collective bargaining is further expanded, the traditional definition of "management"—as either a legally defined group of people or a function, from which unions are excluded—may come to have little real meaning. Insofar as labor's usurpation of the prerogatives of management presents a legislative problem, the solution has been said to lie in a legislative redefinition of the scope of collective bargaining.[37] However, any statute which attempts specifically to define those matters which are to be recognized as the proper subjects of collective bargaining, as well as those which should be left to the discretion of management, leaves the real problem untouched. Inasmuch as both employer and employee define their legitimate interests in different ways and from different points of view, such a statute would be a compromise, with the significant concessions being valid only on a short-run basis. Perhaps a more obvious drawback to such an approach is the lack of any nation-wide pattern which could be used as the basis for the suggested statutory definitions. The extreme differences in the labor-management function which are encountered in each industry indicate that any effective definition is unlikely.

A more realistic argument would favor a requirement that as the function of labor becomes the management function, labor be made to assume the responsibilities and statutory limitations imposed on management. In other words, to the degree that organized labor succeeds to that discretion formerly exercised by the management group, it would be required to give up those rights and privileges which are accorded exclusively to labor. Such a solution would not attempt to confine either group within any statutory definition not already attained, but would instead be an important addition to the now recognized "rules of the game."

DETERMINATION OF UNION RESPONSIBILITY BY AGENCY PRINCIPLES

Two recent National Labor Relations Board decisions have interpreted the controversial "agency" definition of the Taft-Hartley Act.[1] In the *Sunset Line & Twine Co.*[2] case, a strike arose out of the failure of the company and the local union to negotiate a new contract. When some of the employees began to return to work they were called abusive names and were followed home from work by striking employees. One non-striker was threatened with a beating, and another engaged in a fight with the business agent of the local union. A crowd composed of pickets, strikers, and members of the local employed at

[37] Industrial Relations Counselors, Monograph No. 9, National Collective Bargaining Policy 41 (1945).

[1] Labor-Management Relations Act § 2(13), 61 Stat. 139 (1947), 29 U.S.C.A. § 152(13) (Supp., 1947).

[2] Sunset Line & Twine Co., 79 N.L.R.B. No. 207, Lab. Rel. Rep. (Spec. Supp., Oct. 25, 1948).

nearby companies prevented automobiles from entering the struck plant. Some of these incidents which the Board labeled acts of restraint and coercion were participated in by the business agent and vice-president of the local union. In addition the regional director of the international gave the local "advice and guidance" in the management of the strike. In the *Perry Norvell Co.*[3] case, the employer's refusal to reinstate a discharged employee led to an unauthorized strike by some of the workers. The striking employees elected a committee to direct the strike and to displace the local union as a bargaining agent. Various members of the committee, in their zeal, threatened to beat and did beat several non-striking employees. In both cases the Board held that the statutory right to refrain from self-organization and related activities included the right to go to work during a strike free from intimidation and molestation. In compliance with Section 10 of the Act,[4] the NLRB issued cease and desist orders against the offending labor organizations. In doing so the Board had its first opportunity to construe the "agency principles" of the Taft-Hartley Act stated in Section 2(13).

One of the basic purposes of the Taft-Hartley Act was to "equalize legal responsibilities of labor organizations and employers."[5] One equalization provision was to make a "labor organization or its agents" as well as an employer, subject to cease and desist orders for unfair labor practices. As an aid in determining whether a person was acting as an agent of a labor organization, the Act defines this relationship in Section 2(13): "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."

The Board was guided in its interpretation by the clearly expressed legislative purpose that Section 2(13) was intended to nullify Section 6 of the Norris-La Guardia Act.[6] The Taft-Hartley Act proponents feared that Section 6 of the Norris-La Guardia Act, which required "actual authorization" of unlawful acts, insulated unions from liability for the conduct of their officers and representatives.[7] Their fears were intensified by the first authoritative interpretation

[3] Perry Norvell Co., 80 N.L.R.B. No. 47, 23 L.R.R.M. 1061 (1948).

[4] Labor-Management Relations Act § 10, 61 Stat. 146 (1947), 29 U.S.C.A. § 160 (Supp., 1947).

[5] 61 Stat. 136 (1947). Section 2(13) is also made applicable to contract suits by and against unions brought in the federal courts, and to tort suits against unions growing out of "unlawful" strikes. Labor-Management Relations Act, 61 Stat. 156, 158 (1947), 29 U.S.C.A. §§ 185, 187 (Supp., 1947).

[6] H. R. Rep. 510, 80th Cong. 1st Sess., at 36 (1947).

[7] Ibid. Section 6 states: "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 actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof." 47 Stat. 71 (1932), 29 U.S.C.A. § 106 (1947).

of Section 6 by the Supreme Court, which came in March 1947, while the Taft-Hartley Act was still in the hands of the House and Senate committees.[8]

It is doubtful, however, whether Section 6 and the Supreme Court's construction of it in the *United Brotherhood of Carpenters and Joiners v. United States*[9] really immunized unions from vicarious liability for the conduct of their officials. Section 6 was designed primarily to protect unions from the oppressive burdens imposed on them by antagonistic courts rather than to shelter unions from normal responsibilities.[10] Also the actual holding in the *Carpenters* case was too limited to justify the congressional reaction. The Court was confronted with the problem of establishing, in a criminal case, the authority of officers to make contracts in violation of the Sherman Act. Only conjecture and dictum support the belief that the Court's ruling was intended to apply to civil cases or to tort suits. Nevertheless, Section 2(13) was designed to eliminate any chance of over-protection afforded unions by Section 6 of the Norris-La Guardia Act and the *Carpenters* decision.

The second legislative purpose behind Section 2(13) of the Taft-Hartley Act was to apply the ordinary common law of agency to both employers and unions.[11] Relying heavily on this legislative exhortation, the Board in the *Sunset* case, interpreted Section 2(13) to mean that unions would be held responsible for the acts of their officers according to the doctrine of respondeat superior.[12] The Board's interpretation was, perhaps, inevitable in view of the language of Section 2(13). Since the section states that actual authorization should not be controlling, the obvious agency rule for the Board to turn to was respondeat superior. This doctrine imputes the servant's tortious acts committed in the scope of his employment to his master, even if the specific acts done were not authorized, or indeed were expressly forbidden.[13] The legisla-

[8] 93 Cong. Rec. 6859 (1947). [9] 330 U.S. 395 (1947).

[10] Ibid., at 418 (Justice Frankfurter, dissenting). The Carpenters case contains a review of the legislative history of Section 6. It is apparent that the broader purposes, if any, of the section are not clearly stated in the congressional debates and reports. Some writers believe that Section 6 actually immunizes unions from vicarious liability. 1 Teller, Labor Disputes and Collective Bargaining 230 (1940). Contra: Frankfurter and Greene, The Labor Injunction 221 (1930); Witmer, Trade Union Liability: The Problem of the Unincorporated Corporation, 51 Yale L.J. 40, 49, 50 (1942).

[11] 93 Cong. Rec. 6859 (1947).

[12] Sunset Line & Twine Co., 79 N.L.R.B. No. 207, Lab. Rel. Rep. (Spec. Supp., Oct. 25, 1948). To support the interpretation of Section 2(13), the Board cites Sections 219, 228-37 of the Restatement of Agency. The sections are part of Title B (Torts of Servants) and obviously enunciate the rule of respondeat superior. The Board sums up the rule as follows: "A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the 'scope of his employment' if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted." Lab.Rel. Rep. (Spec. Supp., Oct. 25, 1948).

[13] Rest., Agency § 219 (1933); Tiffany, Handbook of the Law of Principal and Agent §§ 36-38 (Powell's 2d ed., 1924).

tive mandate to apply the entire common law of agency to unions means, in effect, that only the doctrine of respondeat superior would be applied to union responsibility for the acts of its agents. The legislative assumption behind the mandate would appear to be either that union officers are servants, for whose acts the union could be held responsible according to respondeat superior, or that respondeat superior should be applied to unions whether union officials are servants or "agents who are not servants."[14] Either assumption leads to the same result—it obviates the need of determining whether the physical conduct of a union official is under the control of the union, the test commonly used in establishing the master-servant relationship upon which hinges the propriety of invoking respondeat superior.[15]

Thus an important step in holding unions to a high degree of responsibility is made with no investigation of union "anatomy and physiology" and no attempt at fixing the locus of authority in a labor organization.[16]

The doctrine of respondeat superior has flourished because it fulfills a social need. A strong social policy has demanded that an injured person be compensated from the "deep pocket" of business, which is best able to bear and administer such costs.[17] An equally strong social policy, determined to impose a high degree of responsibility for the "costs" of strikes and picketing, may well make use of respondeat superior. The doctrine would then be applied with little attention to the niceties of the relationships between the members and the officials of a union in the conduct of strikes and picketing.

The instant cases reveal that the Board's use of agency rules in strike and picketing situations will impose a heavy burden of responsibility on unions. Unions may be held responsible for mass picketing not as a result of a policy decision, but on "subagency" and "instrumentality" technicalities.[18] In the *Perry Norvell* case, the strike committee was held liable on the basis of tortuously applied agency rules resulting in a confusion from which it was impossible to distinguish principal from agent.[19] The Board has been willing to impute to

[14] Rest., Agency § 220 (1933); Mechem, Outlines of the Law of Agency § 504 (1923).

[15] Title B of Chapter 7 of the Restatement of Agency gives the rule of liability for the "Torts of Servants," while Title C gives the rules for "Torts of Agents who are not Servants." That different rules of liability apply to the principal-agent relationship than to the master-servant is emphatically stated in Baty, Vicarious Liability 44 (1916). Baty cites Wright and Pollock to the same effect. Ibid., at p. A 2, preface. Mechem and Tiffany also admit the distinction.

[16] It has been said that union officers are agents but not servants. 1 Teller, Labor Disputes and Collective Bargaining 231 (1940); Responsibility of Labor Unions for Acts of Members, 38 Col. L. Rev. 454, 466 (1938).

[17] Douglas, Vicarious Liability and Administration of Risk, 38 Yale L.J. 584, 586 (1929).

[18] Sunset Line & Twine Co., 79 N.L.R.B. No. 207, Lab. Rel. Rep. 21 (Spec. Supp., Oct. 25, 1948).

[19] Perry Norvell Co., 80 N.L.R.B. No. 47, 23 L.R.R.M. 1061 (1948). The Board considers the strike committee as an entity. The committee then seems to be the principal, and the members the agents. Those members not participating in the coercive acts are not held responsible for the acts of the active members. However, the cease and desist order runs against the com-

labor organizations acts done in the "furtherance of . . . same purposes. . . ." It has found failure to act to be ratification and silence to be authorization.[20] The Board has not hesitated to hold the international body liable where its representative merely advised and guided the local in the management of the strike.[21] The international organization may thus be safe only if it disavows the strike, whereas its natural function is to assist the local.

The General Counsel has gone far beyond the Board in his attempts to hold the union responsible. He has already argued that the acts of pickets as well as of officers should be attributed to unions, even though the legislative history of Section 2(13) stands clearly opposed to the view that union members are per se agents of the union.[22] He has also tried to make unions liable by resorting to theories "reminiscent of the long discredited conspiracy and proximate cause doctrines. . . ."[23]

A more moderate legislative policy toward union responsibility would encourage the Board to reach a fair balance between protecting the non-striking employees and the employers from restraint and coercion without impeding proper union activities. Such a policy would direct the Board's attention toward enjoining the individual members, pickets, and officers actually participating in the coercive activities, and to look to the union as the responsible entity only when necessary to avoid violence.[24]

STANDARDS OF CARE FOR CORPORATE TRUSTEES

The growing judicial desire to impose a stricter duty of care on corporate trustees than that normally required of individual trustees was exemplified in a recent New Jersey decision.[1] The trust company fiduciary had advertised its special skill in trust administration and presumably was appointed trustee in reliance on such skill. In an accounting proceeding by the trustee, exceptions

mittee as an entity and against the offending individuals by name. Are the innocent members of the committee bound by the order, since they make up the entity?

[20] Sunset Line & Twine Co., 79 N.L.R.B. No. 207, Lab. Rel. Rep. 20–22 (Spec. Supp., Oct. 25, 1948).

[21] Ibid., at 23.

[22] Ibid., at 21. Senator Taft stated during the congressional debates: "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).

[23] Perry Norvell Co., 80 N.L.R.B. No. 47, 23 L.R.R.M. 1065 (1948).

[24] In his message vetoing the Taft-Hartly Act, President Truman stated in reference to the agency rule: ". . . it would expose unions to suits for acts of violence, wildcat strikes, and other actions, none of which were authorized or ratified by them. By employing elaborate legal doctrine, the bill applies a superficially similar test of responsibility for employers and unions—each would be responsible for the acts of his agents. But the power of an employer to control the acts of his subordinates is direct and final. This is radically different from the power of unions to control the acts of their members who are, after all, members of a free association." 93 Cong. Rec. 7455 (1947).

[1] Liberty Title and Trust Co. v. Plews, 60 A. 2d 630 (N.J. Eq., 1948).