouse Workers, 29 N.J. Super. 341, 102 A. 2d 480 (L. 1954)} to grant recovery to a member of the union for libel, on the ground that the agency prohibition was limited to rights owing to the union member as a member.


\textsuperscript{171} Of these the most well-known are the Upholsterers Review Board, established in May 1954, and the United Auto Workers Appeal Board, created on April 12, 1957 at the union’s sixteenth convention. Wellington, “Union Democracy and Fair Representation: Federal Responsibility in a Federal System,” 67 Yale L.J. 1327, 1349-51 (1958).

to the allocation of responsibility to the national union for the conduct of its local and intermediate unions.

III. Conclusion

This attempt to clarify the responsibility of the national union for the acts of its subordinate organizations yields three conclusions. First, the national union may be held liable when the facts will support an inference that it has consented to unlawful conduct. Consent may be expressed or it may be implied from silence or acceptance of benefits when the union fails to discharge a duty established by a prior course of national union conduct, by an employer-union agreement, or by the unlawful conduct of a local union which makes a substantial contribution to a clear and definite union policy. Second, the national union may be held liable for the unauthorized conduct of a local or intermediate union whenever it can be shown to have actual control over the local union or to have a right of control and a clearly defined beneficial interest in the activities of the local. Where the control-benefit analysis seems too vague to provide concrete assistance, the court would do well to impose on the national union no more than a duty to act. The imposition of such a duty in the area of authorized conduct can provide a useful halfway house in imposing responsibility on the national union on the basis of respondeat superior because of the court's discretion to determine whether the national union is under a duty to act and whether it has discharged the duty. Finally, the national union should be held responsible for the fair representation of employees and for the protection of the rights of union members.