

1-1965

Use of Presumptions to Establish the Tort of Instigation of Strikes in Breach of Contract

Owen Fairweather

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

 Part of the [Law Commons](#)

Recommended Citation

Owen Fairweather, *Use of Presumptions to Establish the Tort of Instigation of Strikes in Breach of Contract*, 17 HASTINGS L.J. 301 (1965).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol17/iss2/7

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

Use of Presumptions to Establish the Tort of Instigation of Strikes in Breach of Contract

By OWEN FAIRWEATHER*

TO an employer, the most important provision of a collective bargaining agreement is the pledge that there shall be no strikes during its term. This commitment enables an employer to make plans. Deliveries can be scheduled on the assumption of uninterrupted production. A strike in breach of this basic commitment frustrates, from the employer's point of view, the economic purpose of the agreement.

Furthermore, as our national labor policy develops, it is clear that one of its main objectives is labor peace. This aspect of the policy is so strong that when arbitration is provided in an agreement which does not contain a no-strike clause, one is implied to prohibit strikes over arbitrable disputes.¹ Hence, no-strike commitments in labor agreements are not only important to employers but are vital to the attainment of this major national policy objective.

Because of the importance of the no-strike clause, remedies for its breach must be readily available. This fact motivated Congress to enact section 301 of the Labor Management Relations Act, 1947,² to provide the necessary jurisdictional basis for actions against labor unions to enforce a union's no-strike commitment.³ The report explaining this portion of the Senate bill stated:

* A.B., 1935, Dartmouth College; J.D., *cum laude*, 1938, University of Chicago; member, Illinois Bar.

¹ Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962).

² (Taft-Hartley Act), 61 Stat. 156 (1947), 29 U.S.C. § 185 (1964).

³ Section 301 (29 U.S.C. § 185).

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. 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.

If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities in the Federal courts in disputes affecting commerce.⁴

Despite this clear expression of Congressional intent to establish adequate remedies for contract breach strikes, the employer considering legal action following such a strike faces numerous problems.⁵

The Scope of the No-Strike Pledge

The first variable in an employer's ability to obtain financial compensation for strike action by employees in breach of a no-strike pledge is the scope and clarity of the language of the pledge. Some labor agreements merely say "There shall be no strikes during the life of this Agreement." Others say

The Union agrees that neither it nor any officer or agent acting on its behalf will instigate, sponsor or encourage strike action and that any employee who engages in a strike during the life of this agreement shall be subject to discharge or other discipline as determined by the Company

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in 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.

⁴ 1 NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 422 (1948).

⁵ For a discussion of the problems involved in various employer counteractions, see Fairweather, *Employer Actions and Options in Response to a Strike in Violation of a Contract*, 18th ANNUAL N.Y.U. CONF. ON LABOR (1965).

The second clause divides the no-strike pledge into two parts—a pledge by the employees and one by the union. It shifts to the employer the burden of proving matters that are difficult to prove. He must show not only instigation, sponsorship, or encouragement, but also that these activities were conducted by persons who were officers or agents of the union. The first clause, on the other hand, merely says that “there shall be no strikes during the life of the agreement,” and the critical fact establishing its breach is a strike, which is easy to prove.

However, lawyers representing international unions do not believe that their clients are liable for breaches of a no-strike pledge when the union's members strike, even where the first type of clause is used, unless the employer can prove that an international union official actively instigated the strike action or later ratified it. This claim is made notwithstanding the active instigation or subsequent ratification of the strike by local union officials, which the attorneys for the international union concede would make the treasury of the local union, but not that of the international, liable for the breach.

The claim that the employer must prove active instigation or actual ratification by an official or agent of the international union, even though the language of the no-strike pledge does not require such proof, is actually a claim that tort law rather than contract law applies, and, surprisingly enough, there are decisions to support this position.

The agency principle in which various courts have become entangled in strike-breach cases has its roots in a century-old English decision holding that the instigation of a breach of a contract of employment is an actionable tort.⁶ This principle is still part of our tort law.⁷

One example of an application of tort theories to bar contract liability occurred in *Boeing Airplane Co. v. Aeronautical Indus. Dist. Lodge No. 751 (IAM)*.⁸ In that case the international union was a joint signer of the labor agreement with the local union. Both the local and the international unions were referred to and defined in the contract, in the singular, as “the union.” In spite of this, the Court stated that the international union and its treasury were not liable for the breach of contract because there was no proof that an international union official had instigated the walkout, even though it was proven that the local union officials had done so. The requirement of strict proof of an in-

⁶ *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853).

⁷ RESTATEMENT, TORTS, § 766 (1939).

⁸ 91 F. Supp. 596, 603-608 (W.D. Wash. 1950) (dictum) *aff'd*, 188 F.2d 356 (9th Cir. 1951); *cf. Packinghouse Workers v. Maurer-Neuer, Inc.*, 272 F.2d 647 (10th Cir. 1959).

stigating act by an agent also prevented the imposition of liability on an international union in *United Constr Workers v. Haulip Baking Co.*⁹

Other courts have used the agency approach but required very little proof before holding the international union liable. For example, the mere presence on a picket line of an officer of an international union was sufficient to hold the international liable in *ILWU v. Hawaiian Pineapple Co.*¹⁰ and in *Gibbs v. UMW*¹¹ The participation of an international representative in pre-strike negotiations in which he voiced certain demands made the international union responsible in *Western States Regional Council No. 3, Int'l Woodworkers of America.*¹²

The heavy reliance on agency law found in some decisions usually results in insulating the treasury of the international union, which is ordinarily the only practical source of restitution. This reliance is caused by carrying forward, without careful analysis, the agency tests created in section 6 of the Norris-LaGuardia Act. That section provided:

[N]o 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 officials, members or agents, *except upon clear proof of actual participation in, or actual authorization of, such actions, or the ratification of such actions after actual knowledge thereof.*¹³

The emphasis of this provision upon the "unlawful acts of members" and upon "proof of actual participation, authorization or ratification" clearly indicates that it was designed to insulate the international union and its treasury. However, the Norris-LaGuardia Act is now inapplicable to damage actions against unions for breach of contract under section 301.¹⁴ Today it is this more recent section that is the source of the law governing suits for a breach of a labor agreement. Section 301 contains the following language concerning the agency tests to be applied.

⁹ 223 F.2d 872 (4th Cir. 1955).

¹⁰ 226 F.2d 875 (9th Cir. 1955).

¹¹ 220 F. Supp. 871 (E.D. Tenn. 1963).

¹² 137 N.L.R.B. 352, 354-355 (1962), *enforced*, 319 F.2d 655, 659 (9th Cir. 1963). See also *UMW v. Osborne Mining Co.*, 279 F.2d 716 (6th Cir. 1960), *cert. denied*, 364 U.S. 881 (1960); *UMW v. Patton*, 211 F.2d 742, 746-748 (4th Cir. 1954). See generally Evans, *The Law of Agency and the National Union*, 49 Ky. L.J. 295 (1961); *Local 984, Int'l Bhd. of Teamsters v. Humko Co.*, 287 F.2d 231, 241-242 (6th Cir. 1961).

¹³ 47 Stat. 71 (1932), 29 U.S.C. § 106 (1964). (Emphasis added.)

¹⁴ *UMW v. Patton*, 211 F.2d 742, 747-748 (4th Cir. 1954) (dictum).

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act, and any employer whose activities affect commerce as defined in this Act, *shall be bound by the acts of its agents.*

* * *

(e) For the purposes of this section, in 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.¹⁵

This agency test is not expressed in the *negative* as is the agency test in the Norris-LaGuardia Act, and only apparent authority, not actual authority, need be shown.¹⁶

Actions for breach of contract often involve reference to agency principles. For example, it must be shown that the contract itself was entered into by an authorized agent, or by one with apparent authority.¹⁷ Agency principles must also be applied if the liability of the union is limited to a promise that its union officials or agents will not instigate or promote a strike.¹⁸

However, it does not follow from a recitation of an apparent-authority agency test in section 301 that *tort liability*—that is, inducing a breach of contract of employment—must be established before *contract liability* can be imposed in an action for breach of the simple pledge that there will be no strikes during the life of the agreement. As noted above, now there is even an implied no-strike pledge concerning matters which are subject to arbitration.¹⁹ When Congress established the right to sue a union for breach of a labor agreement to which it is a party, it could hardly have intended to require that to obtain recovery against the union treasury for breach of an express no-strike pledge or of one implied from the arbitration clause, an employer must prove two actual wrongs, one in tort and the other in contract.

In evaluating congressional intent in enacting the quoted 301 language, the shift in liability from the personal assets of the individual striking employee to the assets of the union needs emphasis. That this shift of liability to the union as an entity was intended is shown in the following language from section 301(b)

¹⁵ 61 Stat. 156, 157 (1947), 29 U.S.C. § 185(b), (e) (1964). (Emphasis added.)

¹⁶ Burstein, *Enforcement of Collective Agreements by the Courts*, 6TH ANNUAL N.Y.U. CONF. ON LABOR 31, 47 (1953).

¹⁷ See *Watteau v. Fenwick*, [1893] 1 Q.B. 346 (1892).

¹⁸ *Garneada Coal Co. v. International Union, UMW*, 230 F.2d 945 (6th Cir. 1956).

¹⁹ See note 1 *supra* and accompanying text.

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.²⁰

This protection of the individual, if the union is liable, results from a reaction against the manner in which damages were collected by the employer after the infamous *Danbury Hatters* case,²¹ where the judgments were collected from individual employees, causing some of them to lose their homes.²² The Seventh Circuit had said, in *Sinclair Refining Co. v. Atkinson*,²³ that Congress meant that individual employees should be free from liability for strike action engaged in by other employees, but should remain liable for their own breaches. However, the Supreme Court held that, if the union was liable for the breach, the individual employee, even though he engaged in the breach, was not.²⁴ On the other hand, it pointed out that it was not deciding whether the individual employees remained insulated from liability when the union was not liable.²⁵

If the individual becomes liable when the union is not, it would seem to be contrary to congressional intention for the courts to create impossible barriers of proof for the employer to climb before liability can be imposed on the union. Insulation of the individual is not meaningful *unless the union can be held liable* for the contract breach. Requiring proof of the tort of instigation before proving the union's contract liability would not effectuate the apparent congressional intention to *insulate the individual striking employee* from personal liability.

Behind this congressional intention to shift liability from the individual to the union may well be a public policy consideration. If the union is liable for the breach caused when its members strike, the union as an entity will be stimulated to establish controls and develop disciplines that will cause the members to respect no-strike clauses in labor agreements.

The importance, from the point of view of public policy, of imposing liability upon the union treasury when the employee members breach their agreement by engaging in strike action, even if union

²⁰ 61 Stat. 156 (1947), 29 U.S.C. § 185(b) (1964). (Emphasis added.)

²¹ *Loewe v. Lawlor*, 208 U.S. 274 (1908); *Lawlor v. Loewe*, 235 U.S. 522 (1915).

²² *Loewe v. Savings Bank of Danbury*, 236 Fed. 444 (2d Cir. 1916). See *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 248 (1962).

²³ 290 F.2d 312, 317-319 (7th Cir. 1961), *remanded*, 370 U.S. 238 (1962).

²⁴ *Atkinson v. Sinclair Refining Company*, 370 U.S. 238, 247-249 (1962).

²⁵ *Id.* at 249, n.7.

officials do not instigate, authorize, or ratify, was well expressed by Arbitrator H. H. Rains in *Brynmore Press, Inc.*²⁶ He said:

The economic power and the legal status of labor unions requires a commensurate degree of responsibility.

The parties pledged that there would be no stoppage of work, slowdown, or lockout during the life of the contract for any reason. In signing the contract the workers and the union leaders fully understood the obligation imposed by their agreement with management . . .

The crux of the issue before the arbitrator is that a breach of the contract between the company and the union took place and that the company claims appropriate remedies for that wrongful breach. The responsibility of the union for such wrongful breach is clear, and failure to apply proper effective remedies in the form of prohibition orders, assessments of penalties, and award of damages claimed by the aggrieved party would have the effect of freeing the union and its members from liability for their actions. Such failure could only mitigate against the desirable ideal of "Union responsibility" Assessment of penalties and award of damages payable to the aggrieved party is a step in the direction of preserving "Union responsibility" and its integrity as the "responsible party" to the collective bargaining agreement.²⁷

An even clearer case of a union treasury being held liable *without* any proof of instigation, authorization, or ratification by a union agent was the award in *Publishers Ass'n of N.Y.*²⁸ In that case damages of 1,029 dollars were assessed against the union because striking union members shut down the presses printing the *New York Times* for twenty-one minutes. The work stoppage ended within minutes after a union business agent arrived at the Times Building and instructed the striking members to return to work. In spite of this, the arbitrator imposed liability on the union, even though he made the following finding: "The unlawful work stoppage and contract violation were caused or instigated without the knowledge or consent; nor with privity or connivance of any authorized, responsible official of the union."²⁹ It can be seen that experienced arbitrators recognize that irresponsible strikes in breach of contract will not disappear unless the union is liable for such actions.

Therefore, when considering the proof of the liability of the union for the breach caused by the striking members, it is imperative that protective agency concepts inherited from another statute, enacted in

²⁶ 7 Lab. Arb. 648 (1947).

²⁷ *Id.* at 657-58.

²⁸ 39 Lab. Arb. 564 (Arb. Moskowitz, 1962).

²⁹ *Id.* at 567.

a different era, be forgotten. The intentions of Congress should be found not in historical decisions, but in section 301 and in the national labor policy being created by the courts as they interpret congressional intention since its enactment.

Effectuation of Congressional Intention through Presumptions

Difficulties confronting the employer, because of the requirement that the tort of instigation be proved before recovery may be had for contract breach, have been eliminated by courts and arbitrators who recognize the socio-psychological fact that group action is induced by persons who act as leaders. These courts and arbitrators have adopted a rebuttable presumption that, when a strike occurs, it has been instigated by the union officers, who are the leaders chosen by the members. To escape from the consequences of this presumption, the union must show that its leadership was rejected and that other persons not agents of the union had assumed control.

The first and classic decision that reports this rebuttable presumption is *United States v. International Union, UMW*,³⁰ wherein John L. Lewis attempted to disclaim responsibility for a simultaneous nationwide work stoppage in the coal mines by declaring that the miners decided to strike "entirely on their own volition and without instructions from the President, direct or indirect."³¹ Judge Goldsborough said that if the law encouraged the use of the "nod or wink," union responsibility would evaporate, because liability would evaporate. He then wisely made these observations:

[T]his Court believes that there is a principle of law which, as far as I know, no Court has ever been called upon to announce, because this use of a code in order for a union to avoid responsibility is a new thing. It is a new method of endeavoring to avoid responsibility

The Court thinks the principle is this: that as long as a union is functioning as a union it must be held responsible for the mass action of its members. It is perfectly obvious not only in objective reasoning but because of experience that men don't act collectively without leadership. The idea of suggesting that from 350,000 to 450,000 men would all get the same idea at once, independently of leadership, and walk out of the mines, is, of course, simply ridiculous.

So that, in general, this Court announces a principle of law. The Court has no means of knowing whether higher courts will adopt the principle or not, but the Court has no doubt about its soundness, not

³⁰ 77 F. Supp. 563 (D.D.C. 1948), *aff'd*, 177 F.2d 29 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949).

³¹ 77 F. Supp. at 564.

any—that a union that is functioning must be held responsible for the mass action of its members.³²

These observations were made in a contempt action where a strike had occurred in violation of an injunction. The importance of Goldsborough's decision was magnified when the same presumptions were announced by another court in another contempt action. In *United States v. Brotherhood of Ry. Trainmen*,³³ the court said:

[A]s long as the Union functions as a Union the Union is responsible for the mass actions of its members. That means this, that when the members go out and act in a concerted fashion and do an illegal act the Union is responsible. They just can't say, "Oh, well, we didn't do that as Union members."

If they are members of the Union, then they do act in concerted fashion under the decision of the courts in this country; if it is a mass action the Union is responsible for that sort of an action.

* * *

Now, can the Union escape responsibility under that sort of a situation? Let us admit Mr. Kennedy did what he says he did, all he says he says he did, and these officers did all they say they did. Yet, the great mass of the Union stayed out. They said, "We refuse to work. We are sick." And they carried on what it is admitted was an unauthorized work stoppage or unauthorized strike. That is admitted.³⁴

And, most significantly to the employer in the normal strike in breach of agreement case, the same rules of presumption were adopted recently by a federal district court to hold a union responsible for a strike in breach of a no-strike pledge. In *United Textile Workers v. Newberry Mills, Inc.*,³⁵ the court stated:

As long as a union is functioning as a union it must be held responsible for the mass action of its members. It is perfectly obvious not only in objective reasoning but because of experience that men don't act collectively without leadership. The idea of suggesting that the number of people who went on strike would all get the same idea at once, independently of leadership, and walk out of defendant's mill "is of course simply ridiculous." A union that is functioning must be held responsible for the mass action of its members. The above stated principles of law will preserve the union, "because if the plan is adopted throughout the country of trying to use a wink, a nod, a code, instead of the word 'strike,' and if that sort of a maneuver is recognized as valid by the Courts" then we "will have among the unions lawlessness, chaos, and ultimate anarchy. And then the unions will

³² *Id.* at 566-67 (dictum).

³³ 96 F Supp. 428 (N.D. Ill. 1951).

³⁴ *Id.* at 431-432.

³⁵ 238 F Supp. 366 (W.D.S.C. 1965) (dictum).

have to be socialized. In other words, they will have to be destroyed."³⁶

Arbitrators, too, have recognized this principle. In *Mueller Brass Co.*,³⁷ Arbitrator David Wolff upheld discipline imposed upon the union officials who participated in an unauthorized strike, stating:

The fact that all those who participated in the lines were not punished is understandable. From all the testimony, it appears to the arbitrator that the Company disciplined only those persons who were union officials. Such action on its part was not discriminatory. It had a right to assume that, when union officials participated in unauthorized activities, they were acting as leaders.³⁸

In *General American Transp. Corp.*,³⁹ Arbitrator Harry Pollock wrote:

It is generally safe to say that members of unions do not act in concert without leadership. This rule is proven by experience. Since this local was functioning and there was apparently no schism, the union leadership must be held responsible for the acts of its members.⁴⁰

Hence, there is no lack of decisional authority to support the suggested presumption.

Rebutting the Presumption of Union Responsibility

The presumption of union liability for a strike may be rebutted if the union comes forward with persuasive evidence identifying the actual strike instigators. In some cases the ringleaders may be a group of dissident employees within the bargaining unit. In other cases the leaders may be agents of another union attempting to discredit the incumbent union so it can be displaced as the representative.

The union officials are certainly in a far better position to determine the real instigators than are the representatives of the employer. The union stewards are in every department and know those employees who are making an effort to discredit the incumbent union. Finally, if the strike is organized by agents of a raiding union, witnesses should be willing to testify concerning their activity, as such testimony would support their own (the incumbent) union.

Requiring the union officials to come forward and identify the

³⁶ *Id.* at 373.

³⁷ 3 Lab. Arb. 285 (1946).

³⁸ *Id.* at 308.

³⁹ 42 Lab. Arb. 142 (1964).

⁴⁰ *Id.* at 143-144.

instigators of a contract breach strike or to assume responsibility for it will promote labor peace during the term of the contract. Employees contemplating strike action contrary to the union's sanction would know they face the risk of exposure and subsequent discipline (usually discharge) by the employer. The raiding union would also be risking a suit for the tort of inducing a breach of contract if its agents instigated a contract breach strike.⁴¹

Arbitrators have adopted reasoning similar to that suggested herein in several cases where they were reviewing discipline for violation of the no-strike clause. For example, in *Kaye-Tex Mfg Co.*,⁴² the employer disciplined seven employees it thought were "responsible" for a wildcat strike involving more than seventy employees. The union claimed that the employer could not discipline only seven out of the seventy. The arbitrator rejected this contention, noting especially the union's failure to assist the employer in determining who the actual leaders were. He stated:

The Union is not in the best position to complain of inadequacies in the Company's procedure for fixing responsibility. It declined to name those who should be blamed. That it did not know who they were and could not find out is a little incredible. If it knew and wouldn't say, although importuned often to do so, its interest in seeing strict justice done might be a little less than its complaint about the Company's procedure would suggest.

A refusal to disclose information out of a desire to protect a brother member would it seems to me be a mistaken loyalty. The officers of the Union have a serious responsibility to live up to the contract obligations. The no-strike obligation is only met by effectively preventing unauthorized work stoppages. The history of such stoppages and the April 7, 1959 settlement agreement strongly underscores this obligation. It is not fully met by urging the men to go back after a wildcat occurs. It includes as well the responsibility to deter by seeing that those who violate the contract are disciplined. Indeed, many responsible unions have taken strong action against wildcaters, [sic] even expelling them from the Union.⁴³

In arriving at the above conclusion, Arbitrator Horlacher noted the difficulties that would confront an employer if he had the burden of proving the identity of the strike ringleaders. He reasoned that, if union officers fail to come forward with the identity of the actual strike leaders, the employer may make the selection. Otherwise, the no-strike

⁴¹ See, e.g., *Sterling & Welch Co. v. Duke*, 33 Ohio Op. 482, 486-87, 67 N.E.2d 24, 29-30 (Ohio C.P. 1946); PROSSER, TORTS § 123 (3d ed. 1964).

⁴² 36 Lab. Arb. 660 (Arb. J. P. Horlacher, 1960).

⁴³ *Id.* at 665.

clause would become a "nullity," and "an interpretation making the no-strike clause of the Agreement a nullity must be rejected."⁴⁴

Similarly, in *Ford Motor Co.*,⁴⁵ Arbitrator Harry P. Shulman said:

It will serve no useful purpose to relate in detail the evidence with respect to the nineteen employees against whom the Company took action as a result of this stoppage. It is loudly whispered—and doubtless truly—that the real instigators of the stoppage, or at least some of them, have not been penalized. But if this is so, it is because the Company lacked knowledge of the alleged real instigators. The employees upon whom it imposed penalties are those against whom it had evidence of active participation which it believed would support its judgment in the ultimate proceedings before the Umpire. If the real instigators have been omitted, they are still subject to the Union's own powers of discipline. And perhaps more accurate findings of guilt could have been made in the first place if the Union had fully assumed responsibility for investigating the stoppage and taking action against the violators of its Constitution and Contract.⁴⁶

Conclusion

As our national labor policy develops by judicial interpretation of congressional intention in the section 301 cases, it is clear that labor peace and union responsibility are important public policy objectives.

Requiring the employer to prove the tort of instigation where members of a union strike in violation of a no-strike pledge, unless the language of the labor agreement clearly requires it, has the practical effect of generally insulating the union from responsibility and thereby permitting irresponsibility.

The courts and arbitrators who apply presumptions to eliminate the necessity of proving the tort of instigation are promoting the above objectives of our national labor policy. When they do so, they are not actually abandoning tort thinking. Rather, they are applying to the strike situation reasoning similar to that underlying the universally recognized tort principle of *res ipsa loquitur*. That principle is applied in negligence cases, in some jurisdictions creating a permissible inference of negligence and in others a rebuttable presumption.⁴⁷ Regardless of the jurisdiction, however, it does at least assist in the establishment of a prima facie case.⁴⁸

⁴⁴ *Id.* at 663.

⁴⁵ 1 Am. Lab. Arb. Awards ¶ 67,278 (1945).

⁴⁶ *Id.* at 67,629-30.

⁴⁷ PROSSER, TORTS § 40 (3d ed. 1964).

⁴⁸ Compare *Sweeney v. Erving*, 228 U.S. 233 (1913) (permissible inference) with *Schechter v. Hann*, 305 Ky. 794, 205 S.W.2d 690 (1947) (presumption). See *Burr v.*

Res ipsa loquitur operates when (1) the occurrence is of such a nature that it ordinarily does not occur in the absence of someone's negligence, (2) the apparent cause of the occurrence is such that the defendant would be responsible for the occurrence, and (3) the evidence explaining the occurrence is more accessible to the defendant than the plaintiff.⁴⁹ These same factors are present in the strike situation. A strike ordinarily does not occur in the absence of leadership. The group leaders are the union leaders, and the union is the institution through which the employees ordinarily take group action. If some other group leaders have taken over, the evidence concerning that fact is more readily accessible to the union than the employer. The analogy to the tort doctrine of *res ipsa loquitur* may not be perfect, but it is fair to say that where there is a labor union representing a group of employees through elected leaders and a strike in violation of the agreement occurs, the *literal*⁵⁰ translation, "the thing itself speaks," applies.

Increased use and articulation of presumptions by courts and arbitrators in analyzing contract breach strike cases will promote the national labor policy favoring contract stability and the concomitant industrial peace.

Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954). *But see* Zentz v. Coca Cola Bottling Co., 39 Cal. 2d 436, 247 P.2d 334 (1952).

⁴⁹ PROSSER, *op. cit. supra* note 47, § 39.

⁵⁰ *But see* comment of Shaw, L.J., in *Ballard v. North British Ry.*, [1923] Sess. Cas. H.L. 43, 56.

