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MERK v. JEWEL FOOD STORES: THE PAROL EVIDENCE RULE APPLIED TO COLLECTIVE BARGAINING AGREEMENTS - A TREND TOWARD MORE FORMALITY IN THE NAME OF NATIONAL LABOR POLICY?

I. INTRODUCTION

A dispute arises in the course of collective bargaining. Management insists that a most favored nations clause be included in the collective bargaining agreement. Labor refuses. As this dispute is the only impediment towards reaching a final agreement, the parties diligently work out a resolution: management drops its demand for a most favored nations clause in exchange for a promise offered by the Union. What this promise consists of is not altogether clear. What is clear, however, is that the Union's negotiators insisted this "side agreement" remain oral, and that it was not subsequently ratified by the Union membership.

Litigation involving the content of this agreement ensued. In Merk, the United States Court of Appeals for the Seventh Circuit fused together two theories of law to exclude management's testimony offered to prove the existence of the side agreement. First, the court applied the parol evidence rule, not as it is applied in an ordinary contracts analysis, but in a different manner in which, the court held, was mandated by national labor policy. In conjunction with this analysis, the court held that because the side agreement was not ratified by the rank and file, in violation of the union's constitution, management was not entitled to rely on it.

The dissent in Merk reached a diametrically opposed result. After considering that the agreement was not ratified, and after applying the parol evidence rule, the dissent concluded that management should be

2. What follows is a synopsis of the facts in Merk. A complete undertaking appears infra part II.
3. Merk, 945 F.2d at 889.
4. Id. at 894.
5. Id. at 893.
allowed to introduce evidence as to the agreement's terms. The difference in these two views is based upon two very different interpretations of national labor policy. The dissent looked to a national labor policy which stresses flexibility, not formality, in labor relations, while the majority found that collective bargaining agreements must be "more secure" against modification than are ordinary commercial contracts.

Part II of this Comment outlines the facts of Merk. Part III traces the various aspects of its case history. Part IV sets forth the relevant case law prior to the Merk decision. Part V outlines the majority's and dissent's position in Merk. Finally, Part VI adopts the dissent's rationale; concludes that this position is not only mandated by national labor policy, but is the only outcome which reduces the type of uncertainty in labor relations created by the majority's holding, and; offers the theory of promissory estoppel as an alternative method to resolve the case.

II. THE MERK FACTS

In September 1982, Jewel Food Stores, Inc. ("Jewel"), an operator of approximately 180 supermarkets, began negotiations for a new collective bargaining agreement ("CBA") with its workers, who were represented by Local 881 of the United Food and Commercial Workers Union ("Union"). The parties agreed to a contract which was reduced to writing and subsequently ratified by Union membership on January 27, 1983. The CBA did not include every element of the parties' agreement. Both parties acknowledged that four days prior to the CBA's execution, during a hallway conference, a deal was struck. The parties do not agree, however, on the exact terms of this deal. They do agree that, at the behest of the Union's negotiators, its terms were not disclosed to, or ratified by, the Union membership as required by the Union constitution and bylaws.

6. Id. at 906.
7. Id. at 900-02.
8. Id. at 894.
9. Id. at 890-91. The CBA was to run from September 15, 1982 to June 15, 1985. Id.
10. Id. at 891.
11. Id.
12. Id.
13. Id.
14. Id. at 897.
15. Id. Jewel claimed that the Union officials insisted the agreement remain oral because
Jewel argued that because it was very concerned about the possible entrance of a "warehouse" competitor into the marketplace, it insisted on the inclusion of a most favored nations clause in the CBA throughout the negotiations. The Union refused to accede to this demand and the final CBA lacked such a clause. To offset the lack of the most favored nations clause, Jewel argued it reached the oral agreement with the Union. Specifically, Jewel argued the Union's president and two Jewel representatives (their chief negotiator and corporate vice president) agreed to "an economic reopener with full reservation of rights." This provision would allow Jewel, upon the entrance of a warehouse competitor into the market, to reopen the economic terms of the CBA and re-negotiate wages. The parties, upon such occurrence, would proceed as though they were bargaining over a new contract. In addition, each party would retain their respective economic weapons, which include management's right to unilaterally implement its final offer after reaching impasse, and the Union's right to strike. The Union countered that it did not agree to a reopener clause, rather, it merely agreed to "sit and discuss" Jewel's competitive position when and if the warehouse competitor arrived in the marketplace.

In 1983, the warehouse competitor entered the market. Pursuant to the oral agreement, Jewel reopened wage negotiations with the Union. Negotiations reached impasse and Jewel implemented its final offer. As a result, wages were reduced below the minimum amounts specified in the written CBA.

The Union sought, and subsequently received, a court order to compel arbitration. The Union also brought an unfair labor practice
complaint. After a long course of negotiations, Jewel agreed to settle the dispute by awarding backpay to its current employees in exchange for the Union's relinquishment of its unfair labor practice complaint. Jewel's backpay settlement, however, was not offered to the group of approximately 2,000 employees who quit, retired, or were fired from Jewel during the parties' 15-month dispute. This group eventually formed the class of plaintiffs in Merk.

III. THE MERK CASE HISTORY

The plaintiff's road to recovery lasted seven years and cumulated in five published opinions detailing their legal battle. The plaintiff's first cause of action consisted of a "hybrid" suit against Jewel and the Union under § 301(a) of the Labor Management Relations Act ("LMRA"), as well as a direct § 301 claim against Jewel alone. Specifically, the hybrid suit alleged that Jewel breached the parties' CBA by cutting wages and that the Union breached its duty of fair representation to the plaintiffs by reaching a settlement offer with Jewel that excluded them. These allegations raised what the district

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30. Merk, 945 F.2d at 891.
31. Id.
32. Id.
33. Id.
34. See generally DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 164 (1983) (explaining that "such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act.").
35. 29 U.S.C. § 185(a) (1988). This section provides:
   (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
court termed "difficult labor law issues which appear to be of first impression." 37

The adjudication of the hybrid suit boiled down to the resolution of this issue: did the Union owe a duty of fair representation to the plaintiffs notwithstanding that the Jewel settlement was reached after they left Jewel's employ? 38 Interestingly, both the Union and the plaintiffs agreed that no such duty existed. 39 Jewel, however, argued that it did. 40

The court first determined that the Union's duty of fair representation extends no further than its authority under §9(a) of the National Labor Relations Act ("NLRA") 41 to act as the bargaining unit's exclusive bargaining agent. 42 The court held that because the plaintiffs were ex-employees at the time of the settlement offer and because the plaintiff's interests in receiving a portion of the settlement offer ran directly counter to the Union's duty to provide for its current members, 43 the Union owed no duty of fair representation to them. 44 Thus, the court dismissed the plaintiff's hybrid suit. 45

Two years later, the plaintiffs sought summary judgment against Jewel regarding their "straight" § 301 claim. 46 The plaintiffs argued they were entitled to summary judgment on the undisputed fact that

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37. Id. at 1025.
38. See id. at 1027.
39. Id. at 1027.
40. Id. If the duty existed, the plaintiffs would be limited to litigating their hybrid suit alone and would thus have to prove both prongs. If no duty existed, plaintiffs would have to prove only that Jewel breached the CBA, a substantially lighter undertaking. Id.
41. 29 U.S.C. § 159(a) (1988). This section provides, in part, that:
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .
Id.
42. Merk, 945 F.2d at 1027.
43. The court explained that the plaintiffs, after leaving Jewel, had but one interest for the Union to fight for — recovering their lost wages. Id. at 1029. The other employees, however, had broader interests in ensuring that the Union would not jeopardize their hopes for obtaining good future wages and working conditions. Id. The court noted that the Union, by leaving the plaintiffs out of the settlement offer, "gave up nothing of economic value to [the current members], but gave Jewel an economic plum." Id. at 1030. Thus, for the Union to achieve the plaintiff's interests they would necessarily be hurting the interests of the current members. This, the court concluded, was a classic case of conflict of interest. Id.
44. Id. at 1032.
45. Id. at 1037. Jewel's motion to dismiss, as time-barred, plaintiff's direct § 301 suit against Jewel was denied. Id.
Jewel unilaterally reduced wages in violation of the express wage provision of the parties' written CBA. In its defense, Jewel offered testimony regarding the oral reopener agreement. The plaintiffs countered that such testimony was barred by the parol evidence rule. First, the court found that oral supplements to CBAs are not unenforceable and that the parol evidence rule would not act to exclude Jewel's reopener evidence. Next, the court found that Jewel submitted a sufficient amount of evidence to withstand the motion for summary judgment.

The suit against Jewel did eventually reach trial. Jewel received a jury verdict in its favor. The plaintiffs then made a post-trial motion, arguing that the enforcement of the oral reopener was against federal labor policy. In making this argument, the plaintiffs relied

47. Id. at 1399.
48. Id.
49. Id.
50. Id. at 1400.
51. Id. The court rejected plaintiff's argument that a provision in the CBA prohibited oral supplements. Id. at 1401. This provision provided that "[i]t is agreed that the parties to this agreement shall not enter into any oral supplements to this agreement..." Id. The court determined that unlike an integration clause, this provision appeared to apply only to supplements entered into after the CBA was executed. Id. Thus, it would not operate to preclude an oral supplement entered into at the time the CBA was executed. Id. The court also rejected Jewel's argument that the mere fact the Union engaged in negotiations with Jewel after the warehouse competitor entered the market was itself evidence that the Union agreed to a reopener provision. Id. at n.10. The court wrote: "That the Local sought negotiations rather than a lawsuit is consistent with the federal labor policy to encourage the extrajudicial resolution of disputes rather than a reflexive rush to the courts. The Local did not accept a modification to the collective bargaining agreement merely by discussing it." Id.

53. Id. at 333. The plaintiffs also argued that if the Union and Jewel did agree to a reopener, "they were not using the term as one of art." Id. Specifically, plaintiffs argued that Jewel and the Union did not intend that the relevant provisions of the CBA would be repealed, but instead that they would merely be suspended provided that Jewel bargained in good faith and would reduce wages only if the parties reached impasse. Id. Plaintiffs further argued that Jewel failed to bargain in good faith, and instead "implemented a fixed pre-existing plan to reduce wages." Id. Thus, plaintiffs concluded, the reopener was never activated because terms of the reopener were not fully met. Id. This argument was rejected by the court as it determined that when a term of art, such as "reopener" is used, the parties can be presumed to have used the term in its customary form as found in the trade or business in which the contract was made. Id. The court found that the plaintiffs offered no evidence to overcome this presumption, and that the Union "had its remedies under the National Labor Relations Act against Jewel's bargaining in bad faith. There is no indication it negotiated for a contractual remedy as well." Id.
on case law disallowing oral modifications of CBAs where the agreements modified pension or welfare trusts established by the CBA. Judge Posner rejected the plaintiff's argument. The court determined that:

Statutes like Landrum-Griffin and ERISA impose obligations in the administration of collective bargaining contracts; oral modifications, unknown to the union rank and file, can upset entitlements created by the contracts and enforced in administering them. But these statutes do not seek to interfere with the negotiation of the agreement — the domain of the National Labor Relations Act, section 8(d) of which is a considered decision to allow oral agreements when both parties prefer them.

It is important to note that the court found the oral reopener agreement was adopted during the contract's negotiation process, not after the contract was signed. Thus, the reopener did not modify the contract, it was part of it. As such, the court concluded that the enforcement of the oral reopener was not against federal labor policy.

IV. THE RELEVANT CASE LAW

A. The Parol Evidence Rule

Case Law Prior to Merk

Some background on the parol evidence rule is necessary before exploring its application in the courts. The rule itself is inappropriately named. First, it is not a rule of evidence, but rather, a substantive law of contracts. This is because rules of evidence "bar some

54. Id; see, e.g., Central States, Southeast & Southwest Areas Pension Fund v. Behnke Inc., 883 F.2d 454, 459-60 (6th Cir. 1989) (holding that, by law, employer contributions to trust funds on behalf of employees must be pursuant to written agreements).
56. Id. (emphasis in original).
57. Id.
58. Id.
59. Id.
60. See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS, § 7.2 at 193 (1990).
61. See id. at 194; 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS, § 574 at 375 (1960). At early common law, collective bargaining agreements were not regarded as contracts at all because contract necessities such as consideration and capacity were thought to be lacking. 9 SAMUEL WILLISTON, WILLISTON ON CONTRACTS, § 1020 at 244 (3rd ed. 1967). Gradually, however, collective bargaining agreements have achieved the status of contracts. Id. at 250-51.
methods of proof to show a fact but permit that fact to be shown in a different way. In contrast, the parol evidence rule bars a showing of the fact itself — the fact that the terms of the agreement are other than those in the writing.  

Second, the rule is not limited to parol, or oral, agreements; written documents may be suppressed under the rule as well.  

The rule itself has been defined as a vehicle which "simply" affirms the primacy of a subsequent agreement over prior negotiations and even prior agreements. Specifically, the rule provides that where there is either a completely or partially integrated writing, evidence may not be introduced to contradict a term of the writing. Whether a writing is deemed fully or partially integrated depends upon the degree the writing was intended by the parties to be an expression of their entire agreement. A fully integrated agreement contains the complete expression of the parties' agreement. A partially integrated agreement contains the final expression of the terms the writing contains, but is not a complete expression of all the terms agreed upon because some terms remain unwritten.

62. See Farnsworth, supra note 60, at 194.
63. Id. The rule has been more aptly referred to as the "Rule Against Contradicting Integrated Writings." See 3 CORBIN, supra note 61, § 595 at 660 (Supp. 1992).
64. For a discussion of how "simple" the rule is, see Justin Sweet, Contract Making and Parole Evidence: Diagnosis and Treatment of a Sick Rule, 53 CORNELL L. REV. 1036, 1036 (1968) (noting that "[t]his 'simple' rule is in fact a maze of conflicting tests, subrules, and exceptions adversely affecting both the counseling of clients and the litigation process.").
65. Farnsworth, supra note 60, § 7.2 at 197. Professor Corbin explained the rule as follows:

Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties. No contract whether oral or written can be varied, contradicted, or discharged by an antecedent agreement. Today may control the effect of what happened yesterday; but what happened yesterday cannot change the effect of what happens today. This, it is believed, is the substance of what has been unfortunately called the 'parol evidence rule.'

3 CORBIN, supra note 61, § 574 at 371-72.
67. Farnsworth, supra note 60, § 7.3 at 198.
68. Id.
69. RESTATEMENT (SECOND) OF CONTRACTS § 216 (2) provides that "[a]n agreement is not completely integrated if the writing omits a consistent additional agreed term which is (a) agreed to for separate consideration, or (b) such a term as in the circumstances might naturally be omitted from the writing."
70. Farnsworth, supra note 60, at 198. It has been written that:

This business of partial integration has never caught on . . . . Courts having difficulty with the fundamental concept of integration are unwilling (or unable, and with good reason) to split the imaginary hair even more finely by engaging in another analysis, the outcome of which is so uncertain as to command no princi-
The agreement must be termed partially or fully integrated to determine what evidence, if any, is allowed to be introduced to elucidate the agreement. If the agreement is partially integrated, evidence of prior agreements is admissible to supplement, though not contradict, its terms. If the agreement is found to be fully integrated, no evidence may be offered to explain the agreement.

Is the issue of whether a writing is fully integrated one of law or fact? One commentator has argued that this issue is always a question of fact. Most courts, however, reserve this question for the judge as a matter of law.

B. The Parol Evidence Rule's Application in the Courts

Federal courts have applied the parol evidence rule to collective bargaining cases in different degrees. The Fifth Circuit, in Manville Forest Products, Corp. v. United Paperworkers International Union, held that contract law concepts, such as the parol evidence rule, should not be applied at all to issues involving collective bargaining.
The court, in affirming an arbitrator's decision to introduce parol evidence to show the parties intended to retain a certain class of machine operators even though the CBA was silent on the question, reasoned that the collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."

It is important to note that the court allowed the introduction of the extrinsic evidence notwithstanding that the CBA contained both a "no modification" clause and a "zipper" clause. With regard to the modification clause, the court explained that although the agreement could not be modified, the clause did not prohibit the arbitrator from looking to extrinsic evidence to determine what provisions were in fact part of the agreement. The zipper clause, the court noted, did not require all the provisions in the CBA to be written; rather, it simply required all agreements reached after the signing of the CBA to be reduced to writing. Because the arbitrator found that the parties' retention of the class of machine operators was part of the CBA, the zipper clause did not apply.

The Seventh Circuit, in Mohr v. Metro East Mfg. Co., admitted parol evidence regarding an oral side agreement to modify the parties CBA. The Mohr court, following the "sparse authority" on point, found that the parol evidence rule should be applied to collective bargaining contracts. The court then engaged in a contract law analysis and determined the CBA was not fully integrated; thus, the parol evidence was admissible. Specifically, the Mohr court concluded that the master agreement between the association of employers and the international union was not intended to be the complete

78. Id. at 75.
80. This clause provided that "[t]he arbitrator shall have no power to add to, subtract from, alter, amend or disregard any provision of this Agreement." Id. at 76.
81. This clause provided that "[a]ll modifications, amendments or supplemental agreements to this Agreement have been reduced to writing . . . Any modification, amendment or supplement executed after the effective date of this Agreement shall be void and of no force and effect unless reduced to writing and approved by the parties . . . ." Id.
82. Id.
83. Id.
84. Id.
85. Id.
86. 711 F.2d 69 (7th Cir. 1983) (Posner, J.).
87. Id. at 72.
88. Id.
agreement between each employer and each local union and that the parties' supplemental oral agreements governing their specific terms of employment could, therefore, be introduced.\textsuperscript{89}

The Third Circuit has allowed the introduction of parol evidence in the context of labor relations as well. In \textit{Griesmann v. Chemical Leaman Tank Lines, Inc.},\textsuperscript{90} the court found that because the parties labor contract\textsuperscript{91} was not fully integrated, extrinsic evidence should be admitted to vary the contract's express provisions.\textsuperscript{92} The case was then remanded so that both union and the employer could offer evidence indicating whether the employer violated the employment contract by "dovetailing"\textsuperscript{93} additional cement drivers into the union's seniority list.\textsuperscript{94}

The Ninth Circuit has developed a long line of cases dealing with the parol evidence rule in the area of collective bargaining. In \textit{Pacific Northwest Bell Telephone Co. v. Communications Workers},\textsuperscript{95} the court found that "collective bargaining contracts by their very nature cannot fairly be limited to their express provisions."\textsuperscript{96} This was because, "[a]s has been frequently pointed out, agreements of this sort are far different in nature and purpose from the ordinary commercial agreement. They are in effect a compact of self-govern-\textsuperscript{97} ment." The court then remanded the case for a new trial so that the parties could introduce evidence of their bargaining history as to the arbitrability of the employer's resort to disciplinary suspensions.\textsuperscript{98}

\begin{itemize}
\item \textsuperscript{89} Id.
\item \textsuperscript{90} 776 F.2d 66 (3rd Cir. 1985).
\item \textsuperscript{91} The district court's determination that a letter and a posted notice drawn up by the employer combined to constitute a CBA was found to be in error. \textit{Id.} at 71. The court found, however, that they constituted an "enforceable labor contract." \textit{Id.}
\item \textsuperscript{92} \textit{Id.} at 72. \textit{See also} Demirs v. Plexicraft, Inc., 781 F. Supp. 860, 862 (D.R.I. 1991) (finding that where an employment agreement was not intended to be a complete integration of the parties' negotiations, parol evidence is admissible to aid in its interpretation); Harden v. Warner Amex Cable Communications, Inc., 642 F. Supp. 1080, 1094 (S.D.N.Y. 1986) (finding that an employee can introduce parol evidence under a less than fully integrated employment contract).
\item \textsuperscript{93} "Dovetailing" refers to the practice of combining two separate seniority lists into one after a group of employees are transferred to a new location. \textit{Id.} at 69 n.3.
\item \textsuperscript{94} \textit{Id.} at 72.
\item \textsuperscript{95} 310 F.2d 244 (9th Cir. 1962).
\item \textsuperscript{96} \textit{Id.} at 246.
\item \textsuperscript{97} \textit{Id.} at 247.
\item \textsuperscript{98} \textit{See id.} at 249. The court found that the CBA was silent as to whether disciplinary suspensions were arbitrable. \textit{Id.} at 247. However, even when a CBA is clear on its face regarding its terms, the Ninth Circuit, in \textit{Communications Workers v. Pacific N.W. Bell Tel. Co.}, 337 F.2d 455, 459 (9th Cir. 1964) (\textit{Communications Workers II}), allowed the admission of parol evidence so that the CBA may be read in light of the parties' bargaining history.
\end{itemize}
Pacific Northwest was followed in Cappa v. Wiseman.\textsuperscript{99} The Cappa court recognized the Ninth Circuit's "great difficulty of limiting collective bargaining agreements to their express terms."\textsuperscript{100} The court then made two important determinations: (1) the parol evidence rule will not bar testimony where the CBA is not fully integrated;\textsuperscript{101} and, more importantly, (2) national labor policy does not proscribe an oral supplemental agreement\textsuperscript{102} to the parties' written CBA.\textsuperscript{103}

In Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996,\textsuperscript{104} the Ninth Circuit took the application of the parol evidence rule a step further. There, the union and employer, Certified, executed a CBA which contained a no-strike provision.\textsuperscript{105} By its terms, the CBA was to govern from March 1, 1974 to February 28, 1977.\textsuperscript{106} Certified alleged, however, that a bargaining agent for the union entered into an oral side agreement with Certified which extended the CBA on a "day to day" basis and required the union to give notice 48 hours before termination of the CBA.\textsuperscript{107} The union struck on March 1, 1977 without giving notice of termination.\textsuperscript{108} Certified argued the CBA was still in effect, based on the oral agreement, and that striking without notice was thus in violation.\textsuperscript{109} The union countered with two arguments: first, the only binding agreement between the parties was the written CBA; second, the written CBA could not be orally modified because it contained a provision requiring all amendments and modifications to be in writing.\textsuperscript{110}

The court noted that courts, when interpreting collective bargaining agreements, have not adhered strictly to general contract rules\textsuperscript{111}

\textsuperscript{99} 469 F. Supp. 437 (N.D. Cal. 1979), aff'd, 659 F.2d 957 (9th Cir. 1981).
\textsuperscript{100} Id. at 439.
\textsuperscript{101} Id.
\textsuperscript{102} The agreement dealt with an oral understanding between the union and employer limiting the industry-wide collective bargaining agreements' application as it related to the scope of the bargaining unit. Id. at 438.
\textsuperscript{103} Id.
\textsuperscript{104} 597 F.2d 1269 (9th Cir. 1979).
\textsuperscript{105} Id. at 1270.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 1271. For example, the court noted that consideration is not needed to make a CBA enforceable, that a non-party may be bound by a CBA's provisions, and that some
and that courts "should not be preoccupied with principles which might apply to ordinary contracts." The court then determined that the parties’ CBA could be orally modified notwithstanding the agreement’s provision to the contrary. The court held that its decision to allow into evidence such parol testimony was not counter to federal labor policy. In fact, the court concluded that its holding effectuated labor policy by maintaining industrial peace; that is, encouraging the parties to negotiate, rather than resort to a strike.

In contrast, there does exist a "handful" of cases which hold that the parol evidence rule should be used to bar testimony offered to prove the existence of oral agreements in the context of labor relations. In *Gatliff Coal Co. v. Cox*, the Sixth Circuit (adopting verbatim the district court’s opinion) excluded parol evidence offered by the employer, Gatliff Coal, that the parties reached an oral side agreement allowing Gatliff Coal to disregard the multi-employer and union CBA and agree upon terms more suitable to both Gatliff Coal and the union. In so holding, the court reasoned that:

The National Labor Relations Act, in the public interest, has given such collective bargaining agreements a more secure and stable position in our National economy than that of ordinary common law contracts which may be altered at pleasure by rendering ineffectual and unavailable any collateral agreements between individual members of the collective bargaining group designed to obtain a diminution of the obligations of a particular employer... .

The court determined that to hold otherwise "would reduce the National Labor Relations Act to a mere futility and leave collective agreements no stronger than the weakest members of the union."
To further buttress its holding, the court found that the NLRA "contemplates that a collective bargaining agreement be in writing." For these two reasons, the court concluded that Gatliff Coal was not entitled to rely on the oral agreement it had with the union.

Gatliff Coal was followed in International Ladies’ Garment Workers Union, Local 509 v. Annshire Garment Co. In Annshire, the court wrote "[t]o suppress industrial strife based on this type of controversy national labor policy requires that the clear and unambiguous requirements of the written collective bargaining agreement be immune from attack found on a covert side agreement." The court detailed two possible evils resulting from a contrary interpretation of national labor policy:

One is the overzealous or unprincipled union negotiator who will induce a management signature to a collective bargaining agreement with side assurances that management will not have to comply with certain controverted provisions. The other is management who will avoid certain obligations required by the executed collective bargaining agreement and attempt to justify such action by an alleged oral side agreement that compliance will not be required notwithstanding the clear and unambiguous requirement if the written collective bargaining agreement.

In N.D.K. Corp., the NLRB, relying solely on the Gatliff Coal rationale, found that "[n]ational labor policy requires that evidence of oral agreements be unavailing to vary the provisions of a written collective-bargaining agreement on its face." Similarly, in Restaurant Employees, Bartenders and Hotel Service Employees Welfare Fund v. Rhodes, the Supreme Court of Washington held that the employer could not introduce evidence to show that a union agent represented that it did not have to make monthly payments to the health and welfare and pension funds on behalf of employees who were not yet union members.

121. Id. at 56.
122. Id.
124. Id. at 2772.
125. Id.
127. Id. at 1035.
129. See id. at 2869-71. The CBA provided that employees were required to join the
C. The Union’s Ratification Requirement

The other body of labor law implicated by the facts of Merk involves the Union’s failure to ratify the reopener provision. Specifically, the issue becomes whether the oral reopener loses its legal effect due to its failure to be ratified by the union rank and file as required by the union’s constitution.

At the outset it should be noted that it is well settled that a union has no duty under the NLRA to submit an employer’s proposal for a collective bargaining agreement to its membership for ratification. Thus, the failure to ratify issue, such as the one found in Merk, arises when a union self-imposes such an obligation through a provision in its constitution or bylaws, or simply makes an ad hoc agreement to ratify with management.

In addressing the ramifications of ratification clauses on management, the NLRB in McLaughlin & Moran, Inc., declared that, “as a matter of law, it is none of the Employer’s business how (or even whether) the [union] obtains the employees’ approval of the Employer’s offer.” The Board added that “it is for the union, and not the employer, to construe the meaning of the union’s internal requirements for ratification.” The Board reasoned that to hold otherwise, it would be
difficult, if not impossible, for the parties to a collective-bargaining agreement to arrive at a final settlement without the fear of being forced into protracted litigation regarding the union’s compliance with its own procedures, clearly a collateral issue. The encouragement of such industrial instability could not have been with the intendment of the [National Labor Relations] Act.

The Board, in conclusion, determined that it would be unlawful for

union within 30 days after hiring. Id. at 2869.

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130. See, e.g., NLRB v. Auciello Iron Works, Inc. 980 F.2d 804, 809 (1st Cir. 1992).
131. See Williamhouse-Regency of Delaware, Inc. v. NLRB, 915 F.2d 631, 635 (11th Cir. 1990).
133. Id. at 32.
134. Id.
135. Id. at 33 (quoting M & M Oldsmobile Inc., 156 N.L.R.B. 903, 905-06 (1966), enforced, 377 F.2d 712 (2d Cir. 1967). To put it another way, the Board noted that “it would not serve the statutory purpose of encouraging collective bargaining to allow unions to avoid their contracts on the ground that they had failed to follow their own internal procedures.” Id.
the employer to refuse to sign its collective bargaining agreement because the union failed to follow the ratification requirements found in its constitution and by-laws.\textsuperscript{136}

This holding has been reiterated by the Board for decades.\textsuperscript{137} In \textit{M & M Oldsmobile Inc.},\textsuperscript{138} union officials informed the employer that it would seek ratification of the agreement the parties had reached.\textsuperscript{139} After the employer was informed that a majority of the employees had not voted for ratification, the employer requested a hearing to determine if ratification was proper.\textsuperscript{140} The Board found the employer to be in violation of the NLRA for questioning the union’s ratification procedures and failing to sign the agreement.\textsuperscript{141}

In \textit{Houchens Market of Elizabethtown, Inc. v. NLRB},\textsuperscript{142} union officials, during the course of negotiations, told the employer that any of its proposals would have to be ratified by the union membership.\textsuperscript{143} After an agreement had been reached, the union officials changed their position and insisted the agreement be implemented without being ratified.\textsuperscript{144} The employer refused.\textsuperscript{145} The Board found this refusal to be an unfair labor practice.\textsuperscript{146} The Sixth Circuit, in enforcing the order, wrote:

\begin{quote}
The purpose of collective bargaining is to fix wages, hours and conditions of work by a trade agreement between the employer and his employees. This can be done satisfactorily only if a bargaining agent is selected to represent all the employees with full power to
\end{quote}

\textsuperscript{136} Id.
\textsuperscript{137} See \textit{Merk}, 945 F.2d at 903 (Easterbrook, J., dissenting).
\textsuperscript{138} 156 N.L.R.B. 903 (1966) enforced, 377 F.2d 712 (2nd Cir. 1967).
\textsuperscript{139} Id. at 904.
\textsuperscript{140} Id. at 905.
\textsuperscript{141} Id. at 906.
\textsuperscript{142} 375 F.2d 208 (6th Cir. 1967).
\textsuperscript{143} Id. at 209.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 210. The Board found that the employer refused to bargain in good faith, in violation of § 8(d) of the NLRA. Id. This section provides, in part, that:

\begin{quote}
For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .
\end{quote}

Id.
speak in their behalf. The purpose of the statute would be largely frustrated if the results of bargaining must be submitted to a vote of the employees, with all the misunderstandings and cross currents that would inevitably arise in an election of that sort.¹⁴⁷

The court concluded that the union, because it was certified as the exclusive bargaining agent, was empowered by its members to reach a binding agreement without seeking ratification.¹⁴⁸

More recently, in Williamhouse-Regency of Delaware, Inc. v. NLRB,¹⁴⁹ the Eleventh Circuit held that an employer that was notified by the union at the outset of their negotiations that any tentative agreement would have to be ratified by the membership¹⁵⁰ was not permitted later to insist that the agreement be ratified.¹⁵¹ The court wrote that a union’s self-imposed ratification requirement is “essentially a restriction on the authority of its negotiators to execute an agreement reached at the bargaining table absent the approval of its membership . . . . But [it] is not treated by the Board as the functional equivalent of the act of acceptance essential to the formation of a contract.”¹⁵²

Other courts have decided this issue by employing an agency analysis. The basis for such theory may be found in § 301(b) of the LMRA, which provides that “[a]ny labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents.”¹⁵³ Subsection (e) further provides that “in determining whether any person is acting as an ‘agent’ of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed where actually authorized or subsequently ratified shall not be controlling.”¹⁵⁴

In Central States Southeast & Southwest Areas v. Kraftco,

¹⁴⁷. Id. at 212 (quoting NLRB v. Darlington Veneer Co., 236 F.2d 85, 88 (4th Cir. 1956)) (citation omitted). The court determined that the employer, by insisting on ratification, was attempting to bargain with respect to a matter not encompassed within wages, hours, or working conditions. Id. Instead, it was attempting to bargain about a matter “which was exclusively within the internal domain of the Union.” Id.

¹⁴⁸. Id.

¹⁴⁹. 915 F.2d 631 (11th Cir. 1990).

¹⁵⁰. Id. at 633.

¹⁵¹. Id. at 635-36.

¹⁵². Id. at 635.


Inc., the court applied the above sections to conclude that although the union had a ratification requirement, the employer was permitted to rely on an non-ratified side agreement it reached with union negotiators. The court found that as a general rule an employer is entitled to rely on the "apparent authority" of the union negotiators to conclude a CBA, where there is a basis for such reliance, notwithstanding a ratification requirement. In finding that the union president had the apparent authority to enter into the side agreement, the court pointed to the fact that such authority may be inferred from the custom or practice of the parties and that the parties had twice before executed non-ratified side agreements.

V. THE MERK DECISION

A. The Majority Opinion

The majority relied on two theories to reverse the jury verdict Jewel received at the district court level. First, the majority held that the parol evidence rule should be applied to prohibit Jewel's testimony regarding the existence of the oral reopener agreement. Next, the court held that because the reopener agreement was not disclosed to the union membership, and thus not ratified as required by the Union's constitution, Jewel was not entitled to rely on it.

The majority began its discussion of the parol evidence rule with

156. Id. at 1114.
157. Id. at 1112. See NLRB v. Truckdrivers, Chauffeurs & Helpers, Local Union No. 100, 532 F.2d 569, 571 (6th Cir.) cert. denied, 429 U.S. 859 (1976); NLRB v. International Union of Elevator Constructors Local No. 8, 465 F.2d 974 (9th Cir. 1972).
158. Central States, 794 F.2d at 1113-14. See also Moreau v. International Brotherhood of Firemen & Oilers, 851 F.2d 516, 519 (1st Cir. 1988) (affirming the grant of summary judgment for the employer because it demonstrated that the international union informed the employer that the local union had authority to enter into "side agreements," thus proving apparent authority existed).
159. Specifically, the plaintiffs made five arguments challenging the verdict against them: (1) the district court improperly admitted the oral reopener evidence in violation of the parol evidence rule; (2) the reopener agreement should not be enforced because it violated the Union's constitution requiring ratification; (3) national labor policy and section 8(d) of the LMRA militate against the enforcement of a secret oral agreement which contradicts the terms of a written and ratified CBA; (4) numerous evidentiary errors were made by the district court requiring a new trial; and, (5) the district court should not have dismissed their claim for punitive damages. Merk. 945 F.2d at 892.
160. Id., 945 F.2d at 894.
161. Id. at 898.
a standard contract law analysis. The majority noted that it was proper for the district court to leave to the jury the question of whether the contract was fully integrated, because the CBA did not indicate on its face whether it incorporated all the terms the parties agreed to. In addition, the court agreed with the jury’s determination that the agreement was not a full integration because both the Union and Jewel conceded there was an additional oral term to the CBA. The court further acknowledged that because the written CBA was not fully integrated, it would have been proper for the jury to consider the reopener testimony and ultimately conclude that Jewel did, in fact, bargain for a full economic reopener. Thus, the majority noted that if it applied a standard contract law analysis, it would have allowed the parol evidence to be introduced.

The Merk majority, however, was not pleased with this “mechanical application” of the parol evidence rule. Explaining that “our analysis of the parol evidence issue cannot proceed in a vacuum abstracted from the particular setting from which it arose,” the majority found that because the oral agreement supplemented a collective bargaining agreement, national labor policy is implicated. Only after considering national labor policy did the court conclude that it would be improper to enforce the clandestine oral reopener.

In determining exactly what national labor policy mandated, the majority wrote:

[The laws regulating labor relations would have little substance if the central provisions of the collective compact could be nullified by means of secret side agreements. Union officials and management would then be free quietly to barter away basic guarantees contained in the collective bargaining agreement and relied upon by all union members.]

The court continued that in order to avoid potential conflicts in labor relations, “collective bargaining agreements must be more secure than

162. See id., at 892-93.
163. Id. at 893.
164. Id.
165. Id.
166. Id.
167. See id.
168. Id.
169. Id.
170. Id. at 894.
garden variety contracts."\textsuperscript{171}

The court presented various cases to support its holding that national labor policy proscribed an oral reopener which contradicts the written CBA. The court focused on what it termed the "seminal case" of this nature, \textit{Gatliff Coal}.\textsuperscript{172} This case, the court wrote, held that the NLRA "clearly precluded the [employer's] reliance upon a prior or contemporaneous oral agreement to modify the terms of the written collective bargaining agreement."\textsuperscript{173} The court noted that \textit{Gatliff Coal} was followed in \textit{Annshire Garment}, a district court decision from Kansas, decided in 1967.\textsuperscript{174} The majority explained that \textit{Annshire Garment} court, in order to suppress industrial strife, invoked national labor policy to allow the clear and unambiguous terms of the written CBA to be immune from attack based on a secret side agreement.\textsuperscript{175} The court also added a string citation, which included two cases, \textit{N.D.K. Corp.}\textsuperscript{176} and \textit{Rhodes},\textsuperscript{177} to further reiterate the proposition that national labor policy makes parol evidence unavailing to modify a written CBA.\textsuperscript{178}

The court determined, however, that the "real danger posed by this reopener stems from its secrecy and not simply from its oral character."\textsuperscript{179} The court found that Jewel and the Union explicitly agreed to keep the reopener hidden from the Union membership.\textsuperscript{180} Specifically, the court found:

\begin{quote}
Jewel is hardly an unsophisticated employer. Aware of the secrecy surrounding the oral reopener, it must have drawn the obvious conclusion that the terms of the side agreement would not be submitted for ratification or even disclosed to the Union membership. Jewel now argues that it believed the secrecy was intended solely to keep the reopener hidden from the International Union. But whether concealment was motivated by a desire to keep the side agreement from the membership or from the International is irrelevant: the reopener was in fact kept from the membership and Jewel was on
\end{quote}

\begin{itemize}
\item 171. \textit{Id.}
\item 172. 152 F.2d 52 (6th Cir. 1945); see also supra notes 117-22 and accompanying text.
\item 173. \textit{Merk}, 945 F.2d at 894.
\item 174. \textit{Id.}
\item 175. \textit{Id.}
\item 176. 278 N.L.R.B. 1035 (1986); see supra notes 126-27 and accompanying text.
\item 177. 99 L.R.R.M. (BNA) 2868 (1978); see supra notes 127-29 and accompanying text.
\item 178. \textit{Merk}, 945 F.2d at 894-95.
\item 179. \textit{Id.} at 895.
\item 180. \textit{Id.} The court reviewed the district court's denial of the plaintiff's judgment notwithstanding the verdict \textit{de novo}. \textit{Id.} at 892.
\end{itemize}
notice of this fact.\textsuperscript{181}

This meant that Union members who reasonably thought they had a secure CBA were, in fact, at the mercy of a secret reopener which, the court found, “strikes at the heart of the CBA” and “throws open the most central provisions governing wages and benefits . . . .”\textsuperscript{182}

The majority used this secrecy concern to conclude that it was in error for the district court to rely on the Seventh Circuit’s decision in \textit{Mohr v. Metro East Mfg. Co}\textsuperscript{183} to allow the introduction of the reopener testimony.\textsuperscript{184} The court noted that the \textit{Mohr} decision, which allowed the introduction of oral agreements between the local union and employer to modify a CBA reached between the employers association and the international union, was unlike the scenario in \textit{Merk} for two reasons.\textsuperscript{185} First, the local union membership in \textit{Mohr} knew of the oral modifications.\textsuperscript{186} Second, the oral agreements there dealt with only peripheral matters.\textsuperscript{187}

The court, however, did not rest its entire holding on its secrecy analysis and \textit{Gatiffany Coal}. The court also held, as a matter of federal law, that Jewel was not entitled to rely on the oral reopener when it knew it was not ratified by the Union’s rank and file.\textsuperscript{188} The majority wrote that the “[f]ailure to ratify under circumstances where an employer is aware of both of the ratification requirement and of the failure to comply with it may invalidate an employer’s claims under the unratified agreement.”\textsuperscript{189}

The court recognized an exception to this general rule. If an employer could demonstrate a past practice of non-ratification of contract terms, it could establish a waiver of the ratification requirement.\textsuperscript{190} The court found, however, that Jewel “failed to demonstrate any established history of non-ratification of \textit{substantial} terms of the

\textsuperscript{181} Id. at 897.
\textsuperscript{182} Id. at 895.
\textsuperscript{183} 711 F.2d 69 (7th Cir. 1983); see supra notes 86-89 and accompanying text.
\textsuperscript{184} See \textit{Merk}, 945 F.2d at 895.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id. at 898.
\textsuperscript{190} \textit{Merk}, 945 F.2d at 896. The court wrote that Central States S.E. & S.W. Areas Pension Fund v. Kraftco, Inc, 799 F.2d 1098, 1113-14 (6th Cir. 1986), suggested in dicta that well-trenched practices establishing a history of non-ratification may signify a waiver of the ratification requirement. Id.
labor contract.” 191 It noted that although “peripheral” terms of the CBA, such as the seniority system and personal days were regarded by Jewel and the Union as binding without ratification, these terms did not rise to the significance of the reopener before the court which effectively repealed the employee’s wages. 192 The court reasoned that it would not infer waiver from past practices of non-ratification of terms of such “trifling magnitude,” for to do so would encourage unions to submit even trivial issues to its membership simply to avoid such waiver. 193 This, the court found, would violate national labor policy. 194

It is important to note that in an attempt to prove a history of non-ratification, and thus waiver, Jewel introduced evidence that the parties had agreed to an non-ratified reopener provision in their 1969 CBA, which allegedly reopened wages and renegotiated them higher if the Teamsters Union attempted to organize Jewel’s employees. 195 Nonetheless, the court concluded this 1969 reopener would not operate as a waiver because the 1969 reopener protected all the parties, 196 while the 1983 reopener was a “controversial” provision allowing Jewel to unilaterally cut wages if a competitor entered the marketplace. 197 That is, because the 1969 reopener was not analogous to the 1983 reopener, the former could not be used to prove a ratification waiver of the latter. 198

The majority also disapproved of the district court’s finding that the 1983 reopener may be relied on by Jewel even in the absence of

191. Id. at 896 (emphasis in original).
192. Id. In finding that the reopener provision should not be equated with the provisions dealing with the seniority system or personal days to determine waiver, the court wrote that “the reopening of labor contracts during their term is deemed so significant that it is expressly forbidden by section 8(d) of the National Labor Relations Act except when provided by contract. This provision argues strongly against unratified reopeners.” Id. See generally Texaco Inc. v. NLRB, 722 F.2d 1226 (5th Cir. 1984).
193. Merk, 945 F.2d at 896.
194. Id.
195. Id. at 896-97.
196. This was true, wrote the court, because Jewel would be able to keep the Teamsters out of its stores, the Union would retain its membership, and the rank and file would possibly receive a raise in salary. Id. at 897.
197. Id. at 897. The court wrote that “it would not have been difficult for Jewel to predict that such a provision would have been at least highly controversial and might well have been overwhelmingly defeated by vote of the membership.” Id. The court noted that when the 1983 reopener was submitted to the membership in connection with the plaintiff’s suit against the Union, it was voted down by a large margin. Id.
198. See id.
a past practice of non-ratification. The district court, relying on *Chrysler Workers Ass'n v. Chrysler Corp.*, found that as long as Jewel did not have clear notice that the Union was acting in bad faith against its membership in agreeing to the reopener, Jewel was entitled to believe it was a binding provision.

The majority found this interpretation of *Chrysler Workers* to be “inapposite,” for the parol evidence there consisted of a side letter agreement, dealing merely with worker’s transfer rights, and was not kept hidden from the union membership. Such an agreement was not analogous to the economic reopener in *Merk*, thus, the court found that reliance on *Chrysler Workers* was not proper. In addition, the majority disagreed with the dissent’s view of the need for flexibility in labor relations. Although the majority agreed that flexibility is a virtue in collective bargaining, it “should hardly extend to surreptitious downward adjustments of basic wages. Such changes, if concealed, are highly destabilizing, producing strikes and lawsuits which the national labor policy does indeed eschew.”

The majority also added that the dissent “protests overmuch” about its reliance on *Gatliff Coal*. The court noted that “the dissent cites no more recent case on point . . . and is unable to find any case which holds contra to *Gatliff Coal*. The court concluded that such a case could not be found “probably because the principles of fairness underlying *Gatliff Coal* are still central to the labor law of the land.”

**B. The Dissent’s Opinion in *Merk***

“Labor law emphasizes flexibility, not certainty.” This conclusion pervades Judge Easterbrook’s dissenting opinion. It flows, the dissent argued, from the idea that collective bargaining agreements are “relational contracts;” that is, they merely establish a framework from

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199. *Id.*
203. See *id.*
204. *Id.* at 898-99.
205. *Id.* at 899.
206. *Id.*
207. *Id.*
208. *Id.* at 901.
which the parties may resolve their differences.\textsuperscript{209} A CBA is merely
a framework, the dissent argued, for two reasons. First, it is not pos-
sible for the negotiators to reduce to writing all of the understandings
and practices (even all of the important ones) which comprise a
CBA.\textsuperscript{210} Second, labor contracts govern a myriad of labor relations
issues, many of which, due to a changing marketplace, must be modi-
fi ed at a date subsequent to the contract's execution.\textsuperscript{211}

The dissent, in explaining why the majority was incorrect in
concluding that labor agreements must be more secure than ordinary
commercial contracts, wrote:

It is perverse to say that the contracting process in labor must be
more formal than the contracting process in shipping or construction
or natural resources. You can define how much coal to sell and
where to deliver it; you can set the duration of a charter party.
Labor agreements govern the ongoing relations among thousands of
persons and affect matters not so easy to specify. Rigidity backfires.
Competitive conditions and technology change. Labor relations must
change too . . . . Failure to adjust to new developments means fail-
ure in product markets (look at the automobile and railroad indus-
tries), and when the employer slips in product markets labor takes
the fall.\textsuperscript{212}

Then, in an effort to define what national labor policy mandates
in cases such as these, the dissent turned to the labor statutes. The
NLRA, wrote the dissent, requires only one type of agreement to be
in writing: pension plans.\textsuperscript{213} This signifies that Congress left to the
parties themselves the decision as to whether the remainder of their
CBA would be wholly in writing, or partially or fully oral.\textsuperscript{214} In
fact, noted the dissent, Uniform Commercial Code §§ 2-201, 2-202,
and 2-209\textsuperscript{215} have the effect of making commercial contracts more

\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Id. (emphasis in original).
\textsuperscript{213} Id. at 900.
\textsuperscript{214} Id. The dissent added:
If labor policy really emphasized stability . . . . the NLRA would require the com-
mitment of all agreements to writing, would require [union] leaders to submit them
to vote by members, and would require the written pact to be circulated far
enough in advance of the vote that it could be digested and intelligently debated.
Labor law requires none of these things, as my colleagues concede.
\textsuperscript{215} Id. Uniform Commercial Code (1978). Section 2-201 sets forth formal requirements and
secure against oral modifications than labor contracts are.\textsuperscript{216}

The dissent cited a number of United States Supreme Court decisions to demonstrate that the Court has held that labor contracts require more flexibility than ordinary contracts.\textsuperscript{217} The dissent noted two cases in particular. In \textit{Transportation-Communication Employees v. Union Pacific R.R.},\textsuperscript{218} the Court wrote that a CBA "is not . . . governed by the same old common-law concepts which control such private contracts . . . . In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage, and custom pertaining to all such agreements."\textsuperscript{219} In \textit{Consolidated Rail Corp. v. Railway Labor Executives' Ass'n},\textsuperscript{220} noted the dissent, the Court found that under both the NLRA and the Railway Labor Act, flexibility was a hallmark of labor relations and that courts should not frown upon informal arrangements.\textsuperscript{221}

The dissent reasoned that because national labor policy emphasizes flexibility, a court should not apply the parol evidence rule in a fashion as to prohibit oral side agreements.\textsuperscript{222} In support of this proposition, the dissent cited the Fifth Circuit's decision in \textit{Manville Forest Products Corp. v. United Paperworkers International Union},\textsuperscript{223} which held that the parol evidence rule should not be applied at all in the context of collective bargaining.\textsuperscript{224} \textit{Manville Forest Products}, wrote the dissent, stands for the proposition, which runs directly counter to the majority's analysis, that labor and management may not have a fully integrated CBA, no matter how strongly the parties prefer the benefits of certainty.\textsuperscript{225}

\begin{thebibliography}
\item the Statute of Frauds; Section 2-202 relates to parol or extrinsic evidence; and, Section 2-209 encompasses with modification, rescission and waiver.
\item 216. \textit{Merk}, 945 F.2d at 900-01.
\item 218. 385 U.S. 157 (1966).
\item 219. \textit{Merk}, 945 F.2d at 901, quoting \textit{Union Pacific}, 385 U.S. at 160-61.
\item 220. 491 U.S. 299, 308-09 (1989).
\item 221. \textit{Merk}, 945 F.2d at 901-02.
\item 222. \textit{See id.} at 902.
\item 223. 831 F.2d 72 (5th Cir. 1987).
\item 224. \textit{Id.} at 75-76.
\item 225. \textit{Merk}, 945 F.2d at 902. As to this finding, the dissent wrote:
I am no more enamored of an approach that dishonors attempts to put everything in writing than I am of an approach that dishonors oral agreements when the parties did not want their writing to be complete. There is a happy middle ground:
Parties may choose for themselves.
\end{thebibliography}
The dissent also noted that courts regularly hold that arbitrators need not follow the parol evidence rule when interpreting collective bargaining agreements. Courts realize, wrote the dissent, that because "collective bargaining agreements are incomplete, and so much of labor relations consists in oral understandings, arbitrators may use these oral exchanges to supplement or even contradict the written terms." 

The dissent also found fault with *Gatliff Coal* and the "smattering of unreviewed decisions by district courts, all more than a generation old," upon which the majority relied to buttress its holding. *Gatliff Coal*, wrote the dissent, is based in part on a premise that it obtained by misreading *H.J. Heinz Co. v. NLRB*. The dissent noted, merely affords a union a written memorial of their agreement with the employer by holding that it is an unfair labor practice for an employer, after having reached a final agreement with a union, to refuse to sign the agreement when its reduced to writing. The dissent concluded that the *Gatliff Coal* court was thus in error to use *Heinz* to stand for the proposition that the NLRA intended that all CBA's be in writing.

The dissent found *Gatliff Coal* to be unpersuasive for another reason as well. The *Gatliff Coal* court, wrote the dissent, attempted to solve the problem of a member of a multi-employer bargaining unit refusing to sign the agreement reached with the union, arguing that the local union's officials said it would not have to. Today, wrote the dissent, this problem is not dealt with as one of parol evidence, but rather, as the NLRB determined in 1958, it is dealt with by filing an unfair labor practice charge. The dissent then noted that after the Board solved the multiemployer problem in 1958, "*Gatliff* vanished without a trace."

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226. Id. at 901.
227. Id.
228. 152 F.2d 52 (6th Cir. 1945).
229. *Merk*, 945 F.2d at 902.
230. 311 U.S. 514 (1941).
231. *Merk*, 945 F.2d at 902.
232. See id.; see also supra note 121 and accompanying text.
233. *Merk*, 945 F.2d at 902.
235. *Merk*, 945 F.2d at 902.
236. Id. Judge Easterbrook further noted:

My colleagues think it significant that I have not found a case disapproving *Gatliff* by name. Guilty as charged. Plea in mitigation: As other courts take no notice of
The dissent next attacked the majority's ratification analysis, raising four important issues. First, whether a provision in a union's constitution has a legal effect on the validity of a CBA. Relying on *McLaughlin & Moran, Inc.* and its progeny, the dissent declared that, as a matter of federal law, union negotiators have the authority to enter into binding agreements irrespective of whether the union's constitution provides otherwise. The dissent argued that this principle was "conclusive against plaintiffs." The dissent added, "I cannot find any contrary holding," and that "my colleagues, who extol the importance of stability, also promote the sort of litigation regarding internal union procedures that, the Board and other circuits believe, undermines stability." 

Second, even assuming that the Union's internal procedures do have an affect on the CBA, the question becomes whether Jewel had knowledge that the Union's negotiators would keep the oral reopener secret. The dissent pointed out that Jewel denies having such knowledge, and the jury verdict in Jewel's favor "hardly resolves this question against it." The dissent also noted that it was contradictory that the majority distinguished *McLaughlin & Moran* based on the employer's lack of knowledge there, while it ignored Jewel's argument that it too lacked knowledge. In any event, declared the dissent, the question of knowledge is not a factor when the Board, or other circuits, determine this issue.

Third, the dissent asked, "[w]hy should Jewel be bound by the provisions favorable to the union (those the union's officers told the membership about) but be unable to avail itself of the provisions
favorable to itself?" The dissent argued that a defect in ratification should affect the entire CBA, not simply the oral aspect.

Fourth, the dissent asked "[w]hy is Jewel, as opposed to the union, answerable to persons injured by defects in the ratification process?" The dissent argued that the plaintiff's claim in Merk sounded like a breach of the Union's duty of fair representation, a cause of action that plaintiffs originally brought but was subsequently dismissed by the district court.

The dissent also disagreed with the majority on the issue of whether the parties had a history of non-ratification. The dissent noted that the jury found the parties had a history of non-ratified oral agreements. Then, in countering the majority's finding that the previous non-ratified agreements dealt with issues too trivial to establish a waiver of an agreement such as an economic reopener, the dissent wrote "[m]y colleagues deem details such as seniority and days off to be trivial — questionable as an original matter, but no ground for upsetting the jury's contrary decision on the same point. Especially not when one of the examples presented to the jury was — another oral reopener agreement!"

The dissent then argued that the result of the majority's waiver analysis makes collective bargaining agreements less, not more, secure. This, the dissent wrote, is because labor and management cannot know whether their oral agreement is binding until they go to court and find out how "important" the agreement is. The dissent found this outcome unsatisfactory because "[n]egotiators need to know while they are dickering which agreements will be enforced and which will not . . . ."

In conclusion, Judge Easterbrook argued that the majority played favorites in this case. It was contradictory that the majority refused to entertain Jewel's argument that the reopener was actually to

246. Id.
247. Id.
248. Id.
249. Id.
250. See id.
251. Id. In reply to the majority’s argument that the parties' 1969 reopener was different than the 1983 reopener because the 1969 reopener benefitted all parties, the dissent wrote "[t]his sounds more like a lawyer's closing argument to a jury than like a reason why the jury's verdict must be set aside." Id. at 905.
252. See id. at 905.
253. Id.
254. Id.
255. See id. at 906.
the benefit of the Union's membership, finding that "it is not for us to decide whether the reopener would have ultimately benefitted or harmed the Union membership," when the majority did make this determination regarding the parties' 1969 reopener. The dissent wrote: "This is special pleading. Reopeners are OK when they help the employees but not when they help the employer. Such a disposition bears no resemblance to a rule of law. It is a thumb on the scales of justice."8

VI. ANALYSIS

In determining whether the parol evidence rule should operate to exclude Jewel's reopener testimony in Merk, both the majority and the dissent sought refuge under national labor policy for their respective positions. Ultimately, however, the majority fashioned its view of the parol evidence rule and national labor policy through Gatliff Coal.

Gatliff Coal, decided in 1945, does not represent the view of national labor policy that other circuits have taken. The Ninth Circuit has consistently allowed the introduction of parol evidence in the context of labor relations. The Ninth Circuit's holding in Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996 is of particular importance. The Certified court allowed the introduction of parol evidence to modify the parties CBA and admonished courts for being preoccupied with ordinary contract law principles such as the parol evidence rule. Implicit in this holding is the court's accession that if the agreement, instead of being a CBA, was a garden variety contract, it might, under an ordinary contract law analysis, be insulated from oral modification by the application of the parol evidence rule. However, because the document is a labor compact, which is necessarily a less integrated agreement than a garden variety contract, the parol evidence rule should not operate to bar testimony

256. Id. at 897.
257. Id.; see supra notes 195-98 and accompanying text.
258. Merk, 945 F.2d at 906 (references to page numbers omitted).
259. Compare id. at 894 with id. at 900 (Easterbrook, J., dissenting).
260. 152 F.2d 52 (6th Cir. 1945).
261. See supra notes 95-115 and accompanying text.
262. 597 F.2d 1269 (9th Cir. 1979).
263. Id. at 1271.
264. See id.
regarding the parties side agreement.\textsuperscript{265} The \textit{Merk} majority, in direct contrast, first found that in applying an ordinary contract law analysis, the parol evidence rule would not operate to bar the oral testimony;\textsuperscript{266} then used the rule in the context of labor policy to exclude the oral testimony.\textsuperscript{267}

The \textit{Certified} court was not alone in holding that a CBA which was not fully integrated could be supplemented by the parties oral agreements. Part IV of this Comment set forth a number of cases, from various circuits, in which courts have admitted parol evidence to modify the parties CBA. Together, these cases clearly indicate that labor contracts are not as secure as \textit{Merk} majority deems them to be.\textsuperscript{268} Thus, the majority did not follow the mandate of national labor policy, it created its own.

The \textit{Merk} majority responded to this adverse case law by determining that the facts of \textit{Merk} make it distinguishable. The majority cited the fact that the reopener was not ratified and remained hidden from the Union membership.\textsuperscript{269} Whether the reopener was ratified should not, however, be used by the court to prevent Jewel from relying on it. As other circuits and the Board have determined, issues involving a union’s constitution and bylaws are matters wholly internal to the union.\textsuperscript{270} An employer must play no role in these affairs.\textsuperscript{271} In fact, the employer is subject to unfair labor practice charges for insisting that a union follow its own ratification procedures.\textsuperscript{272}

The relevant case law thus undercuts both the majority’s holding that the parol evidence rule must be applied to make labor contracts more secure, and that a failure ratify a labor proposal makes such proposal empty under the law. Therefore, the majority was forced to expend much judicial energy in circumvention. First, the majority, as mentioned above, differentiated the case law allowing parol testimony into evidence because in those cases the oral agreements introduced

\begin{itemize}
  \item \textsuperscript{265} Id.
  \item \textsuperscript{266} \textit{Merk}, 945 F.2d at 893.
  \item \textsuperscript{267} Id. at 894.
  \item \textsuperscript{268} See Archibald Cox, \textit{Reflections Upon Labor Arbitration}, 72 HARV. L. REV. 1482, 1500 (1959) (concluding that “collective agreements . . . are less complete and more loosely drawn than many other contracts; therefore there is much more to be supplied from the context in which they were negotiated.”).
  \item \textsuperscript{269} \textit{Merk}, 945 F.2d at 895, 896.
  \item \textsuperscript{270} \textit{See supra} notes 132-52 and accompanying text.
  \item \textsuperscript{271} Id.
  \item \textsuperscript{272} Id.
\end{itemize}
were not kept hidden from the union membership.273

Second, the majority was forced to determine that the oral agreement in Merk was more significant to the parties than were the agreements in these distinguishable cases, and therefore should not be admitted into evidence.274 Third, in an effort to quash Jewel's argument that the parties had a history of non-ratification, the majority differentiated the previous non-ratified oral reopener agreement that Jewel and the Union had, from the 1983 reopener, by finding that the 1969 reopener benefitted all the parties, while the 1983 reopener did not.275

This judicial energy was misplaced. Instead of contorting the parol evidence rule and the legal effect of a union's ratification requirement to hold Jewel responsible for the plaintiff's loss, the court should have placed the liability on the Union. A quick glance at the Merk case history reveals that the plaintiffs thought their Union was at fault, for they first chose to commence a hybrid cause of action under § 301 of the LMRA which, of course, included the Union as a defendant.276

The plaintiff's, however, did not act fast enough. When they instituted the action against their Union for failing to include them in settlement offer reached with Jewel, the plaintiffs were no longer Jewel employees and were not members of the bargaining unit; thus, the district court dismissed the action.277 However, Jewel and the Union, as well as the majority and dissent in Merk, all concurred that the reopener agreement remained secret at the insistence of the Union's negotiators. Therefore, it seems intuitive that the Union be responsible for the plaintiff's damages.278

One approach that may be utilized to hold the Union responsible is to invoke the theory of promissory estoppel.279 Promissory estop-

273. Merk, 945 F.2d at 895.
274. Id. at 897.
275. Id.
276. Id. at 891.
277. See Merk, 641 F. Supp. 1024, 1032 (N.D. Ill. 1986); see also supra notes 34-45 and accompanying text.
278. Towards this end, courts have determined that § 411 (a) of the Bill of Rights of Members of Labor Organizations (29 U.S.C. § 411(a)) protects a union member's right to vote for ratification where the union's constitution has such a provision, and that former employees may state a cause of action under this statute against their union. See Christopher v. Safeway Stores, Inc., 644 F.2d 467, 470 (5th Cir. 1981); Trail v. International Bhd. of Teamsters, 542 F.2d 961 (6th Cir. 1976).
279. This theory has its jurisdictional basis in § 301 of the LMRA. Although this section provides district courts with jurisdiction over contracts between an employer and a labor
pel, an equitable doctrine whose "hallmark . . . is its flexible application," exists to "avoid injustice in particular cases." The doctrine has been accepted in labor relations actions.

The doctrine of promissory estoppel provides that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." To prevail under this theory, a party must show: (1) a substantial change in its position; (2) which was, or should have been, foreseeable by a reasonable person in the promisor's position; and, (3) such change in position must have been in reliance upon an actual promise by the promisor.

In Merk, the Union allegedly promised Jewel that if a warehouse competitor entered the marketplace the wage provision of the CBA would be reopened. Relying on this actual promise, Jewel allegedly relinquished its insistence on a most favored nations clause. Such a relinquishment is substantial, for without a most favored nations clause Jewel is prohibited from reducing union wages in an effort to match a competitor's lower wage rates. This clearly hampers Jewel's competitive position in the marketplace. In addition, there can be no question that Jewel's action was foreseeable, because the Union promised to agree to an oral reopener clause with the purpose of having Jewel drop its most favored nations clause.

organization, the term "contracts" has been interpreted to include suits based on promissory estoppel. See Retail Clerks International Ass'n v. Lion Dry Goods, Inc., 369 U.S. 17, (1962); Byerly v. Duke Power Co., 217 F.2d 803 (1954); Morauer & Hartzell, Inc. v. International Union of Operating Eng'rs, Local 77, 88 L.R.R.M. (BNA) 2087 (D.D.C. 1974).


284. See supra notes 16-24 and accompanying text.

285. Id.

286. As an alternative theory, the court may have found that the reopener agreement was an independent contract for the purposes of § 301(a). In Retail Clerks International Ass'n v. Lion Dry Goods, Inc., 369 U.S. 17 (1962), the Court explained that for an agreement to be termed a "contract" in this setting, "[i]t is enough that [it] is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them," and that it "resolved a controversy arising out of, and importantly and directly affect-
The court in *Merk*, however, utilized the parol evidence rule and the Union’s ratification requirement to preempt Jewel’s effort to prove that a reopener existed, because the court was concerned with protecting the plaintiff’s expectations in the written CBA. Deciding the case on a promissory estoppel theory, however, does not force the court to abandon the plaintiffs. It simply allows Jewel raise, as a defense against the Union, the fact that the Union’s negotiators made a binding promise during the parties’ negotiating sessions. Allowing Jewel to raise this defense not only allows Jewel to exonerate itself from liability, but it places the responsibility with the party that effectuated the plaintiff’s losses—the Union.

The alternative, as taken in *Merk*, is to exclude the reopener testimony in the name of the formality of national labor policy. The effect of the *Merk* decision reveals that this path leads to a rather dubious result. What should an employer in Jewel’s position do after *Merk*? If the employer informs the union that the parties’ side agreement is not valid until ratified as mandated by the union’s constitution, it would commit an unfair labor practice. If, on the other hand, the employer accepted the reopener and relied on it without ratification, a court following *Merk* would find the agreement was empty under the law. Such a no-win outcome for an employer cannot be mandated by national labor policy.

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287. *Merk*, 945 F.2d at 896 (noting “Union members who reasonably believed that they were guaranteed a fixed rate of pay for the duration of the CBA unexpectedly found their wages slashed at mid-term.”).


289. Forcing the Union to pay damages is not an unjust result. The Union’s membership elected the Union as its exclusive collective bargaining representative. The membership receives great benefits when the negotiators leave the bargaining table with a CBA favorable to the Union. They must be prepared, however, to accept any losses occasioned by the Union as well.

290. See supra notes 167-71 and accompanying text.

291. See supra notes 132-48 and accompanying text.

292. See supra notes 188-89 and accompanying text.