SECTION 302 OF THE LMRA: MAKE WAY FOR THE EMPLOYER-PAID UNION REPRESENTATIVE

CHRISTOPHER J. GAROFALO*

In 1947, Congress enacted section 302 of the Labor Management Relations Act in order to regulate payments from employers to the union representatives of their employees. Whether originally intended by Congress or not, section 302 has been applied to the common labor practices of allowing employers to pay employees for part-time or full-time leave in order to work for their union. A split among the various circuit courts of appeals has developed as to whether these payments fall within an exception to section 302's general prohibition and remains unresolved after the Supreme Court dismissed certiorari after the settlement of Caterpillar, Inc. v. International Union, UAW. *In this Note, Christopher Garofalo argues that courts have struggled with the text of section 302 in order to allow payments for what, he argues, are beneficial and useful labor practices. However, Garofalo maintains that their interpretations of section 302 have created standards which are ultimately unworkable because they cannot distinguish beneficial from harmful practices in a principled way. Since the current statute's textual limitations make it difficult to protect against conflicts of interest and corruption while allowing union representatives to be paid by employers, Garofalo concludes that a legislative solution is preferable to a judicial one and proposes an amendment to section 302 that constructively would resolve the issue.*

INTRODUCTION

In 1997, the Supreme Court granted certiorari to hear *Caterpillar, Inc. v. International Union, UAW*[1] and decide whether the Labor Management Relations Act[2] permits employers to grant paid leaves of absence to employees to work full-time for their union.[3] The decision was expected to impact other employer payments to union representatives and to determine their extent. Fortunately, the parties settled, and certiorari was dismissed before the Court could rule.[4] Had the

* I would like to thank Professor Samuel Estreicher for suggesting this Note's topic and for his invaluable guidance and insightful comments. I also would like to thank Iris Bennett, Christopher Carolan, and David Kraut for their help in developing this Note. Special thanks to Sally Kesh, Rebecca Blemberg, and Andy Weinstein for their thoughtful and thorough editing. This Note is dedicated with love, admiration, and gratitude to my wife, Kate, and son, Sean.

1 107 F.3d 1052 (3d Cir. 1997), cert. granted, 521 U.S. 1152 (1997), cert. dismissed, 523 U.S. 1015 (1998).

2 29 U.S.C. §§ 141-144, 171-187 (1994).

3 See *Caterpillar*, 107 F.3d at 1053.

4 See *Caterpillar*, 523 U.S. at 1015 (dismissing certiorari); Robert L. Rose & Carl Quintanilla, Caterpillar Touts Its Gains as UAW Battle Ends, Wall St. J., Mar. 24, 1998, at A4 (describing Caterpillar strike and union's loss).

Court held that the practices in question were prohibited, the decision would have rendered void provisions for beneficial labor practices in numerous collective bargaining agreements and would have called provisions in countless other agreements into question.[5] On the other hand, had the Court followed the rationale of any of the circuit court decisions upholding the legality of employer-paid leaves of absence, it would have set precedent that had the potential to allow bribery, extortion, and other corrupt practices to flourish.[6]

Drawing the line between legitimate and illegitimate employer payments to union representatives is a high-stakes endeavor. An underinclusive rule may prohibit useful labor practices such as allowing an employee paid time off during the workday to help other employees resolve grievances against the employer,[7] or allowing an employee to take a leave of absence to work for the union without loss of pay or benefits.[8] An overinclusive rule may allow payments that create conflicts of interest for the recipient or degenerate into outright bribes and kickbacks. Section 302 of the Labor Management Relations Act (LMRA) helps draw the line between legitimate and illegitimate employer payments,[9] although it does not specifically address payments to current or former employees on leave to conduct union business. Instead, section 302 broadly prohibits employer payments to any representative of any of its employees.[10] Within this broad prohibition, however, section 302 contains several exceptions, including one for money paid to an employee or former employee "as compensation for" or "by reason of" his service to the employer.[11]

Although this exception was not specifically designed for paid union leave, courts have struggled to interpret it in a way that upholds the legality of labor practices the courts find beneficial and innocuous. In order to differentiate legitimate from illegitimate payments, courts

---

5 See infra note 15 and accompanying text.

6 See infra Part II.B. Even if the Court were to adopt a different approach than that adopted by the circuit courts that have addressed this issue, it is unlikely that the Court could fashion a satisfactory rule under the current statutory framework. See infra Parts II.A and III.B.

7 See infra note 19 and accompanying text.

8 See infra note 20 and accompanying text.

9 See 29 U.S.C. § 186 (1994). Section 8(a)(2) of the National Labor Relations Act (NLRA), id. § 158(a)(2) (1994), also assists in making this distinction. Section 8(a)(2), however, has limited application in the context of employer-paid union employees and, thus, is outside the scope of this Note. For further information on section 8(a)(2), see generally Samuel Estreicher, Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA, 69 N.Y.U. L. Rev. 125 (1994).

10 See § 186(a).

11 See § 186(c)(1).

have adopted unlikely and illogical interpretations of section 302. While in the actual cases before the courts this ad hoc approach has efficiently separated criminal payments from innocuous ones, courts have articulated standards that do not include sufficient safeguards to prevent more problematic and even harmful payment arrangements.[12] Such unsettled rules have created uncertainty and have threatened the practice of employer-paid union workers.[13] A settled judicial rule, however, will fare no better because courts will be unable to fashion an interpretation of section 302 that will simultaneously uphold legitimate practices, protect union autonomy, and safeguard against payments that degenerate into bribes and kickbacks.[14]

As an alternative to a judicial solution, this Note offers a legislative solution in the form of an amendment to section 302 that exempts certain employer-financed union positions and includes specific safeguards to preserve union autonomy and minimize conflicts of interest. Part I considers the policy rationales for allowing employer-paid union representatives in certain contexts and for preventing unfettered employer payments. Part II examines several leading judicial interpretations of section 302 in the context of employer-paid union officials and considers the limitations of these judicial solutions. Part III discusses the consequences of an unsettled law and the inadequacy of a judicial solution and concludes with a legislative proposal in the form of an amendment to section 302.

I

THE BENEFITS AND COSTS OF EMPLOYER-PAID UNION REPRESENTATIVES

The appropriate legal rule regulating employer payments to union representatives should allow those payments when they promote useful labor-management practices. At the same time, the rule should safeguard against union disloyalty and minimize conflicts of interest between the recipient union representative and the employer. This Part describes two common labor-management practices and discusses the benefits that justify their preservation. It also recognizes the countervailing concern that employer payments threaten union autonomy and loyalty and the important role these values play in the U.S. labor system.

---

12 See infra Part II.B.

13 See infra Part III.A.

14 See infra Part III.B.

A. *No-Docking and Paid Union Leave: Beneficial Labor-Management Practices*

This Note endorses a legal rule that allows for employer-paid union representatives in two fairly common contexts.[15] The first involves the long-standing[16] practice of allowing an employee time off during the workday to help his fellow employees resolve grievances without loss of time or pay.[17] This employee is commonly referred to as a shop steward,[18] and the practice is called "no-docking," because the employee is not docked any wages for time spent on union activity.[19] The second beneficial labor practice is paid union leave, whereby an employee is allowed a leave of absence in order to work for the union while the employer continues to pay the employee's salary, make pension fund contributions, or allow the employee to continue to accrue seniority.[20] These practices allow an employee to

---

15 This Note does not argue that employers should, as a matter of public policy, finance no-docking and paid union leave; this debate is beyond the scope of this Note. This Note supports the union and management right to negotiate and bargain over such terms, circumscribed within certain statutory safeguards. For further discussion of whether employers should pay union representatives for time spent on the grievance process, see Walt Baer, Labor Union Representatives: Allowed and Prohibited Practices 44-59 (1992); Bertram R. Crane & Roger M. Hoffman, Successful Handling of Labor Grievances 107-10 (1956).

16 A 1944-45 study conducted for the War Labor Board by the Bureau of Labor Statistics found that, in four out of every five plants, management compensated union representatives for time spent handling grievances during working hours. See Bureau of Labor Statistics, U.S. Dep't of Labor, Grievance Procedures Under Collective Bargaining 1 n.2 (1946); see also Bureau of Labor Statistics, U.S. Dep't of Labor, Bull. No. 686, Union Agreement Provisions 152-53 (1942). The most recent study by the Bureau of Labor Statistics found that no-docking provisions are contained in over 80% of all collective bargaining agreements in the transportation equipment, electrical machinery, chemicals, ordnance, furniture and fixtures, communications, and utilities industries. See Bureau of Labor Statistics, U.S. Dep't of Labor, Bull. No. 1425-19, Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business 6 (1980) [hereinafter Bureau of Labor Statistics, Major Agreements].

17 See Crane & Hoffman, supra note 15, at 110-14 (providing illustrations of typical clauses in collective bargaining agreements relating to pay for grievance time).

18 Other names for this union representative include shop committee member, department steward, and grievance committee member. See id. at 90-91 (listing possible grievance handlers); Clyde E. Dankert, Contemporary Unionism in the United States 151 (1948) (describing role of shop stewards in grievance process). A shop steward and a full-time grievance committee member are chosen either by election of the rank-and-file members or by appointment of union officers. See Crane & Hoffman, supra note 15, at 91. Many collective bargaining agreements require that union representatives be employees of the company. See id. at 91-92.

19 See Caterpillar, Inc. v. International Union, UAW, 107 F.3d 1052, 1053 (3d Cir. 1997) (describing no-docking practice); United States v. Phillips, 19 F.3d 1565, 1575 n.18 (11th Cir. 1994) (same).

20 See Caterpillar, Inc. v. International Union, UAW, 909 F. Supp. 254, 255 (M.D. Penn. 1995) (describing paid union leave policy between Caterpillar and UAW); Gilbert E.

exploit acquired knowledge about workers' concerns and problems to the benefit of both the employer and the union.[21]

The shop steward plays a vital role in the administration of the collective bargaining agreement and serves as a communication link between the union and the rank-and-file members.[22] Shop stewards thus provide many benefits that justify a system of no-docking. Through the administration of the collective bargaining agreement, the union is able to enforce the rights of workers guaranteed in the agreement and protected by applicable laws and regulations.[23] Central to contract administration is the grievance process by which violations of, or ambiguities in, the collective bargaining agreement are resolved.[24] The shop steward's role as the frontline union representative in the grievance process is essential to the union's ability to run the grievance machinery efficiently and successfully.[25]

The shop steward's responsibilities begin with the important role of informing the workers of their rights under the collective bargaining agreement and applicable law.[26] For employees who suspect that their rights have been violated, consulting with the shop steward is often the initial step in resolving a grievance.[27] When a grievance is

---

Dwyer, Employer-Paid "Union Time" Under the Federal Labor Laws, 12 Lab. L.J. 236 (1961) (describing practice of paid union leave).

21 See Crane & Hoffman, supra note 15, at 92 (noting mutual advantages to employer and union because representative will have some familiarity with grievance problems).

22 See Herman Erickson, The Steward's Role in the Union 20-21 (1971) (stating that shop steward performs most important function because "he safeguards the contract and represents the workers in day-to-day problems with management"); Terry L. Leap, Collective Bargaining and Labor Relations 202-03 (2d ed. 1995) (describing shop stewards as one of most important groups in local union and as "backbone" of local union activities).

23 See Thomas A. Kochan & Harry C. Katz, Collective Bargaining and Industrial Relations 15 (1988); Leap, supra note 22, at 10; see also Harold W. Davey et al., Contemporary Collective Bargaining 174-76 (4th ed. 1982) (reviewing federal legislation impacting grievance procedure); Erickson, supra note 22, at 65-66 (stating that grievance procedure is available for violations of state and federal laws involving such matters as safety, working conditions, hours, wages, and fair employment practices).

24 See Crane & Hoffman, supra note 15, at 1-3. Benefits from the grievance process also accrue to the employer. See id. at 3-5 (describing grievance machinery as contributing to harmonious employee relations and productive efficiency).

25 See Erickson, supra note 22, at 20-21 (noting that success of union depends largely on steward and that the steward performs union's most important functions); see also Al Nash, The Union Steward: Duties, Rights, and Status 6 (1977) (noting that central function of shop steward is grievance handling). But see Leap, supra note 22, at 202 (describing eroding power of shop stewards).

26 See Erickson, supra note 22, at 30 (noting that "[t]he steward must educate the members regarding their rights").

27 See Michael J. Duane, The Grievance Process in Labor Management Cooperation 64-65 (1993) (describing four steps in representative grievance procedure, the first of which involves discussions with shop steward); Kochan & Katz, supra note 23, at 295 (same). But see Leonard R. Sayles & George Strauss, The Local Union 41-42 (1953) (noting tendency to bypass shop steward in grievance procedure and rely on other, higher-ranking union

reported to a shop steward, he investigates it to gain further information and weed out unmeritorious claims.[28] The shop steward then presents valid grievances to a foreman or other first-line supervisor on behalf of the employee in order to attempt an informal resolution of the problem.[29] If the shop steward cannot resolve the grievance informally through discussions with management, he often helps the employee to file a formal grievance against the employer.[30] Although employees have the right to file grievances on their own, the shop steward greatly influences employees' decision to file.[31] The shop steward also has the power to file a grievance in the name of the union, regardless of the employee's wishes.[32] With this power, the shop steward plays an important role in monitoring the employer's compliance with the collective bargaining agreement.

The shop steward also serves another important function as a communication link between the rank-and-file and the union leadership.[33] To many rank-and-file members, the shop steward is "the union."[34] Through daily contact with fellow workers, the shop steward is a primary source of union information for the rank-and-file, keeping workers abreast of union activities and initiatives, the status of contract negotiations, union politics, and the national labor move-

officers). Under federal law, all employees have the right to meet with their employers to present grievances without the intervention of the bargaining representative, provided that the bargaining representative has the opportunity to be present at such meetings. See 29 U.S.C. § 159(a) (1994). Despite this right, very few employees bypass union counsel and assistance in the grievance process. See Crane & Hoffman, supra note 15, at 43. In 1984, the U.S. Department of Labor issued a study of grievance procedures, stating that 99% of the 1717 labor agreements included in the study contained procedures for handling grievances. See Baer, supra note 15, at 130-31. A particularized study of 416 of these agreements showed that almost two-thirds (238) of them identified the initiating parties in the grievance process as the employee and union representative. See id.

28 One of the shop steward's "primary responsibilities is to determine the legitimacy of the employee's complaint." Crane & Hoffman, supra note 15, at 225; see also Leap, supra note 22, at 381 (noting that shop steward's responsibility includes performing initial investigation and gathering facts surrounding grievance).

29 See Crane & Hoffman, supra note 15, at 223-25; Leap, supra note 22, at 200 (stating that many grievances are quickly resolved through conversations between shop steward and management's first-line supervisor); Nash, supra note 25, at 1 (same).

30 See Leap, supra note 22, at 200, 244-45; see also Baer, supra note 15, at 43 (stating that underlying purpose of grievance procedure is orderly and peaceful process for prompt and expeditious resolution of disputes between parties).

31 See supra note 27.

32 See Erickson, supra note 22, at 38.

33 See id. at 20; Robert W. Miller et al., The Practice of Local Union Leadership 64-69 (1965) (noting studies that found talking with union steward was one of leading sources of information for union members about union affairs, officers' views, and international union's views); Nash, supra note 25, at 10.

34 See Leap, supra note 22, at 203 (describing shop steward in many unions as "'the union' in the eyes of rank-and-file employees").

ment.[35] The shop steward also serves as a conduit of information from the rank-and-file to union leadership.[36] This information is particularly useful to union negotiators when gauging rank-and-file preferences and demands during contract negotiations.[37]

A second labor practice, paid union leave,[38] has several benefits which justify its legitimacy. Employees on leave to work for the union usually serve as full-time grievance committee members whose responsibilities include the resolution of grievances in their later stages and, to a lesser extent, in contract negotiations.[39] A grievance committee member's familiarity and experience as an employee are invaluable benefits in the performance of his responsibility, as they are for a shop steward.[40] In grievance administration, knowledge and past experience with workers, management, and working conditions will provide added insight into the merit of grievances and possible resolutions. In the negotiation context, a negotiator's first-hand knowledge of the problems and concerns of the rank-and-file members will both increase the likelihood that these issues will be addressed and promote the striking of an agreement acceptable to the rank-and-file members.[41] To gain the many benefits of having former employees work for the union, extended periods of leave to work for the union should be encouraged.

The employee's retention of at least the same level of salary and benefits, including the continued accrual of seniority, is essential to encourage employees to pass between work for the employer and work for the union. If an employee had to take a reduction in wages

---

35 See Erickson, supra note 22, at 29 (noting workers look to shop steward for information regarding their own union and union movement in general).

36 See id. at 33-34 (describing function of shop steward as communication link between members and officers of union in both directions); Leap, supra note 22, at 202 (noting that important aspect of local unions is to "keep a close watch on member problems and concerns").

37 See Leap, supra note 22, at 216, 300 (noting that bargaining demands by union leaders in collective bargaining are determined by input from local union officers who have intimate knowledge of working conditions and employee concerns).

38 "Paid union leave" is used in this Note to describe an employee on leave from active duty with the employer who is working for the union while continuing to receive his salary from, or retaining fringe benefits provided by, the employer, such as pension contributions.

39 See Crane & Hoffman, supra note 15, at 49-52 (noting grievance committee member's participation in later stages of grievance process). Employees also take leave after being elected local president or being hired as a national representative. Collective bargaining agreements typically provide for unpaid union leave only for such leaves of absence. However, these employees often retain many employer-provided fringe benefits. See Bureau of Labor Statistics, Major Agreements, supra note 16, at 20; see also supra note 38.

40 See Erickson, supra note 22, at 82 (stating importance of knowing people with whom one is dealing in order to deal effectively); see also supra note 21 and accompanying text.

41 See supra note 37 and accompanying text.

or other benefits in order to work for the union, it is unlikely that he would be willing to make this economic sacrifice. An employee's salary and benefits could be provided either by the employer or the union without any loss to the employee.[42] Only the employer, however, can ensure that the employee can return to work without any loss of job status and with union time credited toward the employee's seniority.[43] Seniority is vital to an employee's retirement status and retirement benefits.[44] A loss of one or two years of seniority would require an employee to work that much longer before retirement or to take less in retirement benefits. An employee would be reluctant to take a leave of absence to work for the union unless job security with the employer was guaranteed and the time spent working for the union could be credited toward his seniority with the employer.

B. Union Loyalty and Autonomy: Crucial Components of U.S. Labor Law

The benefits of no-docking of shop stewards and paid union leave must be balanced against the threat these practices pose to the fiduciary duty of the recipient union representative. This section first discusses the importance of the union representative's fiduciary duty and the union's autonomy to the U.S. labor law system. It next considers the problems that arise when this autonomy and fiduciary duty are threatened by employer payments. It concludes with an illustrative case in which union representatives breached their fiduciary duty in pursuit of benefits from the employer.

Union representatives occupy a position of trust in relation to their union and its members.[45] Their union position obligates them to act for the benefit of the union and its members and not for their

---

[42] It does not matter who pays the employee's salary and benefits, although the parties should be able to negotiate freely for such payments.

[43] Unlike other benefits, such as health insurance and pension fund contributions, which can be provided unilaterally by a union, seniority requires employer approval. Seniority clauses are an integral part of most collective bargaining agreements and thus require employer approval. See Leap, supra note 22, at 549-51.

[44] See John A. Fossum, Labor Relations 217-21 (1989) (discussing benefits of accruing seniority as higher levels of pay, more vacation time, promotions, and job security).

[45] See Erickson, supra note 22, at 24 (stating that shop steward, above all other considerations, must be dedicated to serving others); see also Landrum-Griffin Act § 501, 29 U.S.C. § 501 (1994) (stating that officers, agents, shop stewards, and other representatives of labor organization occupy positions of trust in relation to organization and its members, and must refrain from dealing with organization either as adverse party or on behalf of adverse party in any matter connected with their duties); Kochan & Katz, supra note 23, at 41 (describing how Landrum-Griffin Act imposes duty on union leaders to represent their members' interests fairly).

own.[46] In order to preserve this position of trust, a union must be free from outside control, and union representatives must be loyal to the union and its members. Union autonomy and worker loyalty are prerequisites to the U.S. labor law system of exclusive representation and collective bargaining.[47] Under the system of exclusive representation, employees give up their individual rights to bargain with the employer in exchange for exclusive representation of their interests by their union.[48] If workers could not count on their union's autonomy and their representative's loyalty to their interests, it is unlikely that a worker would be willing to give up his individual right to bargain with the employer. As a central component of the labor system, U.S. labor laws are replete with provisions protecting union autonomy and the fiduciary duty owed by the union to its members.[49]

While a breach of a union officer's fiduciary duty is most obvious when he is bribed by an employer, other more innocuous employer payments may lead the officer to breach his duty. When given a bribe, a union officer is explicitly given something of value in exchange for taking action that violates his position of trust. However, even when

---

[46] See Erickson, supra note 22, at 24.

[47] See 29 U.S.C. § 151 (1994) (setting forth findings and declaration of policy of Labor Management Relations Act); Leap, supra note 22, at 98 (describing exclusive representation and collective bargaining as key features of U.S. labor relations); Clyde W. Summers, Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle, 20 Comp. Lab. L. & Pol'y J. 47, 47 (1998) (describing exclusive representation as fundamental ordering principle of U.S. labor law).

[48] See Leap, supra note 22, at 18 (describing loss of individual bargaining power for employees in collective bargaining contexts); Summers, supra note 47, at 47; see also 29 U.S.C. § 157 (1994) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."); id. § 159(a) (stating that representative selected by majority of bargaining unit is exclusive bargaining representative of all employees of unit with respect to rate of pay, wages, hours of employment, or other conditions of employment). For more information on exclusive representation, see Bruce Feldacker, Labor Guide to Labor Law 134 (1983).

[49] See, e.g., 29 U.S.C. § 158 (1994) (stating that it is unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157"); id. § 401 (stating congressional finding that instances of breach of trust, corruption, disregard of rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct required further and supplementary legislation to afford necessary protection of rights and interests of employees); Vaca v. Sipes, 386 U.S. 171, 190 (1967) (stating that union breaches its duty of fair representation if it represents employee arbitrarily, discriminatorily, or in bad faith); Steele v. Louisville Ry., 323 U.S. 192, 202 (1944) (finding that union has duty to represent fairly all employees for whom it bargains); see also Baer, supra note 15, at 122-23, 126 (describing union's duty of fair representation to represent all employees in bargaining unit, whether members of union or not); Leap, supra note 22, at 86-87 (describing fiduciary standards for union representatives); Kurt L. Hanslowe, Individual Rights in Collective Labor Relations, 45 Cornell L.Q. 25, 46 (examining duties owed by unions to employees in handling grievances).

employer payments are not made as part of an explicit quid pro quo, the payments may act to divide the loyalty of the recipient and create an incentive to pursue selfish ends at a loss to the union. Numerous problems arise when a union officer's loyalties become divided between the employer who pays his wages and the union members whom he has been selected to represent. One of the dangers of allowing union representatives to accept employer payments indiscriminately is that union representatives may become less loyal to bargaining unit employees. This problem may manifest itself in less effective handling of grievances, greater role conflicts, and weakened opposition to the employer in contract and grievance negotiations. Unions and union employees deserve loyal representatives of their interests.[50]

It is easy to see how unfettered employer payments can corrupt the negotiation and grievance processes. A union negotiator who is paid or receives other benefits from the employer may be more likely to accept a collective bargaining agreement that is less than favorable for the union in exchange for the preservation of his salary or benefits, or for an increase in the same.[51] Similarly, a shop steward, who is paid by the employer, may be willing to drop a valid grievance against the employer or discourage an employee from filing such a grievance if the employer can unilaterally withhold or increase the steward's pay or benefits.[52]

The facts of *United States* v. *Phillips*[53] provide a good example of how payments to union representatives can corrupt labor-management relations and lead union representatives to pursue their own interests over those of their union members. In *Phillips*, two union representatives, former employees of the employer, had conditioned the acceptance of an unfavorable local collective agreement on the

[50] These policy rationales are based on the policy arguments for excluding supervisors and managers from collective bargaining units. See S. Rep. No. 80-105, at 3-5 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 407, 409-11 (1948); Kochan & Katz, supra note 23, at 110-11 (stating that policy rationale for excluding supervisors and managers from bargaining units impairs their allegiance to management); Leap, supra note 22, at 107 (same). The parallel between supervisors and managers in bargaining units and union representatives receiving special payments from employers is obvious: Both the employer and union deserve and require loyal representatives in order for the collective bargaining process to function properly. See Kochan & Katz, supra note 23, at 9 (describing collective bargaining process as designed to achieve balance among conflicting goals of union and employer).

[51] See Clyde E. Dankert, Contemporary Unionism 437 (1947) (describing racketeering labor leader who sells out union members by agreeing to unsatisfactory wages and terms); see also United States v. Phillips, 19 F.3d 1565, 1568 (11th Cir. 1994); infra notes 55-56 and accompanying text.

[52] See infra note 55 and accompanying text.

[53] 19 F.3d 1565, 1566-69 (11th Cir. 1994).

employer's agreement to make retroactive pension payments for themselves and several other union employees.[54] In exchange for a promise by management favorably to consider granting the retroactive pension payments, the union representatives agreed to a collective bargaining agreement that included a permanent reduction in the labor force, the elimination of incentive pay, and the discontinuation of certain restrictive work practices.[55] The employer, USX, subsequently agreed to make the pension fund payments in exchange for the union officials' withdrawal of several employee grievances.[56] This case provides a good example of how the opportunities available to union representatives to seek advantages and benefits for themselves in contract negotiations and administration potentially could cause great harm to the union and its members.

Part I has laid out the two competing interests surrounding the issue of employer-paid union representatives: the preservation of two useful labor practices and the protection against union disloyalty. Unrestricted payments to union representatives should not be allowed because of the potential conflicts of interest that arise. However, these payments should not be prohibited outright because of the many benefits that accrue from the practices of no-docking of shop stewards and paid union leave. The proper legal rule should balance these concerns and allow payments with specific restrictions and safeguards. Part II looks at the current legal rule regulating these payments and its interpretations by the courts.

II
SECTION 302 AND ITS INTERPRETATIONS

United States labor law regulates payments from employers to union representatives through section 302 of the LMRA.[57] Section 302 was enacted in 1947 primarily to put an end to the abuse of employee trust funds by both management and labor.[58] The expansive language of the section and its underlying policy goals, however, re-

---

54 See id. Under the terms of the previous leave policy, the union representatives had lost any right to receive a pension from the employer. See id. at 1568. The union representatives asked to be awarded enough years of "continuous service" for pension purposes so that they would be entitled immediately to retire and receive a pension from the employer. See id.

55 See id. at 1567.

56 See id. at 1570.

57 See Labor Management Relations (Taft-Hartley) Act § 302, 29 U.S.C. § 186 (1994).

58 See 93 Cong. Rec. 4678 (1947) (statement of Sen. Ball) (asserting that purpose of section 302 is to ensure integrity of union welfare funds as trust funds for employees and ensure that payments by employers to union funds do not degenerate into bribes); id. (statement of Sen. Byrd) (same). The language of section 302 originated in a successful amendment to the Case Bill, a forerunner to the Taft-Hartley Act, in the 79th Congress.

quire a much broader application of section 302.[59] Section 302 is a sweeping prohibition on all employer payments to union representatives, with a list of specifically delineated exceptions.[60] There is no specific exception, however, for no-docking of employee shop stewards or employees on paid union leave. In an effort to uphold these innocuous and useful practices, courts have struggled to interpret one of the section 302 exceptions to include these employer payments.[61] In applying section 302, courts have relied on indices of corruption or fraud to weed out illegitimate payments.[62] Although the courts have identified important safeguards against corrupt payments, their ad hoc and piecemeal approach has created standards that could allow for outright bribes and kickbacks.

Part II of this Note examines section 302 of the LMRA and various interpretations of the section by courts as they struggle to uphold the legality of certain employer payments. This Part also discusses the dangerous precedents created by these decisions.

A. Section 302 of the LMRA: A Broad Prohibition

Section 302 of the LMRA is a criminal statute,[63] with stated exceptions, prohibiting all payments or loans between employers and employee representatives.[64] Section 302(a) makes it unlawful for an

See H.R. 4908, 79th Cong. (1946). Congress passed the Case Bill, but failed to override a presidential veto. See 92 Cong. Rec. 6674-78 (1946).

59 See United States v. Ryan, 350 U.S. 299, 305 (1956) (stating that section 302 extends beyond regulating trust funds and prohibits all payments between employer and representative with stated exceptions and that narrow construction of section 302 would frustrate intent of Congress); see also United States v. Phillips, 19 F.3d 1565, 1574 (11th Cir. 1994) (stating Labor Management Relations Act "is, in part, a conflict-of-interest statute designed to eliminate practices that have the potential for corrupting the labor movement"); United States v. Pecora, 798 F.2d 614, 622 (3d Cir. 1986) (same).

60 See § 186.

61 See, e.g., Caterpillar, Inc. v. International Union, UAW, 107 F.3d 1052 (3d Cir. 1997) (interpreting section 302(c)(1) as allowing payments contained in collective bargaining agreement).

62 See, e.g., *Phillips*, 19 F.3d at 1576 (noting that payment at issue was bribe or suggestive of bribe); Toth v. USX Corp., 883 F.2d 1297, 1305 (7th Cir. 1989) (same).

63 See 29 U.S.C. § 186(d) (1994) (imposing penalty, upon conviction of violation of statute, of fine of not more than $15,000, or imprisonment for not more than five years, or both; but if value of amount of money or thing of value involved in any violation does not exceed $1,000, penalty shall be fine of not more than $10,000, or imprisonment for not more than one year, or both); see also *Ryan*, 350 U.S. at 305 (stating that "[a]s the statute reads, it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative" and affirming conviction of labor organization president for receiving monetary gifts). It is interesting to note that, while section 302 is a criminal statute, much of the litigation that arises under it is civil. This is largely the result of strategic behavior by employers who take advantage of the unsettled state of the law during labor strife. See infra Part III.A.1.

64 See § 186; see also Dwyer, supra note 20, at 240-41.

employer or a person acting in his interest "to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value" (1) to any representative of his employees, (2) to any labor organization or its officers or employees who represent or wish to represent his employees, (3) to any employee above his regular compensation with the intent to have this employee influence other employees in the exercise of their organizational and bargaining rights, or (4) to any officer or employee of a labor organization with the intent to affect his actions as an employee representative.[65] The Supreme Court has broadly interpreted this prohibition to include more than simply bribery and corrupt practices.[66] This broad prohibition applies to the docking of shop stewards and paid union leave.[67]

Section 302(b) complements section 302(a) by prohibiting the acceptance, request, or demand of any employer payment or loan.[68] On their face, sections 302(a) and (b) would prohibit such innocuous payments as the salary earned working for an employer by an employee who also, in his free time, works for the union. However, specific exemptions contained in section 302(c) temper the obvious over-inclusiveness of this prohibition.[69]

In fact, most of the difficulty of section 302 concerns the application of the section 302(c) exceptions.[70] Of the nine exceptions in section 302(c),[71] subsection (1) is primarily applicable to this analysis of

---

[65] § 186(a).

[66] See *Ryan*, 350 U.S. at 305 (stating that section "outlaws all payments, with stated exceptions, between employer and representative").

[67] See, e.g., Caterpillar, Inc. v. International Union, UAW, 107 F.3d 1052, 1054 (3d Cir. 1997) (noting that wage payments to full-time union representatives are prohibited by section 302(a), but holding that such payments are permissible under section 302(c)); BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union, 791 F.2d 1046, 1048-49 (2d Cir. 1986) (stating that no-docking is prohibited by section 302(a) but permissible under section 302(c)). But see Employees Indep. Union v. Wyman Gordon Co., 314 F. Supp. 458, 461 (N.D. Ill. 1970) (holding that section 302 does not apply to no-docking practice).

[68] See § 186(b)(1) ("It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by subsection (a) of this section.").

[69] See § 186(c).

[70] The major ambiguities of section 302(a) have been resolved, including who is a "representative," who is an "employee," what is "a thing of value," and what constitutes "an industry affecting commerce." See generally W.J. Dunn, Annotation, Section 302(a)-(d) of Labor Management Relations Act (29 U.S.C. § 186(a)-(d)) Concerning Payments Between an Employer and a Representative of His Employees, 13 A.L.R. 3d 569 (1967).

[71] See § 186(c). Four of these exceptions deal with the establishment and administration of employer supported employee trust funds; four others exempt payments to satisfy judgments, "checkoffs" for payment of union dues, payments made to labor-management committees, and payments regarding the sale and purchase of goods at market price. None of these is directly germane to the discussion in this Note.

the lawfulness of employer-paid benefits to union employees.[72] Section 302(c)(1) makes sections 302(a) and (b) inapplicable to employer payments made to a current or former employee who is also a union employee on the condition that those payments are made as compensation for, or by reason of, that employee's service to the employer.[73]

The two central questions on the lawfulness of payments to union officials under section 302(c)(1) are whether the union official receiving the employer payment is "an employee or former employee," and whether he is being "compensat[ed] for, or by reason of, his service as an employee of such employer."[74] The primary difficulty courts face in interpreting section 302(c)(1) has been to give meaning to the concepts of "as compensation for" and "by reason of" an employee's service.[75]

---

[72] In addition to section 302(c)(1), section 302(c)(5), pertaining to employee trust fund contributions, is also applicable when an employee union work leave policy requires an employer to continue to make pension fund contributions for the employee. In this context, the payments are permissible if they meet the requirements of either section 302(c)(1) or (c)(5). See Trailways Lines, Inc. v. Trailways, Inc. Joint Council, 785 F.2d 101, 104-06 (3d Cir. 1986) (holding that provision of collective bargaining agreement requiring employer to make contributions to pension funds on behalf of employees who took leaves of absence to accept full-time positions with union did not meet requirements of either section 301(c)(1) or 301(c)(5)), overruled on other grounds by *Caterpillar*, 107 F.3d at 1052.

[73] See § 186(c):

> The provisions of this section [subsections (a) and (b)] shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer . . . .

[74] Id.

[75] The legislative history on this exception is relatively unhelpful. The sole statement regarding the exception states that it applies "with respect to any money due a representative who is an employee or a former employee of the employer, on account of wages actually earned by him." 93 Cong. Rec. 4805 (1947) (statement of Sen. Ball), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1304 (1959). It should be noted that the use of legislative history is a contested tool of statutory interpretation. For arguments in favor of the use of legislative history, see Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 862-63 (1992) (supporting use of legislative history as essential tool for effective judicial decisionmaking); William N. Eskridge, Jr., Should the Supreme Court Read *The Federalist* but Not Statutory Legislative History?, 66 Geo. Wash. L. Rev. 1301, 1323 (1998) (noting that while some cases "would not have been correctly decided without a thorough examination of legislative history," firm view on appropriateness of its use is impossible without empirical research). For arguments against the use of legislative history, see Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 29-30 (1997); Adrian Vermeule, Legislative History and the Limits of Judicial Competence: The Untold Story of *Holy Trinity Church*, 50 Stan. L. Rev. 1833 (1998). If a court believes that the statute is ambiguous, the rule of lenity allows the court to interpret the statute so as not to find a violation. See, e.g.,

Section 302 successfully operates both to prohibit the obvious cases of bribery and extortion and to allow purely innocuous payments. Examples of prohibited employer payments to union representatives include explicit bribes, gifts, and loans of any type. Examples of permissible employer payments under section 302(c)(1) include the salary earned for work performed for the employer by an employee who is also a union representative, and retirement benefits to a retired employee now working for the union.[76] The difficulty in applying section 302 arises when relatively innocuous payments do not squarely fit into one of the section 302(c) exemptions.[77] No-docking of shop stewards and paid union leave policies fall in this grey area.

B. Three Lines of Cases: Good Results, Bad Precedents

This section looks at three lines of cases applying section 302 to paid union leave policies or no-docking of shop stewards. The cases demonstrate the strained readings of section 302 employed by courts to uphold the legality of beneficial and benign employer payments. The cases also demonstrate that, despite favorable outcomes in the cases themselves,[78] the standards and rules articulated by the courts allow for corrupt and dangerous payments in other labor-management contexts.

1. Caterpillar*: A Collective Bargaining Agreement Can Only Provide So Much Protection*

The Court of Appeals for the Third Circuit held in *Caterpillar, Inc. v. International Union, UAW*[79] that employer payments to full-

Crandon v. United States, 494 U.S. 152, 158 (1990). The rule of lenity applies only "if, after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended." Reno v. Koray, 515 U.S. 50, 65 (1995). For an argument that the rule of lenity does not apply to section 302, see *Caterpillar*, 107 F.3d at 1073 (Alito, J., dissenting) (stating that rule of lenity does not apply because statute is not ambiguous). For more on the rule of lenity, see generally Lawrence M. Solan, Law, Language, and Lenity, 40 Wm. & Mary L. Rev. 57 (1998).

[76] See 93 Cong. Rec. 4805 (1947) (statement of Sen. Ball), reprinted in 2 NLRB, supra note 75, at 1304 (stating reason for exception).

[77] Concerns with the amendment's possibly broad reach were voiced during debate by Senators Ives and Pepper. Senator Ives was concerned that the language was "rather broad" and "vague" and feared that the prohibition would apply to "Christmas presents or birthday presents or anything of that type." 93 Cong. Rec. 4878 (1947) (statement of Sen. Ives), reprinted in 2 NLRB, supra note 75, at 1315. Similarly, Senator Pepper feared that the prohibition could affect "contributions provided by management for picnics or in aid of [employee] baseball teams. . . ." Id. (statement of Sen. Pepper).

[78] For the purposes of this Note, a "favorable outcome" is one in which the court upholds the legality of no-docking and paid union leave, while striking down other payments.

[79] 107 F.3d 1052 (3rd Cir. 1997), cert. granted, 521 U.S. 1152 (1997), cert. dismissed, 523 U.S. 1015 (1998).

time union representatives are permissible under section 302 if contained in a collective bargaining agreement.[80] Such a requirement can serve as a useful safeguard against backroom deals and secretive payoffs. Mere inclusion of payments in a collective bargaining agreement cannot, however, prevent conflicts of interest or eliminate the opportunity for union representatives to act selfishly to the detriment of the union and its members. This section will discuss the *Caterpillar* decision and argue that section 302 cannot fairly be read to allow payments solely because of their inclusion in a collective bargaining agreement.

In 1997, the Third Circuit, sitting en banc in *Caterpillar*, overruled a previous decision and held that employer-paid salaries of full-time union representatives were permissible under section 302 by reason of the employees' past service to the employer when those payments were agreed upon as part of a collective bargaining agreement.[81] At issue was the legality of a provision in the collective bargaining agreement between Caterpillar and UAW that allowed employees who became union committee members or grievance chairpersons[82] to take an indefinite leave of absence in order to work full-time for the union without loss of pay, benefits, or full-time status.[83]

The court held that the payments at issue were permissible under section 302(c)(1) "by reason of" the grievance chairpersons' past service to Caterpillar.[84] Interpreting the section 302(c)(1) exception, the

---

[80] See id. at 1055-56; see also Toth v. USX Corp., 883 F.2d 1297, 1304 (7th Cir. 1989) (holding that payments contained in collective bargaining agreement represent what is "by reason of" employee's service); IBEW Local 2154 v. National Fuel Gas Distribution Corp., No. 92-CV-0403E(H), 1993 WL 7541, at *3 (W.D.N.Y. Jan. 13, 1993) (same); International Union, UAW v. CTS Corp., 783 F. Supp. 390, 394-95 (N.D. Ind. 1992) (same); Communications Workers of Am. v. Bell Atlantic Network Servs., 670 F. Supp. 416, 423-24 (D.D.C. 1987) (same).

[81] See *Caterpillar*, 107 F.3d at 1055, overruling Trailways Lines, Inc. v. Trailways, Inc. Joint Council, 785 F.2d 101 (3d Cir. 1986). *Trailways* is an exception in the line of cases examining employer payments under section 302. The *Trailways* court held that employer contributions to a pension trust fund on behalf of employees who took leaves of absence to work for the union were prohibited by section 302. See *Trailways*, 785 F.2d at 104. *Trailways* is one of the only decisions to hold that these payments were prohibited absent any evidence of blatant corruption or wrongdoing. The *Trailways* decision has been the impetus for many employers to challenge the legality of these payments after almost forty years since the enactment of the statute. See, e.g., *IBEW Local 2154*, 1993 WL 7541, at *1; *Communications Workers*, 670 F. Supp. at 421.

[82] Grievance handlers, also deemed shop stewards, are union employees assigned to investigate the grievances of employees working under the collective bargaining agreement and help resolve these issues. See Leap, supra note 22, at 381.

[83] See *Caterpillar*, 107 F.3d at 1053.

[84] See id. at 1056; see also *IBEW Local 2154*, 1993 WL 7541, at *3 (holding that accrual of years of service for pension plan benefits while employee is on leave pursuant to collective bargaining agreement is justified both "as compensation for" and "by reason of" em-

court stated that the collective bargaining agreement defined what was "by reason of an employee's service."[85] The court reasoned that these payments arose out of a collective bargaining agreement that defined the employees' consideration for working for Caterpillar.[86] According to the court, employees implicitly gave up some benefit in exchange for a promise that, if they were to become grievance chairpersons, Caterpillar would pay their salary.[87] The court stressed that payments included in a collective bargaining agreement would serve to hold the recipient union accountable to the membership.[88]

The Third Circuit announced a collective bargaining agreement requirement for employer payments to union representatives without any further restrictions. Mere inclusion of payments in a collective bargaining agreement cannot, however, immunize payments prohibited by section 302.[89] The drafters of section 302 took deliberate steps to prohibit parties from agreeing to employer payments to union representatives.[90] If Congress had contemplated a collective bargaining agreement exception to section 302, it would have included such an exception. The court anticipated the criticism that their reasoning would allow employers and unions to decide what is legal by including it in their collective bargaining agreement. It responded by stating that a collective bargaining agreement cannot immunize unlawful conduct, but that the contract defines the terms of what is owed to an employee because of his service as an employee.[91] However, the court's apparently circular reasoning does not explain how to distin-

---

ployee's past service to employer). The *Caterpillar* court explicitly rejected the view that these payments were compensation for past service. See *Caterpillar*, 107 F.3d at 1055.

85 *Caterpillar*, 107 F.3d at 1056.

86 See id.; see also Toth v. USX Corp., 883 F.2d 1297, 1304 (7th Cir. 1989) (holding that payments contained in collective bargaining agreement are justified by reason of employee's service); *Trailways*, 785 F.2d at 109 (Becker, J., dissenting).

87 See *Caterpillar*, 107 F.3d at 1056.

88 See id. at 1057. The Seventh Circuit in *Toth* adopted a similar analysis to that of *Caterpillar*, requiring that employer payments can qualify as "by reason of an employee's service," only if they are contained in a collective bargaining agreement. However, distinct from *Caterpillar*, the *Toth* court delineated two categories of payments that would prevent otherwise illegal payments from being legalized merely because of their inclusion in a collective bargaining agreement. The two categories of payments are: (1) payments in which the compensation term is clearly incommensurate with the former employment so as not to qualify as payment in compensation for or by reason of past service, and (2) cases in which the terms of a collective bargaining agreement vest too much discretion in the employer to make decisions regarding the granting of benefits. See *Toth*, 883 F.2d at 1305.

89 See *Caterpillar*, 107 F.3d at 1061 n.4 (Mansmann, J., dissenting).

90 See 29 U.S.C. § 186(a) (1994) (prohibiting employer from paying or agreeing to pay).

91 See *Caterpillar*, 107 F.3d at 1057 ("Put differently, the contract does not immunize otherwise unlawful subjects but, by defining the basis for the payments, speaks directly to the question posed by the statute as to whether the payments are 'compensation for, or by reason of . . . service as an employee.'" (quoting 29 U.S.C. § 186(a))).

guish between prohibited and permissible payments contained in a collective bargaining agreement.

In addition to adopting an improbable reading of section 302, the *Caterpillar* decision was founded on an unsound premise. The court reasoned that the payment of a union employee's salary was permissible "by reason of" his past service to Caterpillar: Each employee had given up something in exchange for the promise that Caterpillar would pay his salary if he became a grievance chairperson.[92] This reasoning cannot justify payments to the first grievance chairperson under a new collective bargaining agreement that contains such provisions.[93] After the new contract becomes effective, neither present grievance chairpersons, nor newly elected chairpersons who have not worked for the employer under the new contract can be said to receive their salary "by reason of" their past service to the employer. This is so because the previous collective bargaining agreement did not provide for employer-paid grievance chairpersons; thus, employees did not give up wages or other benefits in exchange for the promise that Caterpillar would pay their salary should they become grievance chairpersons. By virtue of a similar analysis, the *Caterpillar* court's reasoning cannot justify the payments to a current grievance chairperson when a new collective bargaining agreement becomes effective.

The *Caterpillar* opinion has mischaracterized these payments as a promise of future payment as part of an employee's consideration for services. Concededly, these payments are part of an employee's consideration for services.[94] However, the consideration is the paid salary of *that employee's* current grievance chairperson. In other words, an employee under a collective bargaining agreement is accepting lower wages in return for having a former worker as a grievance chairperson who is paid entirely by the employer.[95] Thus, these payments are not arising "by reason of" the grievance chairperson's past service, but are merely part of a current employee's consideration for services.

The greatest danger of the *Caterpillar* decision is the precedent it establishes for employer payments to union representatives. Although from a policy perspective the collective bargaining agree-

[92] See *Caterpillar*, 107 F.3d at 1056-57.

[93] See id. at 1071 (Alito, J., dissenting).

[94] See id. at 1057.

[95] A current employee may prefer this arrangement to one in which the union pays these salaries and passes the cost along to employees in the form of increased union dues. It would be economically beneficial to such an employee for the grievance chairperson to be paid by the employer out of the employee's pretax wages, rather than out of after-tax dollars in the form of dues. Also, the employee has the added benefit that the grievance chairperson is a former worker of the employer familiar with the particular work site.

ment standard leads to the right decisions both in *Caterpillar* and in *Toth v. USX Corp.*,[96] this standard allows for corrupt payments in other contexts.[97] Because the collective bargaining agreement rule cannot distinguish between corrupt and legitimate payments contained in collective bargaining agreements, it is difficult to imagine which of these payments would be prohibited. As Judge Mansmann noted in the *Caterpillar* dissent, the *Caterpillar* court indeed had embarked down a dangerous slippery slope.[98] It would be consistent with the majority's opinion in *Caterpillar* to pay the salary of the international union president and any other member of the union, if the payments are agreed upon in a collective bargaining agreement and that person happens to be a former employee of the payer. Under this formulation, there is no reason the payments have to be limited to salary. As part of a collective bargaining agreement, the employer may agree to pay for any of the expenses associated with that person's union work, including rental of office space, office equipment, supplies, and the salaries of staff members.[99] This results in greater opportunities for union representatives to pursue selfish objectives at a cost to the bargaining unit employees they represent.

Reliance on the collective bargaining process as a safeguard against corruption in the labor-management relationship is misguided.[100] The *Caterpillar* court believed that union representatives receiving employer payments as part of the collective bargaining agreement would be accountable to the rank-and-file members who vote to accept the collective bargaining agreement.[101] Although a collective bargaining agreement requirement will prevent backroom deals, it will not detect all instances of corruption or violation of a union representative's fiduciary duty. The rank-and-file members will not be aware of all of the terms of the contract or the trade-offs made

---

96 883 F.2d 1297 (7th Cir. 1989).

97 The *Caterpillar* court upheld an employer-paid union leave policy openly agreed upon in the absence of any corruption. Using a similar rule, the *Toth* court struck down retroactive pension fund payments agreed upon under suspicion of bribery.

98 See *Caterpillar*, 107 F.3d at 1062 (Mansmann, J., dissenting).

99 These payments may violate section 8(a)(2) of the NLRA, but they are only one extreme example along a long slippery slope of payments that would be allowed under the *Caterpillar* court's reading of section 302. See 29 U.S.C. § 158(a) (1994); see also supra note 9.

100 Payments as part of a collective bargaining agreement certainly pose less threat of harm than do payments that arise from backroom deals. However, collective bargaining agreements and the process of collective bargaining do not provide sufficient safeguards against all corrupt and illegal payments.

101 See *Caterpillar*, 107 F.3d at 1057.

for these terms.[102] In reviewing the terms of the contract, the members of the union will focus more on those terms that directly affect them, such as wages, hours, and fringe benefits. Moreover, the members will look to the union officials for a summary of the contract instead of reading the lengthy legal document themselves.[103] Even if the members were aware of the payments, a bigger assumption made by the court is that they will know of the trade-offs made by the union in exchange for this benefit.[104] Without the ability to reconstruct and identify trade-offs, the process of rank-and-file approval of the collective bargaining agreement serves a small role in holding union officials accountable.[105]

2. Phillips: *Too Permissive and Too Restrictive*

In *United States v. Phillips*,[106] the Eleventh Circuit construed section 302(c)(1) to require that an employee's benefits have vested before that employee leaves the employer's service.[107] While such a rule helps diminish the opportunity for corruption, it provides neither sufficient protection against corrupt agreements made prior to an em-

---

[102] The collective bargaining process is a complicated, poorly documented process that often involves many offers and counteroffers over hundreds of terms and conditions. Even if one were able to reconstruct the series of negotiations, it is unlikely that it would be clear what was sacrificed in exchange for the salaries of grievance chairpersons. Each individual term of a contract is not negotiated in a vacuum; terms for each side are often viewed in the aggregate. Moreover, the trade-offs may have happened long before negotiations as part of a negotiating strategy. See Daniel Quinn Mills, Labor-Management Relations 216-17 (1986) (noting that negotiation is complex, indeterminate process).

[103] One of the functions of a shop steward is to keep the rank-and-file informed of contract negotiations and of their rights under the collective bargaining agreement. See supra notes 33-35 and accompanying text.

[104] Rank-and-file members may not even safely assume that an agreement to pay grievance chairpersons implies that there has been a trade-off at all. Since a grievance chairperson provides some benefit to the employer, the employer may be willing to agree to this additional term and no other.

[105] But see United States v. Phillips, 19 F.3d 1565, 1570 (11th Cir. 1994) (noting that union officials did not want to include increased personal benefits to themselves in collective bargaining agreement, fearing that union members would be suspicious).

[106] 19 F.3d 1565 (11th Cir. 1994). The employer, USX, and two union officials were convicted under sections 302(a) and (b) for making and accepting employer payments to union officials. The two union officials, who were former employees of USX, conditioned the acceptance of a local collective bargaining agreement on the employer granting them and six other union officials retroactive pension fund payments for those years since they had left service for the employer and had worked for the union. The employer and union officials agreed that it was best not to make these payments as part of the collective bargaining process. Subsequently, the employer agreed to grant some fifty union officials "continued service" pension payments in exchange for the union officials' dismissal of employee grievances pending against USX. See id. at 1567-70.

[107] See id. at 1575; see also Caterpillar, Inc. v. International Union, UAW, 107 F.3d 1052, 1057 (3d Cir. 1997) (citing *Phillips* for proposition that section 302(c)(1) is satisfied when entitlement to payments vest before leave, but not after).

ployee's leave nor sufficient flexibility for changes in benefits after an employee takes leave. This section will discuss the *Phillips* decision, the limited usefulness of the court's standard, and the shortcomings of its legal rule in other payment contexts.

On an appeal from a criminal conviction under section 302, the Eleventh Circuit in *Phillips* addressed the issue of employer contributions to a union pension fund.[108] The court upheld the jury instructions provided at trial and affirmed the conviction, stating that in order to fall within the section 302(c)(1) exception, payments must relate to services actually rendered while the recipients were employees of the employer.[109] The court formulated a new test to determine when payments relate to such services: When an employee's right to a benefit has fully vested before his leave of absence, the payment is permissible "by reason of" the employee's past service and the employer is merely satisfying a preexisting obligation that is unaffected by the employee's status as a union official.[110] The court reasoned that the delivery of payments that vest prior to separation from the employer eliminates the danger of corruption.[111]

The standard articulated by the Eleventh Circuit is helpful in those limited cases, such as in *Phillips*, where it is very clear that the payments have vested prior to the employee's leave of absence. The union representatives requesting the benefits in *Phillips* long since had ceased working for the employer.[112] When the situation is not so clear, this guideline is not as easily applied. Take, for instance, a newly ratified collective bargaining agreement that requires the employer to pay the salary of the union's full-time grievance chairperson. It is clear that on the first day of the new collective bargaining agreement, the current full-time grievance chairperson cannot receive his salary from the employer because this benefit did not vest before he left service with the employer. What is not clear are the conditions current employees must meet for these benefits to vest. Has the right to these payments vested with the employee prior to his becoming grievance chairperson, as part of his compensation for his service? Or is the right to these salary payments contingent upon the employee's

---

108 *Phillips*, 19 F.3d at 1565. On appeal, the defendants claimed the court's jury instructions regarding their defense under section 302(c)(1) was given in error. See id. at 1573. The jury instruction given by the district court stated that the exception applies "only to payments by an employer to former employees *for past services actually rendered* by those former employees *while* they were employees of the employer company . . . ." Id. at 1574 (internal quotation marks omitted).

109 See id. at 1575.

110 See id.

111 See id. at 1576.

112 See id. at 1567.

election as a grievance chairperson and on the successful performance of those duties?[113] Furthermore, the continued payments to a grievance chairperson would be contingent upon the current collective bargaining agreement that provides for such payments.[114]

The Eleventh Circuit standard of pre-separation[115] vested rights does provide a good safeguard against either union representatives bargaining for their own benefits or retroactive payments. However, the rule does not restrict any pre-separation deals. Virtually any deal between an employer and an employee who has not yet separated from employment with the employer would be permissible. It is easy to see how these deals allow for backroom bribes and extortion, especially without any requirement that such deals be part of a collective bargaining agreement. An employee, once elected or appointed, has the bargaining power to promise an employer concessions in future grievances or contract negotiations in exchange for payments for himself.[116] A payment is not made in this context by reason of an employee's past service, but by reason of his prospective service as a union representative.[117]

A further problem with a pre-separation vested rights requirement is its inflexibility after an employee has gone on leave. According to the Eleventh Circuit's requirement that the benefits shall have vested with the employee prior to his severance with the employer, an employee on union leave is stuck with those benefits, if any, which were agreed upon before he took leave.[118] The rule does not allow a union and employer to renegotiate the terms of benefits for existing employees on union leave. Under this approach, a simple cost-of-living adjustment for salary and other benefits would be prohibited.[119]

---

113 Unlike retirement payments, which fully vest at the time the employee terminates service with the employer and do not require the employee to take any further action to receive these payments, payments to a grievance chairperson are not fully vested prior to leaving the employer's service. Rather, the recipient must perform the work as grievance chairperson in order to receive them.

114 It is doubtful that the Eleventh Circuit intended to restrict these payments to vested rights that could not be altered by subsequent collective bargaining agreements.

115 The term "pre-separation" is used to refer to the period before the employee took a leave of absence from the employer.

116 This applies equally when it is likely that the employee will be elected or appointed in the near future.

117 In other words, the employer is not compensating the employee for work he did as an employee, but rather for what he can do for the employer in the future as a union representative. This is not payment by reason of his service to the employer.

118 Only those benefits which vested before the employee took leave are permissible. Any postseparation changes to these benefits are prohibited.

119 This cost-of-living adjustment would not be prohibited if it were agreed upon in the original agreement before the employee left the employer's service.

Although this rule probably was not meant to address payments to shop stewards and other employees who serve simultaneously as employees and union representatives, the pre-separation vesting of rights rule gives little guidance to parties in this situation. The rule may be read to allow any employer payments to shop stewards so long as the employee has not ended service with the employer.[120] This reading would allow shop stewards to trade grievance dismissals for payoffs. Equally problematic would be an application of the rule that prohibited all pre-separation benefits, thus eliminating the position of the shop steward.[121]

3. BASF Wyandotte Corp. v. Local 227: *A Redundant and Futile Standard*

In *BASF Wyandotte Corp. v. Local 227, International Chemical Workers Union,*[122] the Second Circuit addressed the legality of no-docking provisions under section 302.[123] The court concluded that there was nothing in the language or logic of section 302(c)(1) to suggest that no-docking rules were not exempt as compensation by reason of the employee's service to the employer.[124] Interpreting the section 302(c)(1) exception, the court stated that "§ 302(c)(1) is ap-

---

120 This reading would be a straight application of the rule: Any payments that vest before an employee leaves the service of an employer are permitted. See United States v. Phillips, 19 F.3d 1565, 1575 (11th Cir. 1994).

121 The elimination of the shop steward would drastically change labor relations. See supra Part I.

122 791 F.2d 1046 (2d Cir. 1986). The case arose under a collective bargaining agreement between BASF and the union, where BASF agreed to allow the union president and/or secretary, who were also current employees of BASF, each to take up to four hours off from work every day to perform union duties without any deduction from their regular salaries. After a year of honoring this practice, BASF unilaterally ceased to allow the union president and secretary to take time off from work without loss of pay. See id. at 1047. The union filed an unfair labor practice violation with the NLRB. See id. BASF responded by filing suit in federal court for a declaration that these payments were prohibited by section 302. See id. at 1048. The district court denied the employer's motion for summary judgment and dismissed its complaint.

123 See id. The Fifth Circuit decision in *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 855 (5th Cir. 1986), adopts the "bona fide employee" test. The Fifth Circuit was confronted with very similar facts as was the Second Circuit in *BASF Wyandotte Corp.* and adopted the Second Circuit's analysis without modification. See *NLRB*, 798 F.2d at 855-56.

124 See *BASF Wyandotte Corp.*, 791 F.2d at 1049-50. The court stated that there is "nothing in the language or logic of section 302(c)(1) to suggest that Congress did not intend to allow an employer to grant a bona fide employee who is a union official paid time off in order that he may attend to union duties." Id. at 1050. The court's analysis is incorrect; the question should be whether the language of section 302(c)(1) allows for these payments, not whether it prohibits them. These payments are already prohibited by section 302(a), and are permissible only if they properly fall into the language of one of the section 302(c) exceptions.

propriately interpreted by focusing . . . on whether [the activities compensated for] are to be engaged in by one who is a bona fide employee of the payor."[125] The court's bona fide employee test worked well in this case to uphold the no-docking practice, but it embodies an illogical reading of the statute that proves unhelpful in criminalizing corrupt payments.

The court proceeded with what appears to be a disciplined, logical interpretation of section 302(c)(1). The court reasoned that the statute's alternative formulations of "by reason of" and "as compensation for" are intended to cover two general categories of compensation: (1) wages and (2) compensation that is not direct payment for work but occasioned by the fact that the employee has performed or will perform work for the employer.[126] According to the court, this latter category includes fringe benefits, such as vacation pay, sick pay, paid leave for jury duty or military service, and no-docking payments. The court reasoned that the common element shared by these fringe benefits is that the recipient is one who performs services as an employee.[127]

The court's analogy of no-docking payments to vacation pay, sick pay, and paid leave for jury duty or military service is flawed. Concededly, all of these payments are received by employees. However, unlike no-docking payments, these other payments are available to all employees and are not dependent on the employee's status as a shop steward or other union representative. Payments under a no-docking provision, by definition, are paid only to union representatives and, thus, arise by reason of an employee's service as a union representative. Furthermore, unlike these other fringe benefits, payments to a union representative are specifically prohibited.[128] Even if no-docking payments were analogous to other fringe benefits, their exclusion from section 302's prohibition should not turn on whether the recipient is a bona fide employee.[129]

The court's use of the bona fide employee test for section 302(c)(1) is illogical, redundant, and unhelpful in distinguishing be-

---

125 Id. at 1049.

126 See id. at 1048-49. Canons of statutory construction indicate that terms connected in the disjunctive be given separate meanings. See Garcia v. United States, 469 U.S. 70, 73 (1984); FCC v. Pacifica Found., 438 U.S. 726, 739-40 (1978).

127 See *BASF Wyandotte Corp.*, 791 F.2d at 1049.

128 See 29 U.S.C. § 186(a) (1994).

129 This Note does not address whether the payment of these other fringe benefits to union representatives is permissible under section 302. There does, however, appear to be a strong argument that because these benefits are equally available to all employees and are not provided to an employee because of his status as a union representative, they are "as compensation for" or "by reason of" an employee's service to the employer.

tween legitimate and illegitimate payments. Section 302(c)(1) excepts payments made to employees or former employees "as compensation for" or "by reason of" the employee's service to the employer.[130] The court believes that the proper focus for determining whether payments are "by reason of" an employee's service is on whether the recipient is a bona fide employee.[131] In order to fall within the section 302(c)(1) exception, the payment must (1) be made to an employee or former employee, and (2) be "by reason of," or "as compensation for," the employee's service to the employer.[132] An additional requirement that the recipient be an employee (or former employee)[133] is an independent element of the exception.[134] By limiting its inquiry to whether the recipient is a bona fide employee, the Second Circuit Court of Appeals essentially eliminated the statutory requirement that the payment be "by reason of" or "as compensation for" the employee's service. Ensuring that the recipient was an employee has always been a part of the section 302(c)(1) inquiry. The Second Circuit's bona fide employee test is superfluous at best. At worst, it reads out any requirement for the payments to be either "by reason of" or "as compensation for" the employee's service.

The court's focus on whether the recipient is a bona fide employee illustrates its ad hoc attempt to distinguish the innocuous no-docking payments in the controversy before it from sham payments made to union representatives who are placed on an employer's payroll but who perform no work for the employer. This analysis worked in that particular case: It upheld the legality of no-docking practices without disturbing the many similar provisions in numerous collective bargaining agreements.[135] The court, however, inadvertently announced a precedent which would permit kickbacks and extortion. A direct application of the court's holding would allow an employer to pay a shop steward $10,000 for every employee grievance dismissed or resolved in the employer's favor.[136]

---

130 See 29 U.S.C. § 186(c)(1).

131 See *BASF Wyandotte Corp.*, 791 F.2d at 1050.

132 See § 186(c)(1); see also supra note 75 and accompanying text.

133 Because no-docking applies only to current employees, the court ignored the reference to "former" employees in section 302(c)(1). See *BASF Wyandotte Corp.*, 791 F.2d at 1049 n.1.

134 See supra note 73 and accompanying text.

135 For an additional case applying this standard in order to weed out sham payments for no-show jobs, see United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1344-45 (S.D.N.Y. 1993) (citing bona fide employee standard to demonstrate no-show job did not fall within section 302(c)(1) exception).

136 The shop steward is an employee of the employer and thus could fall within the Second Circuit's reading of section 302(c)(1).

The bona fide employee standard is inapplicable to payments to full-time union representatives who are no longer employees of the employer. Granted, the Second and Fifth Circuits were only addressing the legality of the no-docking practice. However, their interpretation of section 302(c)(1) does not provide any guidance on the question of what types of payments may be allowed in other contexts.

None of the cases surveyed in Part II announced a rule that adequately distinguished between innocuous and corrupt payments. The courts in these cases instead looked to the larger context for guidance in their decisions. In each case, the court got the result right; the courts weeded out the corrupt payments from the innocuous ones. This ad hoc approach, however, has left a series of incoherent standards that provide little guidance to future litigants. Part III examines the consequences of this unsettled legal rule and offers a legislative alternative to judicial action.

III
AN INADEQUATE STATUTE: THE CALL FOR LEGISLATIVE REFORM

Part II examined how courts have turned to broader guiding principles to interpret section 302 and delineate between corrupt and innocuous practices. While the courts may have decided the specific cases before them correctly, they also have announced conflicting interpretations of section 302 that produce great uncertainty. Although the Supreme Court granted certiorari in 1997 to resolve this issue, it later dismissed the case when the parties settled.[137] While a Supreme Court decision on section 302 might bring certainty, such judicial decision-making would not strike a proper balance between allowing useful employer-paid union representatives and protecting against conflicts of interest and corruption. Part III examines the uncertainty created by the various circuit court decisions and argues that a Supreme Court resolution of the differences is not the best solution. As an alternative to judicial action, this Part offers a legislative solution in the form of an additional exception to section 302.

A. Uncertainty and Strategic Behavior

The judicial decisions reviewed herein have not articulated a coherent standard of when employer payments will be allowed and when they will be prohibited.[138] Even where circuits have spoken on

[137] See Caterpillar, Inc. v. International Union, UAW, 107 F.3d 1052 (3d Cir. 1997), cert. granted, 521 U.S. 1152 (1997), cert. dismissed, 523 U.S. 1015 (1998).

[138] See supra Part II.B.

the legality of employer payments in one context, it is unclear how these courts will view payments in other contexts. Take, for example, the Second Circuit's opinion in *BASF Wyandotte Corp. v. Local 227, International Chemical Workers Union,*[139] and the Fifth Circuit's opinion in *NLRB v. BASF Wyandotte Corp.*[140] These courts upheld no-docking where an employee is a bona fide employee of the payer, but specifically stated that an employer-paid full-time union official who does no work for the employer would be prohibited by section 302.[141] Despite these dicta, other courts have relied on the *BASF Wyandotte Corp.* decisions to support employer payments to full-time union officials.[142] It is unclear how the Second and Fifth Circuits would decide the issue of full-time union officials. Additionally, several circuits have not addressed employer payments in either the no-docking or full-time contexts. Potential litigants in these circuits virtually have no guidance as to how the courts will rule. The Supreme Court sought to resolve this confusion by granting certiorari in *Caterpillar.*[143] Since, however, Caterpillar and UAW settled their dispute prior to the Court's adjudication, the case was dismissed and these issues were left unsettled.[144]

The unsettled legal status of employer-paid union leave and similar payments has a negative effect on current and possibly future labor-management relations. Fearing that the Supreme Court may not find these payments to be prohibited by section 302, unions will hesitate to bargain for them and, in essence, will weaken their bargaining position by restricting the terms with which they can bargain. This may be especially harmful to smaller and poorer unions that may need employers to foot the bill of grievance handlers.[145] Those unions that proceed to bargain for these payments, or that have bargained already for such payments, run the risk of having these payments voided from

---

139 791 F.2d 1046 (2d Cir. 1986).

140 798 F.2d 849 (5th Cir. 1986).

141 See *BASF Wyandotte Corp.*, 791 F.2d at 1050 (1986); *NLRB*, 798 F.2d at 856 n.4.

142 See, e.g., Caterpillar, Inc. v. UAW, 107 F.3d 1052 (3d Cir. 1997). The *Caterpillar* court assumed the legality of no-docking, despite the circuit not having addressed that issue. See id. at 1063 (Mansmann, J., dissenting).

143 See Caterpillar, Inc. v. International Union, UAW, 521 U.S. 1152 (1997), cert. dismissed, 523 U.S. 1015 (1998).

144 See *Caterpillar*, 523 U.S. at 1015.

145 Some start-up unions offer employees incentives to join them, such as no dues for a period of time. Under such a situation, it may be necessary to the survival of the union for it to be able to have the employer pay either part-time or full-time union employees. By harming mostly non-established unions, this unsettled legal status could prevent the growth of new unions and unionism as a whole.

their contract by an adverse decision of the Court.[146] If this were to happen, the unions would not only lose the voided benefit, but also would lose any benefits they had forgone in exchange for the voided benefit.[147] Even worse, unions who have bargained for such payments risk criminal sanctions under section 302.[148]

Viewing the consequences of the unsettled law from the employer's perspective, the employer is in a virtual no-lose situation.[149] An employer can hide behind the unsettled legal status of these payments to avoid agreeing to such payments in a collective bargaining agreement. If an employer agrees to make these payments, the employer can later bring a declaratory action to have these payments voided under section 302. Or, the employer may enjoy a windfall if the Supreme Court or Congress state that these payments are illegal. If the payments are found illegal, the employer will be able to stop making these payments without having to compensate the unions in a different way.

The employer may also use the unsettled legal status as part of a strategy to gain bargaining advantages. A strategically acting employer unilaterally would rescind previously agreed upon payments by claiming their illegality under section 302. The facts of *Caterpillar* serve as a good example of this. From 1973 to 1991, Caterpillar made continuous payments to union representatives under a union leave policy without raising any legal concerns over these payments.[150] In 1991, when the contract had expired and negotiations were stalled, Caterpillar unilaterally stopped these payments, questioning their legality.[151] In reality, Caterpillar withheld these payments as a punishment for the union's refusal to agree to a contract.[152] The union filed an unfair labor practice violation against Caterpillar in order to have the benefits reinstated.[153] This left the union simultaneously adjudicating the unfair labor practice and negotiating a collective bargaining

146 A final adjudication of the lawfulness of these payments may involve destroying contract rights, a subject beyond the scope of this Note.

147 See Davey et al., supra note 23, at 134-36 (discussing calculation of settlement costs in negotiations).

148 See supra note 63.

149 There are criminal sanctions under section 302, but it is very unlikely that employers would be criminalized under these facts.

150 See Caterpillar, Inc. v. International Union, UAW, 107 F.3d 1052, 1053 (3d Cir. 1997).

151 See id. at 1054.

152 Many cases have arisen in a similar context. See, e.g., Toth v. USX Corp., 883 F.2d 1297 (7th Cir. 1989) (employer denied applications for extended leave program); Trailways Lines, Inc. v. Trailways, Inc. Joint Council, 785 F.2d 101 (3d Cir. 1986) (employer claimed that contributions to pension trust fund violated Labor Management Relations Act).

153 See *Caterpillar,* 107 F.3d at 1054.

agreement. A definitive word on the legal status of these and similar payments would avoid this strategic play and the other negative consequences of the unsettled legal rule.

B. Adjudication Not the Answer

The negative consequences associated with the unsettled legal status of employer payments to union officials easily could be rectified by a definitive Supreme Court decision.[154] However, legal adjudication is not the appropriate long-term solution for this problem. A definitive word from the Supreme Court on the legality of employer-paid union leave and no-docking of shop stewards under section 302 would be incomplete. If the Court held that such employer payments were prohibited by section 302, the Court would have eliminated a useful labor practice. Moreover, such a holding would cause similar employer payments to be voided from the multitude of existing collective bargaining agreements containing such terms.[155]

An alternative decision upholding the legality of no-docking and paid union leave under section 302 is also not the ideal solution. Although such a holding would allow the continuation of two useful labor-management practices,[156] section 302 is inadequate to provide the necessary safeguards to insure that these payments do not degenerate into bribes or create conflicts of interest. Because of the limitations of section 302, the Court does not have the institutional competency to craft a solution that includes proper safeguards against abuse without entering the legislative field.[157] While a decision by the Court would provide stability to this unsettled doctrine, legislative action will be needed to reach any appropriate long-term solution.

---

154 The Court granted certiorari in 1997, see 521 U.S. 1152, then dismissed it in 1998, see 523 U.S. 1015. There have been no subsequent requests for certiorari on this issue.

155 See supra note 27 (discussing Department of Labor study of prevalence of such provisions).

156 See supra Part I.A (describing value of no-docking and paid union leave).

157 See William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 387-89 (2d ed. 1995) (stating that policymaking role lies with legislature rather than judiciary because it is beyond judicial competence); Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281 (1989) (noting that judges are subordinate to legislatures in making public policy and thus are limited in interpreting statutes in way that implements own notions of public policy); Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 19-24 (1985) (observing that separation of powers and legislative supremacy are designed to restrain lawmaking powers of courts); Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. Cal. L. Rev. 277, 314-15 (1985) (pointing to investigative powers of legislatures and unlimited scope of choices as reasons to have legislators rather than courts make social policy choices).

C. *A Roadmap to Legislative Reform*

Section 302(c)(1) does not provide sufficient safeguards to allow for employer-paid union representatives.[158] Section 302(c)(1) may never have been intended to apply to no-docking and paid union leave.[159] However, it still serves the purposes of allowing employees who are union representatives to collect a salary for work done for the employer and of allowing retired employees now working for the union to collect retirement benefits from the employer.[160] A new exception to section 302 is needed that explicitly provides for no-docking of shop stewards and facilitates paid union leave.[161] This section draws on the principles driving the court decisions discussed in Part II to lay a foundation for a new exception, one that properly balances the benefits of employees participating in union activities with the need to preserve union loyalty.

An appropriate amendment should clearly identify what payments are allowed, to whom they may be made, and under what conditions they may be made. The *NLRB v. BASF Wyandotte Corp.* decision of the Fifth Circuit and the *BASF Wyandotte Corp. v. Local 227, International Chemical Workers Union* decision of the Second Circuit focused on the proper recipient of employer payments.[162] The bona-fide employee standard adopted by these courts, although a redundant reading of the text, emphasized the policy reasons for allowing a further section 302 exception for paid union leave. Many benefits are gained by having rank-and-file workers play a greater role

---

158 The only limiting language of section 302(c)(1) is "by reason of" and "as compensation for" services as an employee. See 29 U.S.C. § 186(c)(1) (1994). This language both cannot uphold payments and sufficiently limit them.

159 See Samuel Estreicher, Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism, 71 N.Y.U. L. Rev. 827, 843 (1996) (noting section 302's overly broad prohibition of paid union leave and advocating congressional action to permit greater freedom of contract for employers so they can agree to pay salaries of employees on leave to work for union). The sole statement in the legislative history of section 302(c)(1) states that the exception "is with respect to any money due a representative who is an employee or a former employee of the employer, on account of wages actually earned by him." 93 Cong. Rec. 4805 (1947) (statement of Sen. Ball), reprinted in 2 NLRB, supra note 75, at 1304.

160 See 93 Cong. Rec. 4805 (1947) (statement of Sen. Ball), reprinted in 2 NLRB, supra note 75, at 1304 (describing intent of section 302(c)(1)).

161 Other exceptions have been added to section 302 since its enactment in 1947. See, e.g., 29 U.S.C § 186(c)(6) (1994), added by Pub. L. No. 86-257 tit. V, § 505, 73 Stat. 519, 537 (1959); id. § 186(c)(9), added by Pub. L. No. 95-524 § 6(d), 92 Stat. 1909, 2021 (1978).

162 See NLRB v. BASF Wyandotte Corp., 798 F.2d 849, 858 (5th Cir. 1986) (holding payments permissible because made to bona-fide employee); BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union, 791 F.2d 1046 (2d Cir. 1986) (same).

in contract administration and negotiations.[163] The advantages that accrue from the employee shop stewards' intimate knowledge of the rank-and-file members' concerns and problems justify a partial removal of the prophylactic financial barrier between employer and union provided by section 302.[164] For these reasons, the additional section 302 exception should apply only to payments made to employees or former employees.

A blanket exception for all payments to employees or former employees would allow for no-docking and paid union leave but would not protect against these payments degenerating into corruption and bribes. The proposed section 302 exception must contain more safeguards than just restrictions on the recipient. The *Caterpillar* and *Phillips* courts provide guiding principles for the foundation of further restrictions.[165] The *Caterpillar* court held that employer payments bargained for and included in a collective bargaining agreement were permissible.[166] Because the collective bargaining agreement has to be approved by a majority of the union members and is widely available for review, inclusion in the agreement holds the union representatives accountable to the rank-and-file.[167] Although not all selfish or corrupt acts by union representatives would be detected in the collective bargaining agreement approval process, a requirement of inclusion eliminates backroom deals and serves as a deterrent to union representatives and employers seeking to make illegal deals.[168] For such reasons, the proposed section 302 exception shall be limited to payments bargained for and included in a collective bargaining agreement.

Requiring inclusion in a collective bargaining agreement does not alleviate the conflict of interest faced by a union representative negotiating his own benefits, nor does it provide sufficient deterrence against acts of self-interest pursued at a cost to the union. To eliminate the possibility of a union representative selling out the union and

---

163 See supra Part I.A (describing how considering concerns of rank-and-file improves outcomes).

164 See supra note 33-37 and accompanying text (describing advantages of such communication).

165 See supra Parts II.B.1 and II.B.2 (describing judicial limitations on section 302).

166 See Caterpillar, Inc. v. International Union, UAW, 107 F.3d 1052, 1056 (3d Cir. 1997) (holding that payments made as part of collective bargaining agreement were permissible); see also Toth v. USX Corp., 883 F.2d 1297 (7th Cir. 1989) (finding such payments permissible in general, but not in instant case because they were not part of collective bargaining agreement).

167 See supra note 101 and accompanying text.

168 See United States v. Phillips, 19 F.3d 1565, 1570 (11th Cir. 1994) (noting that parties did not want to include payments in collective bargaining agreement because of fear of rank-and-file oversight).

its members in pursuit of his own interest, union representatives should be prohibited from negotiating collective bargaining agreements that include employer-paid benefits that the union representative will receive personally. This restriction is embodied in the vested rights standard applied by the *Phillips* court.[169] The vested rights requirement seeks to prevent a union representative from receiving employer benefits that were not agreed upon and vested before the employee went on leave.[170] This requirement, however, allows for unrestricted pre-leave bargaining and unduly restricts post-leave bargaining when negotiated by a nonrecipient.[171] A variation of the *Phillips* rule is suggested for the proposed section 302 exception. Although this restriction will not prevent a negotiator from seeking benefits for others, it will prevent contract negotiators from receiving employer benefits for which they personally negotiated.[172]

Further restrictions are suggested to reduce the incentive for a union representative to pursue illegitimate bargaining techniques and to protect against other labor law violations. Such restrictions shall limit what an employer may pay to a union representative. The less valuable the employer payments, the less incentive a union representative will have to pursue these benefits at a cost to the union members. The proposal is to cap payments and benefits at the level the union representative would receive if he were working full-time for the employer.[173] This restriction would allow a shop steward to continue to receive full pay and salary despite the time he spends on contract administration but would prevent him from receiving any additional compensation from the employer. Because a shop steward will not receive any greater benefits from the employer, he will have no financial incentive to act in the interest of the employer at the expense of the union. As for paid union leave, a union representative can continue to collect a full salary, accrue seniority, and receive em-

169 See id. at 1575 (describing vested rights requirement).

170 See id. (applying vested rights requirement).

171 See supra Part II.B.2 (describing *Phillips* decision).

172 This restriction is only a modest limitation because it does not prevent a union negotiator, acting under the direction of the union president, from seeking an employer-paid salary for the union president.

173 A shop steward, for example, would receive the regular full-time compensation package. It may, however, be prudent to allow a shop steward to have super-seniority. It is a common practice for collective bargaining agreements to grant shop stewards super-seniority. This super-seniority protects the shop steward from being laid off until all other workers in the unit have been laid off. Super-seniority for the shop steward is justified on the grounds of maintaining continuity of union representation and protecting the shop steward from employer retaliations. See Crane & Hoffman, supra note 15, at 102; Nash, supra note 25, at 32. Super-seniority would certainly qualify as "anything of value" under section 302(a)'s prohibition.

ployer pension fund contributions while on leave to work for the union. The union representative can also receive any increases in benefits that would apply if he were working full-time for the employer.[174] By limiting what employers can pay employees on leave, this restriction also reduces the opportunity for employers to offer increased benefits as bribes. The restriction on pay and benefits also helps to prevent any violation of section 8(a)(2) of the National Labor Relations Act,[175] which prohibits company domination of unions. Without any limitation, an employer could provide an unlimited amount of money and resources to employees working for the union, thus creating the paradigmatic company union.[176]

The result of the policies discussed above is an amendment to section 302 that exempts from the prohibition of sections 302(a) and (b) those payments made to employees or former employees that are bargained for and included in a collective bargaining agreement. Further limitations restrict the character of the payments to that of the same kind and amount the union representative would receive if he were working for the employer. A further restriction on who may negotiate benefits prohibits union representatives from negotiating benefits for themselves. Together, these restrictions allow a union and an employer to negotiate freely for no-docking of shop stewards and paid union leave policies, while sufficiently reducing incentives and opportunities for union representatives to violate their positions of trust in pursuit of their own interests.[177]

---

174 This restriction does not seek to restrict unions from further compensating shop stewards or employees on leave. Additional compensation may be necessary to account for larger workloads and responsibilities.

175 Section 8(a)(2) of the NLRA is codified as amended at 29 U.S.C. § 158(a) (1994).

176 See Estreicher, supra note 9, at 129-33 (describing original intent of statute as preventing formation of company unions). These payments would amount to a violation of section 8(a)(2) of the NLRA.

177 The following is a model for an additional amendment to section 302(c)(1):

> Section 302(a) and (b) shall not be applicable with respect to any money or benefits paid by an employer as part of a collective bargaining agreement to an employee for time spent on contract negotiations and contract administration during regular work hours, and to a former employee on leave from the employer to work for the union; provided that no recipient of payments under this subsection shall negotiate a collective bargaining agreement in which such person is a recipient of benefits allowed by this subsection, and provided further that the amount of pay and benefits allowed by this subsection shall not exceed that amount which is paid to employees holding similar positions with the employer as the recipient employee does or, in the context of full-time union representatives, the recipient former employee had.

CONCLUSION

Congress is the only actor in our political system that can adequately and effortlessly resolve the problem of employer-paid union representatives. Unlike the Supreme Court, which is saddled with interpreting a fifty-year old statute, Congress can start with a clean slate. A carefully drafted amendment to section 302, as guided by Part III of this Note, will allow unions and employers to choose their own terms for employer-paid union representatives while preserving the position of trust occupied by union representatives.