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

From: Ellis Boal

See also 152 LRRM 1109, 1170

Re: Update on Sympathy Strikes

Date: December 13, 1995

"Sympathy strikes are a common manifestation of traditional union solidarity."[1]

On September 13-14 and October 24 the Coalition called on the Detroit Metro AFL-CIO, based on a vote of its affiliates, to call a one-day work stoppage of area unions as a solidarity action in support of the striking newspaper workers. As of today memberships of three of the six striking unions (printers, engravers, and pressmen) have supported this.

On September 20 I wrote a memo discussing legal notions of general strikes. The gist was that while it was wise to counsel "generalist" unions contemplating action of the dangers of sympathetic action, there should not be a knee-jerk view it would necessarily be held illegal. The memo noted that employers would have trouble enjoining sympathy strikes, suing individual members for damages, claiming there was an illegal secondary boycott, or suing unions such as certain Teamster carhaul locals at the time whose members were working without a contract.

As for damage suits against the generalist unions, the memo noted this would depend on the interpretation of specific no-strike clauses. It reviewed the NLRB's evolving rule of construction. Currently, regardless of the broad and express wording of a particular clause, if the "extrinsic" evidence -- the legal landscape, the linkage of the clause with the grievance procedure and/or no-lockout clause, the existence and placement of other related clauses in the contract, and the history of bargaining, company enforcement, and arbitral decisions -- shows the intent is unclear or ambiguous on the issue of sympathetic action, the NLRB protects it. Union waivers of such important rights which are not "clear and unmistakable" are ineffective.

Two NLRB cases not noted in the memo continue this view:

In 1985, relying on the just-issued and as-yet unclarified Indianapolis Power & Light[2] decision, the NLRB considered a 1980

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1 Black's Law Dictionary, 5th Revised Edition, 1979, p 1276.

2 Indianapolis Power & Light Co, 273 NLRB # 211, 118 LRRM

(continued...)

sympathy strike which resulted in one-day suspensions of 240 OCAW members. The no-strike clause stated simply there will be no strikes, work stoppages, slowdowns, lockouts, or other intentional interferences with production. At first, instead of deciding the merits of the case, the NLRB deferred to a 1978 arbitration decision which had upheld discipline in such a strike. At the time of the 1980 strike under review, in addition to the 1978 case, the evidence was that the company had once previously allowed sympathetic action by members to go undisciplined, the union had proposed and withdrawn a change in the no-strike clause claiming the proposal was only meant to clarify existing understandings, and Davis-McKee[3] with its 180°-different pro-union burden of proof was in effect. Then on appeal, the ninth circuit remanded, holding the NLRB should have considered the extrinsic evidence. On remand in 1987, the NLRB applied the resuscitated Davis-McKee rationale and rejected the 1978 arbitration decision. Without relying on the doctrine of coterminous application, it reasoned that the parties had agreed to disagree on the meaning of the no-strike clause at the time the union had proposed and withdrawn its change in the language. Therefore the sympathy strike was protected.[4]

In a 1989 nursing home case, the NLRB reviewed a contract clause that prohibited both strikes and lockouts and said any differences will be resolved through arbitration. There was no extrinsic evidence of the parties' intent one way or the other. Though the no-strike clause was separate in the contract from the grievance procedure, the functional linkage with arbitration convinced the NLRB under the clarified 1988 Indianapolis Power & Light[5] that it was coterminous with the arbitration clause. Employer statements made during the two-month sympathy strike that strikers could lose their jobs or be replaced were ambiguous; they could have meant merely sympathy strikers were replaceable; this would have been consistent with sympathy strikes not being prohibited by the contract. Accordingly the company should have reinstated 11 unreplaced strikers at strike's end and

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2(...continued)
1201 (1985), remanded IBEW Local 1395 v NLRB, 797 F2d 1027, 122 LRRM 3265 (CADC, 1986).

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

4 Chevron USA, 275 NLRB # 132, 119 LRRM 1238 (1985), reversed, 842 F2d 1141, 127 LRRM 3164 (CA9, 1988), supplemental opinion 296 NLRB # 73, 133 LRRM 1064 (1989).

5 Indianapolis Power & Light, 291 NLRB # 145, 130 LRRM 1001 (1988), aff'd 898 F2d 524, 133 LRRM 2921 (CA7, 1990).

9 more when it began hiring later. Backpay was ordered in amounts to be determined.[6]

NLRB decisions concern individual union members being disciplined, not unions being sued under section 301[7] for damages. My previous memo did not discuss damage suits. The news from this front is less encouraging.

In 1984 a split sixth circuit sitting en banc upheld a $26,238.50 damage award against a Teamster local. Termed a "molehill," the strike -- which assumedly protested the trespassing arrests of two fired drivers -- was not a sympathy strike. But like a sympathy strike, it was over a non-arbitrable issue. The majority treated the rule of coterminous application as one of contract construction not of law. Claiming to view the contract in light of the law when it was made, it held the Teamsters' national master freight agreement and southern conference OTR supplement barred strikes even over nonarbitrable issues. Without citation to bargaining history it held the no-strike clause was given in exchange for the no-lockout clause, not for the grievance procedure. It also relied on the existence of specific contractual allowances of certain non-arbitrable sympathetic actions: supportive actions to assist other Teamster locals having disputes with the generalists' employers, and refusals to cross primary picket lines. The court reasoned these allowances meant other non-arbitrable issues were therefore not strikable. In the previous memo I argued the presence of these clauses tended to establish the contract generally allowed sympathetic action. This decision may undercut that view. But perhaps the court would view a genuine sympathy strike differently from a "molehill." The decision came before the several remands by other courts of the unclarified 1985 Indiana Power & Light doctrine.[8]

Finally in a split 1990 decision the eighth circuit affirmed jury verdicts of $24.6 million for a company against a local and its international union because members honored picket lines of a sister local in a 1987 dispute with the company. The no-strike clause was expressly linked to the grievance procedure. Against a union argument that therefore the contract on its face allowed sympathy strikes, the court noted it also required members to accept struck work from other company plants. Also

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6 Bristol Convalescent Home, 293 NLRB # 73, 132 LRRM 1070 (1989).

7 29 USC 185(a).

8 Ryder Truck Lines v Teamsters Local 480, 727 F2d 594, 115 LRRM 2912 (CA6, 1984) (en banc), cert denied, 469 US 825 (1984).

union negotiators had agreed an earlier no-strike clause barred sympathy strikes, had tried unsuccessfully to change the present one to explicitly allow them, and had agreed the present one barred wildcat strikes. The court held the contract ambiguous. Under general rules governing commercial contracts, the meaning of an ambiguous contract is a jury question. So the court sent it to the jury with the instruction that to win the company had to prove the unions had clearly and unmistakably waived sympathy strikes. The jury said the company had proved this. The court also vacated an arbitration decision upholding the unions. The court noted the company had not consented to arbitrate the issue of sympathy strikes in the submission, and it held the jury verdict should have precluded a contrary arbitration decision. The dissent agreed with the unions that the contract was unambiguous and therefore not jury-submissible. But even if it were ambiguous, it continued, that would necessarily mean any waiver was not clear and unmistakable, and therefore it did not bar sympathy strikes.[9]

Considering these cases, the question of generalist union liability in damage suits is still governed by a union's particular contract and surrounding history. The idea that unions agree to no-strike clauses just to get no-lockout clauses lacks any basis in history,[10] and should be easy to refute. But bad historic union admissions with a particular employer could hurt. If there has been no history of negotiation on sympathetic action at all, as in Bristol Convalescent Home it may be permitted.

Courts of appeals are to use the same standards construing a contract, whether in the NLRB or 301 context.[11] But they should defer to the NLRB's interpretation of a contract if it is reasonable and consistent with the policies of the law.[12] (Arbitration proceedings on the other hand seem to be getting very little deference.)

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9 John Morrell & Co v UFCW Local 304A, 913 F2d 544, 135 LRRM 2233 (CA8, 1990), cert denied 500 US 905 (1991).

10 Textile Workers v Lincoln Mills, 353 US 448, 455, 77 S Ct 912 (1957); Steelworkers v Warrior & Gulf Navigation Co, 363 US 574, 578, 80 S Ct 1347 (1960); Teamsters Local 174 v Lucas Flour Co, 369 US 95, 105-06, 82 S Ct 571 (1962); Boys Markets v Retail Clerks, 398 US 235, 248, 90 S Ct 1583 (1970).

11 Local 1395 IBEW v NLRB, 797 F2d 1027, 1030, 122 LRRM 3265 (CADC, 1986).

12 Electrical Workers v NLRB, 786 F2d 733, 736, 121 LRRM 3259 (CA6, 1986); NLRB v Southern California Edison, 646 F2d 1352, 1362, 107 LRRM 2667 (CA9, 1981).

The most recent NLRB pronouncements amount to reinstatement of Davis-McKee, as the seventh circuit has observed.[13] In NLRB proceedings the burden is now back on employers.

So if any generalist local observes a call to sympathetically strike its own employer in response to calls from the striking unions, perhaps its best legal response to a threat of a damage action would be to start a preemptive NLRB case first against individual threats or reprisals. Then hope to get a favorable NLRB construction of its no-strike clause, which the court would defer to in any subsequent damage action.

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13 Indianapolis Power & Light v NLRB, 898 F2d 524, 528, 133 LRRM 2921 (CA7, 1990).