To: Labor/Community/Religious Coalition in Support of the Striking Newspaper Workers

From: Ellis Boal

Re: Legal Notions Concerning Proposed General Strike

Date: September 21, 1995

I. INTRODUCTION

At its regular meetings of September 13-14, 1995, the Coalition approved the following motion:

> The striking unions are urged to request the Metro Detroit AFL-CIO to ask its affiliates to conduct referendum votes to authorize the AFL-CIO to call a one-day work stoppage as a solidarity action in support of the striking newspaper workers.

In presenting the motion steering committee member and UFCW international rep Jerry Gordon emphasized before the vote that if such radical action were approved by unions it would most certainly be met with a spate of lawsuits and injunctions.

The purpose of this memo is to outline preliminarily some of the legal notions that would be applicable to such an action. Much of the law revolves around interpretation of particular contracts governing the involved unions and their employers, so this can be only general.

The memo assumes that the motion contemplates a pre-announced general strike. It assumes that the demands made by the "generalists" would not be directed at their own employers. That is, in conformance with the ordinary definition of a sympathy strike, there would be solidarizing unions which:

> align themselves with other workers involved in a dispute with another employer (or perhaps the same employer.)[1]

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1 Operating Engineers Local 18 (Davis-McKee Inc), 238 NLRB 652, ___ n 13, 99 LRRM 1307, 1310 n 13 (1978). Sympathetic and general strikes have a long and distinguished history in American labor history. For accounts of the successful four-day 1934 general strike in San Francisco, involving 160 AFL locals and 127,000 workers, see Richard Boyer & Herbert Morais, Labor's Untold Story, 282-89 (UE, New York, 1955); Art Preis, Labor's Giant Step, 31-33 (Pathfinder Press, New York, 1972). The UAW constitution authorizes

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The sole purpose of the generalists would be to show solidarity with the newspaper unions, and to shut down three counties to that end.

The legal consequences are identical regardless whether the action is termed a strike, work stoppage, or sickout.[2] While it is correct to say that sympathetic action is legally risky and courts will probably respond to demanding employers, the legal situation is not entirely bleak.

By way of analogy, recall that in Detroit in 1981 Judge Cohn refused to collect a $100,000 civil contempt fine the government sought against the Detroit PATCO local even though the strike was completely illegal.[3] Additionally, as is described in more detail below:

* Because of the Norris-LaGuardia Act employers will have trouble getting injunctions.

* Damage suits against unions would depend on the particular interpretation of the wording of no-strike clauses in contracts, and the courts seem to have rejected an NLRB attempt in the 1980s to try to expand unclear clauses to include sympathy strikes. Regardless of the express wording of a no-strike clause, if there were evidence that there was no intent that it was to cover sympathetic action, a court may read it to mean that right has not been waived. Additionally, an employer might be required to go through an arbitrator first.

* Damage suits based on contracts against individual strikers are not allowed.

* So long as the generalist unions do not demand of their employers that they curtail business with DNA, there should be no secondary boycott liability for themselves.

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its international executive board in certain emergency situations, by a ⅔ vote and after membership referendums, to declare a general strike in the industry. Article 50 section 8.

2 Laborers Local 616 (Bruce & Merrilees Electric Co), 302 NLRB # 136, 137 LRRM 1144 (1991).

3 US V PATCO, 525 F Supp 820, 108 LRRM 2999 (ED Mich, 1981). The government had fired the controllers, making compliance with the injunction impossible.

* A court of appeals ruled in June that where a union acts solely out of feelings of solidarity with a union which has a primary labor dispute, the solidarizing union is not the primary union's legal agent in an action against the primary union for secondary boycott.

II. INJUNCTIONS BASED ON NO-STRIKE CLAUSES IN CONTRACTS.

In 1976 the supreme court ruled in the Buffalo Forge case that a sympathy strike cannot be enjoined, even though it might violate the contract.[4] In the case, a local of Steelworker clerical employees put a line around a plant, and Steelworker production employees honored it. The employer tried to enjoin the production local. But the Norris-LaGuardia Act,[5] signed by President Hoover, generally prohibits injunctions in labor disputes. With certain exceptions not applicable here, the national labor policy is for the courts to stay out of disputes if the strike is over something that cannot be handled through the grievance procedure. A sympathy strike is the classic example: there would be no demand of the generalists their employers could grant which would stop it. The Buffalo Forge rationale has been used by federal judges in Detroit to deny injunctions.[6]

If an employer believes a general strike violates the contract, it could try to get an order from an arbitrator to that effect,[7] in which case the arbitrator's order could then be enforced by injunction.[8] A "class action" -- wherein all employers as a class sued or grieved against all the unions as a

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4 Buffalo Forge Co v Steelworkers, 428 US 397, 96 S Ct 3141, 92 LRRM 3032 (1976).

5 29 USC 101 et seq.

6 Automobile Transport Inc v Ferdnance, 420 F Supp 75, 92 LRRM 3610 (ED Mich, 1976). Judge Joiner's rationale was also adopted by Judge DeMascio in unreported related litigation.

7 Steelworkers v Warrior & Gulf Navigation Co, 363 US 574, 80 S Ct 1347, 46 LRRM 2416 (1960).

8 Steelworkers v Enterprise Wheel & Car Corp, 363 US 593, 80 S Ct 1358, 46 LRRM 2423 (1960).

class -- would be out of the question, because so many different contracts would be involved.[9]

If an injunction were granted, punitive criminal contempt penalties could only be imposed after a jury trial. Civil contempt fines, which seek to coerce compliance or compensate the employer, could be imposed without a jury. Because there was no jury, last year the supreme court vacated $52,000,000 in fines against the UMWA for widespread, ongoing, out-of-court violations of a complex injunction.[10]

III. DAMAGE ACTIONS OR DISCHARGES BASED ON NO-STRIKE CLAUSES IN CONTRACTS.

It is not likely that an employer would try to fire everyone if a whole shift stayed out, though it might try to nail a few leaders.[11] Nor could the employer sue individual peaceful strikers for damages.[12]

If a union happens to be working without a contract, such as the Teamster carhaulers today who do not work for struck Ryder, there would be no union liability for a general strike. Though employer-employee working conditions continue after contract expiration, employer-union relations including the no-strike clause don't.[13]

A strike where there was a contract with a no-strike clause would be more problematic. An employer might try to sue its

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9 FRCP Rule 23(b).

10 Mineworkers v Bagwell, ___ US ___, 114 S Ct 2552, 146 LRRM 2641 (1994).

11 Schramm v Complete Auto Transit, 101 LRRM 2178 (ED Mich, 1979). Cf Metropolitan Edison Co v NLRB, 460 US 693, 103 S Ct 1467, 112 LRRM 3265 (1983); Indiana & Michigan Electric Co, 273 NLRB # 193, 118 LRRM 1177 (1985).

12 Complete Auto Transit Inc v Reis, 451 US 401, 101 S Ct 1836, 107 LRRM 2145 (1981).

13 Indiana & Michigan Electric Co, 284 NLRB # 7, 125 LRRM 1097 (1987).

union, though it might be required to go through the grievance procedure first.[14]

The bottom line on any threat to sue or arbitrate is the wording of the no-strike clause itself, if there is one, and how an arbitrator would ultimately interpret it. Despite seemingly absolute language in a clause barring all strikes, decided cases show this may not actually be the case. An arbitrator or judge might possibly allow a sympathy strike if:

1. the no-strike clause excludes sympathetic actions such as honoring picket lines, or

2. the no-strike provision is merely inferred, or is narrow in that it is considered a quid-pro-quo for the grievance procedure and not for the no-lockout clause, or

3. the no-strike clause is broad, but there is a bargaining history in which the parties have disagreed whether sympathy strikes are covered by the no-strike clause, or the company has historically permitted honoring picket lines or other sympathetic action.

1. Teamster contracts commonly contain clauses which protect the right to honor primary picket lines at other employers' premises. These clauses are legal and enforceable.[15] They would undercut employer claims that the Teamster contracts prohibit all sympathetic action.

2. Where there is only an inferred or a narrow no-strike clause the traditional rule, following the rationale of Buffalo Forge, is that it is coterminous with the grievance procedure. Hence a sympathetic strike imposes no liability.[16]

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14 Drake Bakeries v Bakery Workers, 370 US 254, 82 S Ct 1346, 50 LRRM 2440 (1962); cf Briggs & Stratton Corp v Local 232, 36 F3d 712, 147 LRRM 2531 (CA7, 1994).

15 NLRB v Rockaway News Supply Co, 345 US 71, 73 S Ct 519, 31 LRRM 2432 (1953); Laborers Local 300 (Jones & Jones, Inc), 154 NLRB 1744, 60 LRRM 1194 (1965). Cf Redwing Carriers, 137 NLRB 1545, 50 LRRM 1440 (1962), enf'd sub nom Teamsters Local 79 v NLRB, 325 F2d 1011, 54 LRRM 2707 (CADC, 1963), cert denied 377 US 905 (1964).

16 US Steel Corp v UMW, 548 F2d 67, 94 LRRM 2049 (CA3, 1976), cert denied 431 US 968 (1977); Delaware Coca-Cola Bottling Co v Teamsters Local 326, 624 F2d 1182, 104 LRRM 2776 (CA3, 1980).

3. In 1978 over a dissent the NLRB decided Davis-McKee,[17] holding no-strike clauses generally are coterminous with arbitration clauses. The board reasoned that a clause's waiver of the right to strike must be "clear and unmistakable." Since there was no specific reference to sympathy strikes in the clause's wording or in the bargaining history the right was held not waived. In effect, there was a presumption that even a broad no-strike clause does not waive sympathetic action.

In 1985 in two cases on the same day, the NLRB overruled Davis-McKee and adopted the reasoning of the dissenter, that absent evidence to the contrary a clause should be construed to prohibit sympathy strikes.[18] In effect the pro-union presumption was reversed. The unions appealed in both cases.

In the first case, in 1986 the ninth circuit reversed the NLRB. It did not reach the broad Davis-McKee issue whether no-strike language generally includes or excludes sympathy strikes. But it reminded the NLRB that strike waivers must be clear and unmistakable. It approved the ALJ's original ruling in the case, made while Davis-McKee was still in effect. The ALJ had found that despite the express language, the bargaining history showed no express agreement about crossing picket lines, and the no-strike clause was a quid-pro-quo for the arbitration clause. The court held it improper for the NLRB to establish an irrebuttable presumption that a broad no-strike clause prohibits sympathy strikes.[19]

In the second case, the DC circuit also reversed and remanded. Though the express language of the no-strike clause was broad and unlinked to the arbitration clause, and therefore seemed on its face to bar sympathy strikes, the court noted the right to honor picket lines was fundamental to unionism. There was evidence that in negotiations the parties had agreed to disagree on the question of sympathy strikes. Accordingly there was no unmistakable waiver, the NLRB's "inflexible presumption" was rejected, and the case was remanded.[20] On remand, the NLRB contended that the reversal of Davis-McKee remained valid. But

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17 Operating Engineers Local 18 (Davis-McKee Inc), 238 NLRB 652, 99 LRRM 1307 (1978).

18 Indianapolis Power & Light Co, 273 NLRB # 211, 118 LRRM 1201 (1985); Arizona Public Service Commission, 273 NLRB # 210, 118 LRRM 1277 (1985).

19 IBEW Local 387 v NLRB, 788 F2d 1412, 122 LRRM 2304 (CA9, 1986).

20 IBEW Local 1395 v NLRB, 797 F2d 1027, 122 LRRM 3265 (CADC, 1986).

it "clarified" its doctrine to require consideration of bargaining history and past practice. It held the no-strike clause -- which was linked to the no-lockout clause not the grievance procedure -- did not cover sympathy strikes. A concurring NLRB member felt the NLRB should own up to holding that it was reversing its rule once again.[21] The employer then appealed to the seventh circuit. That court, finding the clarified interpretation "reasonable and consistent with the act," affirmed. It agreed with the concurring NLRB member that

> the inquiry has come full-circle back to the Davis-McKee approach; the burden is on the employer....

It discounted that the union twice had attempted unsuccessfully to bargain express language allowing certain sympathetic action.[22]

One other case should be noted. In 1987 the third circuit approved the 1986 NLRB's reversal of Davis-McKee. It found the no-strike clause before it was in exchange for the no-lockout clause, not the arbitration clause. Further the law in effect when the clause was negotiated contemplated that broad no-strike clauses generally did cover sympathy strikes, and two arbitrators had interpreted the particular contract before it just that way. But the court agreed the NLRB may not erect an "inflexible presumption" against sympathetic action.[23]

After the third circuit decision the NLRB changed its rule, as noted above. The third circuit decision was barely mentioned in the seventh circuit opinion, which is the most clear-cut.

IV. SECONDARY BOYCOTT LIABILITY

A mere request or informational picket at an establishment that does business with DNA is legal.[24]

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21 Indianapolis Power & Light, 291 NLRB # 145, 130 LRRM 1001 (1988).

22 Indianapolis Power & Light v NLRB, 898 F2d 524, 133 LRRM 2921 (CA7, 1990).

23 Electrical Workers Local 803 v NLRB, 826 F2d 1283, 126 LRRM 2065 (CA3, 1987).

24 DeBartolo Corp v Florida Gulf Coast Building Trades, 485 US (continued...)

Striking generalists would not be liable for boycotts unless they demanded of their employers that they or their subcontractors stop doing business with DNA.[25] A secondary or tertiary[26] boycott that did include such demands would be illegal.

But regardless what other unions did, the striking newspaper unions would only be liable if it were found that the solidarizing unions were their legal "agent." In a case decided this summer, the ILA had a dispute with nonunion stevedoring companies. The ILA asked Japanese unions not to unload fruit that was loaded nonunion in Florida. The Japanese unions, which are beyond the reach of US law, complied. The ILA later thanked them in writing and stated their action was responsible for the diversion of work out of nonunion ports. The DC circuit held that since the Japanese unions acted solely in "a spirit of labor solidarity" with the ILA that did not make them the ILA's legal "agent."[27] In so holding, it disagreed with the NLRB and with an earlier decision of the eleventh circuit in the same case.[28]

One of the implications of this case seems to be that actions of community supporters of the strike, such as members of this coalition, should not be used against the newspaper unions. For instance, the blocking of driveways by community supporters in Sterling Heights should not result in liability for the unions under Judge Cashen's injunction.

24(...continued)
568, 108 S Ct 1392, 1400, 128 LRRM 2001 (1988).

25 29 USC 158(b)(4)(B).

26 Local 450 Engineers v Elliott, 256 F2d 630, 42 LRRM 2347 (CA5, 1958).

27 Longshoremen, ILA v NLRB, 56 F3d 205, 149 LRRM 2449 (CADC, 1995).

28 Dowd v ILA, 975 F2d 779, 141 LRRM 2489 (CA11, 1992).