Into the Mire of Uncertainty: Union Disciplinary Fines and NLRA 8(b)(1)(A)

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STUDENT NOTES

INTO THE MIRE OF UNCERTAINTY: UNION DISCIPLINARY FINES AND NLRA § 8(b)(1)(A)

OVERVIEW

The scope and variety of the problems suggest that Section 8(b)(1) may plunge the Board [National Labor Relations Board] into a dismal swamp of uncertainty. Its vagueness alone, not to mention the broad interpretations put upon it in debates in Congress, encourages the filing of great numbers of charges.

A long period of uncertainty and heavy volume of litigations will be necessary before questions of interpretation can be solved.

Professor Cox's prediction has proved to be accurate. The legal parameters of appropriate vis-à-vis inappropriate levying of disciplinary fines is still developing. This development is on a slow case by case basis plagued with unarticulated analytical standards, inconsistent legislative interpretation, and contradictory policy determinations. This article examines the legal parameters of union disciplinary actions timidly established by the labor laws, the courts, and the NLRB. Part I examines the ability of, and extent to which, unions may discipline their ranks. This grant of power stems from, and is held in check by, the federal labor law, although the particular remedies available to the disciplining union have been defined by the courts and the NLRB. Part II focuses on the operational constraints placed upon the union's ability to levy penalties, particularly court enforced fines, as delineated by the courts and the Board. Part III examines the operation of these developing concepts in similar factual situations with attention toward discerning operational rules of union conduct. And Part IV examines and summarizes the interface between the theoretical and practical constraints placed upon both unions and employees in exercising their respective statutory rights.

I. UNION DISCIPLINE AND § 8(b)(1)(A)

A. The Extent of Union Discipline under Federal Labor Law

Unions derive the power to discipline members from their constitutions and by-laws. This grant of power extends to a wide variety of internal transgressions by members without the triggering of an unfair labor practice violation. When the alleged transgression by the member goes beyond the violation of the internally created rules of the labor union and encompasses the member's rights and privileges granted under the federal labor laws, the analysis shifts toward a balancing of the member's statutory rights against the union's right to self-governance to determine the legality of the imposed disciplinary sanction.

The cornerstone of an employee-member's statutory rights is § 7 of the National Labor Relations Act, as amended (herein-after NLRA). This act grants employees the rights to engage in or refrain from activities of self-organization and "concerted activities for the purpose of collective bargaining or mutual aid or protection." In § 13 of the NLRA the right of employees to use the strike weapon as a concerted activity is also specifically protected. The NLRA gives effect to these employee held rights by declaring an unfair labor practice for both employers and labor unions to restrain or coerce employees in the exercise of these

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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 and protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title.

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications in that right.


It shall be an unfair labor practice for a labor organization or its agents (1) To restrain or coerce (A) employees in the exercise of the rights granted in Section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership; or (B) an
aforementioned rights. Moreover, a labor organization may not indirectly infringe upon these rights. The union may not restrain an employer in the selection of supervisory personnel, or force the dismissal of any employee "on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." These employee protected rights are but one side of the analysis of union disciplinary actions; balanced on the other side is the right of the labor organization, a member created, constitutionally based organization, to govern itself. This is authorized through NLRA § 8(b)(1)(A) stating "that this paragraph shall not impair the right of labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

Thus, the balance is struck; on one side are the employee held rights under the ambit of NLRA § 7, enforceable through NLRA § 8(b)(1)(A), on the other is the right of a union to govern itself under the NLRA § 8(b)(1)(A) proviso. This balance ostensibly takes the form of a statutory duality. One component of the duality examines the unions interface upon an employee's job rights as defined by the relationship of the employee-member vis-à-vis the employer. The other component examines the relationship of the union vis-à-vis the employee-member. Disciplinary actions which affect an employee's job rights and fall within the ambit of NLRA § 7 are within the jurisdiction of the NLRB through NLRA § 8(b)(1)(A). Disciplinary actions which affect the relationship of the union to its membership are

employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

* Id.

[T]o cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee to with respect whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.


within the jurisdiction of the internal union government through the NLRA § 8(b)(1)(A) proviso, and under certain circumstances, the courts.\(^9\) Unfortunately in practical terms, this jurisdictional demarcation cannot be clearly drawn since a particular disciplinary action may simultaneously impact upon both components of the statutory duality. Moreover, in cases dealing with the public policy exception the statutory duality concept has been ignored altogether.

Superimposed upon the disciplinary power of unions are three general substantive constraints. First, disciplinary matters exclusively internal do not trigger Board perusal as no NLRA § 7 rights are allegedly violated. Thus, for example, finding a member for failure to attend a union meeting is handled entirely internally.\(^11\) However, the determination of what constitutes an internal matter is not clear-cut. A union disciplinary rule which serves a legitimate union interest, even though it encroaches on NLRA § 7 rights, can be deemed, in balance, as an internal matter and not subject to Board scrutiny.\(^12\) Thus, the determination of legitimate union interests served by a particular rule is a major focal point in the balancing analysis. A second and perhaps rather obvious substantive constraint is that discipline can only be applied to current members of the union. Employees, as union members, can leave the union and escape the post resignation application of a union rule.\(^13\) Although a simple concept, this presents a myriad of operational problems discussed in Part II.

The third substantive constraint can almost be considered as a coequal input into the balance and is another key analytical focal point. This has been termed as the "public policy excep-


\(^12\) For example, the following have been termed "internal offenses": (1) Exceeding production quotas in violation of union rule; (2) strikebreaking; (3) attempting to coerce union officials; (4) reporting for work after local but before international had ratified new contract; (5) working with nonunion employees; (6) reporting co-workers to management in violation of union rules; (7) splitting vacations in violation of union rules. Whether an offense is "internal" is largely a matter of the specific factual situation and called internal until a post hoc review by the Board or the courts. See notes 77-112 infra, and accompanying text.

tion" and defies operational definition. Rather, the public policy exception is a catch-all category allowing the Board to entertain jurisdiction over a wide variety of matters under the aegis of NLRA § 8(b)(1)(A). Analytically, it would be easy to conceive of the Board examining a disciplinary action, determining the activity was protected under NLRA § 7, finding it violated NLRA § 8(b)(1)(A), and enjoining its enforcement. But such is not the case. Each of these concepts and their interface within the statutory duality has yet to be operationally defined by the Board and the courts. Moreover, using the expansive language of NLRA § 7 and the "public policy" of the labor legislation the Board can expand coverage beyond the limits of the statutory duality concept to enjoin a wider variety of union disciplinary actions. For example, the NLRB has expanded coverage to enjoin union disciplinary actions which attempted to regulate members' access to NLRB processes, for refusal to strike in the face of a no strike clause, for refusal to honor an illegal organizational picket line, and for nonadherence to a secondary boycott. The Board has also used the public policy exception to pierce further into the internal disciplinary process and examine improper ulterior motives of a union in imposing disciplinary actions. This open ended public policy exception view, due to its lack of operational guidelines, has not been entirely embraced by the courts nor applied uniformly by the Board. In some cases, for example, the Board has taken a hybrid approach, restricting only the remedy available to the union rather than enjoining the sanction entirely.

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15 See notes 2 and 5 supra.
17 Communications Workers Local 1197, 202 N.L.R.B. No. 229 (1973).
18 Retail Clerks Local 1179, 211 N.L.R.B. No. 84 (1974), enforced, 526 F.2d 142 (9th Cir. 1975).
21 See, e.g., NLRB v. Local 18, IUOE, 503 F.2d 780 (3d Cir. 1974).
22 See, e.g., International Molder's And Allied Wkrs., Local 125 (Blackhawk Tanning Co.), 178 N.L.R.B. No. 208 (1969), enforced, 442 F.2d 92 (7th Cir. 1971); Tawas Tube Products, Inc., 151 N.L.R.B. No. 46 (1965).
23 Id. Part III elaborates on this peculiar partial restriction. See notes 94-96 infra, and accompanying text.
In addition to the general substantive constraints imposed upon union disciplinary actions, there are also procedural constraints. The Labor-Management Reporting and Disclosure Act of 195924 (hereinafter LMRDA) § 101(a)(5) provides:

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such an organization or by an officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.25

Suffice to say, having the internal labor organization be both judge and prosecutor of alleged union violations affords the disciplined union member a questionable impartial tribunal.26 Redress under LMRDA § 101(a)(5) is available only to individual members through a civil action under LMRDA § 10227 unless the Board can exercise “subject matter” jurisdiction under the NLRA § 8(b) unfair labor practice provisions or the public policy exception. Although beyond the scope of this article, the organizational due process requirements in LMRDA § 101(a)(5) are at a minimum, and judicial scrutiny of internal union discipline in terms of union rule interpretation, previolation notice requirements, and the penalties imposed is limited.28

In summation thus far, unions are empowered to create and reasonably enforce internal rules which reflect legitimate union interests as long as the rules are enforced only against members, meet certain procedural standards, and impair no policy Congress has imbedded in the labor laws.

B. The Penalties Available to the Union

The penalties available to a union imposing a disciplinary action essentially involve: (1) expulsion; (2) suspension; and (3)

fines, inclusive of (a) fines enforced through threat of expulsion or suspension and (b) fines enforced through state courts. As stated previously, Board scrutiny is triggered when the disciplinary action and its enforcement allegedly "restrain or coerce" an employee's NLRA § 7 rights through a NLRA § 8(b)(1)(A) violation, when such action and enforcement fall under the public policy exception, or, in NLRA § 8(b)(2) situations, when the union attempts to have an employee improperly dismissed. A major problem lies in the imprecise nature of the terms "restrain or coerce" and "public policy." NLRA § 8(b)(2) establishes one definable limit beyond which a union may not pursue enforcement of a penalty, but other enforcement limits of expulsion, suspension, and fines are not so readily ascertainable.

Expelling a member for conduct which betrays an objective of the union is generally permissible subject to challenge under LMRDA § 101(a)(5) through a member's civil action through LMRDA § 102. However, the imposition of the expulsion penalty was restricted by the Court in NLRB v. Industrial Union of Maritime and Shipworkers. This case held a disciplinary action resulting in expulsion and falling within the ambit of NLRA § 7 rights or violating public labor policy will be enjoined to the extent that the disciplinary action does not concern an internal union matter. This view, although ostensibly consistent with the balancing test, is inconsistent with the statutory duality concept. Expulsion is an internal disciplinary action whose penalty does not directly impair the exercise of an employee's job rights and, as such, applying the statutory duality concept, Board jurisdiction is not triggered. Moreover, consider the following excerpt from the legislative history of § 8(b):

The pending measure [§ 8(b)(2)] does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire members they wish to fire, and still be able to try any of their members. All that they will not be able to do . . .

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19 See note 7 supra.
20 See note 25 supra and accompanying text.
22 Id. at 428. In Scofield v. NLRB, 394 U.S. 423 (1969), the Court stated: "If the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating NLRA § 8(b)(1)(A)."
23 "Id. at 429.
24 See notes 39-45 infra and accompanying text.
this: If they fire a member for some reason other than non payment of dues they cannot make his employer discharge him from his job and throw him out of work.\textsuperscript{34}

Accordingly, when read with NLRA § 8(b)(1)(A)'s proviso allowing union self-governance, a strong case may be made to exclude expulsion from the "restraint and coercion" language of NLRA § 8(b)(1)(A). This argument can be buttressed with the observations that the expelled member's job security is not in immediate jeopardy, the penalty is entirely internal involving no external enforcement agencies or coercion, and the procedural requirements under LMRDA § 101(a)(5) must still be met. Similar arguments can be made for disciplinary enforcement involving suspension and the enforcement of fines through the threat of expulsion. In essence, this argument posits that a member can escape the rule or penalty by resigning or being expelled\textsuperscript{35} and the union can sidestep the issue of a possible NLRA § 8(b)(1)(A) violation, leaving NLRA § 8(b)(2) to limit the action.

Expulsion, suspension, and fines enforced through the threat of expulsion are internally enforced penalties. A different situation arises in cases involving the imposition of fines when enforcement is secured not through expulsion but through state court proceedings. This penalty can be viewed as externally enforced. This particular twist to the enforcement of union disciplinary actions was approved by the Supreme Court in 1967 with NLRB v. Allis-Chalmers.\textsuperscript{36} Allis-Chalmers brought into analysis interpretation of the previously discussed legislative provisions focusing on policy arguments and the "restraint and coercion" language of NLRA § 8(b)(1)(A). The majority opinion approved court-enforced reasonable fines as a proper penalty through reliance on a weak public policy argument.

Where a union is strong and membership therefore valuable, to require expulsion of a member visits a far more severe penalty.


\textsuperscript{35} This adopts a view consistent with NLRA § 7 right to refuse to aid a labor organization. Consider the view expressed in Scofield v. NLRB, 394 U.S. 423 (1969): "[Section] 8(b)(1) leaves a union free to enforce a properly adopted rule . . . against union members who are free to leave the union and escape the rule." \textit{Id.} at 430. The Court went on to apply this escape provision enjoining penalties imposed after a member has left the union.

\textsuperscript{36} 388 U.S. 175 (1967).
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upon the member than a reasonable fine. Where the union is weak, and membership therefore of little value, the union faced with further depletion of its ranks may have no choice except to condone the member's disobedience.97

Accordingly, the union chose a penalty less severe than expulsion and, therefore, at least to this point, had not "restrained or coerced" members under NLRA § 8(b)(1)(A). Moreover, the Court read the proviso to NLRA § 8(b)(1) as being silent on the issue of court-enforced fines and hence a permissible sanction.98 It went on to express the statutory duality concept, distinguishing between the Board's jurisdiction over job rights and the union's jurisdiction over member rights. The Court held that the Board has no jurisdiction over the "means of union rule enforcement." While this is an accurate application of the statutory duality concept as it applies to internal penalties, the ramifications of this concept as applied to external penalties are substantively different. Arguably ignoring the impact upon NLRA § 7 rights and the practical and theoretical difference between externally enforced penalties and internally enforced penalties,99 the Court concluded that the union did not "restrain or coerce" members under NLRA § 8(b)(1)(A).100 Thus, court-enforced fines were added to a union's list of available sanctions with little guidance as to their application.

The separation of the means of external rule enforcement from Board consideration is a fundamental judgmental flaw. Since a member cannot escape the court enforcement of the fine by leaving the union, the nature and amount of penalties available to the union will unquestionably have a significant economic impact upon the job rights of the employee-member. The union disciplinary process is internal. The rules are created, interpreted, and enforced by internal union tribunals. It follows that the penalties imposed should also be limited to internal enforcement. Allowing unions to resort to external enforcement while blindly applying the statutory duality concept opens many avenues for abuse without adequately protecting the disciplined member's NLRA § 7 rights.

97 Id. at 183.
98 Id. at 191-93.
99 Id. at 202-08 (Black, J., dissenting).
100 Id. at 195.
Justice Black, dissenting in Allis-Chalmers, strongly expressed displeasure over the issue of court-enforced fines. He argued that the Court ignored the practical and theoretical differences between court-enforced fines and expulsion-enforced fines. Moreover, Justice Black viewed court-enforced fines as improper regardless of whether the disciplinary action fell under the ambit of NLRA § 8(b)(1)(A).

It is one thing to say that Congress did not wish to interfere with the union’s power, similar to that of any other kind of voluntary association, to prescribe specific conditions of membership. It is quite another thing to say that Congress intended to leave unions free to exercise a court-like power to try and punish members with a direct economic sanction for exercising their right to work.

The dissent further implies that since external enforcement is involved, disciplinary actions infringing upon the ambit of NLRA § 7 rights are by definition restraint and coercion and should tip any balance toward a finding of a NLRA § 8(b)(1)(A) violation. This issue of articulating and balancing the employee’s NLRA § 7 rights was ineffectively addressed by the majority in Allis-Chalmers.

The union power to levy court enforceable fines, the application of a strict statutory quality concept in matters concerning external penalties, and the NLRB’s retention of an expanded public policy exception allowing the Board to exercise jurisdiction in “some cases” leads to a rather confusing state of the law. Moreover, the failure of the Allis-Chalmers Court to adequately address the theory and ramification of the “means of rule enforcement” exception to Board scrutiny and its place, if any, in determining if a NLRA § 8(b)(1)(A) violation or infringement on public policy has occurred has contributed to inconsistency in Board and court decisions.

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41 Id. at 202-08 (Black, J., dissenting).
42 Id. at 203 (Black, J., dissenting) (Emphasis supplied).
43 Id. at 202-08 (Black, J., dissenting).
44 See notes 36-40 supra, and accompanying text.
II. CONSTRAINTS ON THE UNION'S ABILITY TO LEVY FINES

In balancing the rights of unions and their employee-members in the disciplinary action context, the courts and the Board now have the added consideration of the ramifications of an external penalty, albeit after Allis-Chalmers only implicitly or through the public policy exception. With an externally enforceable fine available, the questions of reasonableness of amount, against whom it can be levied, and how it can be circumvented arise.

A. The Reasonableness of Fines

The dictum in Allis-Chalmers used the adjective "reasonable" in permitting external fines to escape NLRA § 8(b)(1)(A) violation. In Scofield v. NLRB the Court reiterated this inference stating "that the union rule is valid and that its enforcement by reasonable fines does not constitute the restraint or coercion proscribed by Section 8(b)(1)(A)." This dicta led to speculation that the Court viewed unreasonable fines as an analytical point in determining a NLRA § 8(b)(1)(A) violation. The issue of reasonableness of fines, however, is part and parcel of the means of rule enforcement and ostensibly within the union's jurisdiction under the statutory duality concept. In Allis-Chalmers the Court viewed this issue as an internal union matter and an impermissible avenue of Board inquiry. The NLRB read the Allis-Chalmers and Scofield dicta as requiring the issue of reasonableness to be addressed by the state courts and refused to inquire into the reasonableness of the disciplinary fine.

The Board's refusal to inquire into the reasonableness of fines fared badly in the courts of appeal. Thus, the stage was set for the Supreme Court to resolve the conflict. In NLRB v. Boeing Company the Court stated:

46 368 U.S. at 183.
47 394 U.S. at 436 (emphasis supplied).
48 See notes 36-40 supra and accompanying text.
50 See, e.g., Morton Salt Co. v. NLRB, 472 F.2d 416 (9th Cir. 1972), vacated and remanded, 414 U.S. 807 (1973).
Given the rationale of Allis-Chalmers and Scofield, the Board's conclusion that § 8(b)(1)(A) of the Act has nothing to say about union fines of this nature, whatever their size, is correct. Issues as to the reasonableness or unreasonableness of such fines must be decided upon the basis of the law of contracts, voluntary associations, or such other principles of law as may be applied in a forum competent to adjudicate the issue. Under our holding, state courts would be wholly free to apply state law to such issues at the suit of either the union or the member fined.\(^\text{42}\)

This reverse preemption concept in deferring to state courts, while arguably consistent with prior decisions, raises many operational problems. The Court seemingly ignores the special nature of the relationship between a member and the labor union,\(^\text{53}\) its previously imposed restrictions on review and interpretation of union rules as in the Boilermakers v. Hardman case,\(^\text{54}\) and the myriad of potential due process problems.\(^\text{55}\)

The two dissenting opinions in Boeing recognized the difficulties involved in deferring to state courts a matter involving a complex area of labor-management relations and would have preferred a deferral to Board expertise.\(^\text{56}\) Additionally, Justice Douglas, dissenting in Boeing, expressed alarm over the issue of the reasonableness of fines being given, de facto, to unions. He observed:

It is not answer to say that the reasonableness of fines may be tested in a state-court suit. That envisages a rich and powerful union suing a powerful employee. Employees, however, are

\(^{42}\) Id. at 74.

\(^{53}\) The contract concept as applied to union membership is a legal fiction. See NLRB v. Allis-Chalmers, 388 U.S. 175 (1967). The law of contracts and law of voluntary unincorporated associations may have limited usefulness here. First, the union member writes and rewrites the "living" constitutional contract. Second, the terms of the "contract" are only generally stated. Rarely would a union Constitution have an equivalent to a liquidated damages clause for a breach. This renders an assessment of reasonable damages difficult. And, third, penalty clauses in contracts are normally unenforceable. One alternative seems to involve an equity determination in state courts. This approach, however, may lead to inconsistency among the courts. Standards established by the NLRB or an equivalent body would be preferable but would probably require amendments to the present labor laws.


\(^{56}\) 412 U.S. at 78 (Burger, C.J., dissenting); see also id. at 82-83 (Douglas, J., dissenting).
often at the bottom of the totem pole, without financial resources, and unworldly when it comes to litigation. Such a suit is likely to be no contest.\(^7\)

Moreover, the dissenters expressed the view that the Board "cannot properly perform its duties under NLRA § 8(b)(1)(A) unless it determines whether the nature and amount of the fine levied by the union constitute an unfair labor practice."\(^8\) Thus, the dissent implicitly attacks the inappropriately strict application of the statutory duality concept as it relates to the means of rule enforcement exception to Board inquiry.

Leaving the issue of reasonableness of fines to state courts has further compounded the problems discussed in Justice Black's dissent in Allis-Chalmers.\(^9\) The Court in Boeing fails to provide any operational guidelines to state courts to facilitate a determination as to the reasonableness of the fines.\(^10\) Moreover, under the theory that means of rule enforcement are internal issues, these decisions have an effect of insulating union disciplinary actions from effective Board and court scrutiny, thereby sacrificing employee-members' rights to potential abuse by union power.

B. The Requirement of Full Membership

A union may only discipline members of the organization.\(^6\) This requirement of membership, although simple on its face, does present some problems. An employee who fully avails himself of union benefits by tendering dues, taking the oath of membership, and participating in union affairs can be viewed as agreeing to the imposition of union disciplinary actions. At the other extreme sits the employee who merely tenders his dues and fees without participating in any union affairs. Generally, he can be viewed as a non-member and as not submitting to the union's disciplinary reach. Moreover, the union cannot interfere

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\(^7\) Id. at 82 (Douglas, J., dissenting).
\(^8\) Id. at 83 (Douglas, J., dissenting) (emphasis supplied).
\(^9\) See notes 41-44 supra and accompanying text.
\(^10\) See generally, Millan, supra note 55.
with his job security without committing an unfair labor practice under NLRA § 8(b)(2) or NLRA § 8(b)(3). Between these two extremes exist employees who tender dues and fees, proceed to take the oath of full membership and then do not participate in any, or in limited, union affairs. These employees are considered full members based on the oath of membership and are subject to union discipline.

Employees who take the oath of membership with no intention of submitting to union discipline, through misinformation, or mistaken belief that a union security clause requires membership, fare no better in circumventing union discipline. In Allis-Chalmers the Court stated: "[T]he relevant inquiry here is not what motivated a member's full membership but whether the Taft-Hartley amendments prohibited disciplinary measures against a full member..." Therefore, if an employee takes the oath of membership, for whatever reason, he is considered a full member and subject to union discipline. The Court in Allis-Chalmers and in subsequent cases offers no guidance on how to overcome this presumption or the burden of proof required. The Board has yet to adequately address this issue in any detail.

Assuming an employee becomes a full union member, for whatever reasons, under Scofield he can resign from the union and avoid the union rule. In NLRB v. Granite State Textile Workers the Court reiterated this position:

Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man on the street.

A resigned member may still have union obligations to fulfill. He is still required to meet his preresignation financial obligations. If he is subject to a valid union security clause a resigned member may still be required to tender dues. Additionally, the union

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\[8(b)(2)\]

\[8(b)(3)\]

\[29 U.S.C. \S\ 158(b)(3) (1970).\]

\[388 U.S. 175, 195 (1967).\]


\[Id. at 217.\]
may impose internal sanctions on resigned members such as expulsion or suspension and place restrictions on their re-entry. 67

A related question arises as to the effectiveness of the resignation. Where a union's constitution is silent on the issue "a member is free to resign at will by clearly conveying to the union his unequivocal intent to resign." 68 This conveyance must be received by the union and the Board strongly recommends a written resignation, although oral resignations 69 or unequivocal actions 70 are permitted.

A different situation may arise where the union's constitution contains restrictions on the right to resign. In Booster Lodge 405, IAM v. NLRB 71 the Court peripherally addressed the issue by holding that a no strike breaking clause in a union's constitution had no carry-over force on resigned members. 72 In dictum the Court stated "we leave open the question of the extent to which contractual restrictions on a member's right to resign may be limited by the Act [specifically § 7's right to refuse to engage in concerted activity]." 73 However, the dictum in American Broadcasting Companies v. Writers Guild indicates a willingness to accept a union constitution's resignation restrictions applicable during legal strikes. 74

The Board has taken a somewhat different approach, holding members' resignations valid in the face of contrary union constitutional provisions if the provision amounted "to a denial to members of a voluntary method of severing their relationship with the union." 75 The Board relied upon the Scofield rationale.

67 NLRB v. Machinists, District Lodge 99, AFL-CIO, 489 F.2d 769 (1st Cir. 1974); Pattern Makers' Ass'n of Los Angeles and Vicinity, 199 N.L.R.B. No. 15 (1972).
70 Communications Workers, Local 6135, 188 N.L.R.B. No. 971 (1971).
71 412 U.S. 84 (1973).
72 Id. at 89.
73 Id. at 88.
that employees must be "free to leave the union and escape the rule." This approach, possibly at odds with the Court, incorporates the balancing of the employee NLRA § 7 right to refrain from concerted activity and the NLRA § 8(b)(1)(A) proviso. These differences set the stage for a Supreme Court decision in the future.

III. DERIVING OPERATIONAL RULES AND THE PROBLEM OF SPECIAL CIRCUMSTANCES

Thus far the discussion has focused upon the balancing interplay between the NLRA § 8(b)(1)(A) proviso, the ambit of NLRA § 7 rights, and the impact of the public policy exception. Included within this skeletal paradigm are a variety of diverse unweighted variables and jurisdictional elements containing unarticulated operational definitions and pre-analysis guidelines. This part of the article examines the operational effect of the balancing test within the confines of similar factual situations.

A. Strikebreaking Members

The right of the union to discipline strikebreaking members through court-enforced fines balanced against the NLRA § 7 rights of the employee-members appears to favor the union position. This right is subject to the restrictions of full membership and the NLRA § 8(b)(2) limitation on interference with job rights. This is a policy decision designed to protect the union's right to engage in lawful strikes, and perhaps, more fundamentally, to exist. Arguably, without the economic weapons a union would be powerless against its business organizational counterpart. Allowing labor organizations the use of the economic weapons implies the need for cohesiveness in the union ranks for effective implementation. Thus, arguably, an employee waives his § 7 right to refuse to participate in the collective ac-

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78 Id.
78 Id.
79 See note 7 supra.
80 See note 3 supra. Note, however, that this right is given to employees, not to unions. It may seem a matter of semantics but by extending the collective employee rights to union rights the contract theory of union membership is further eroded, replaced by a "living" constitutional theory.
tion, once he has exercised his rights to join or form the labor organization. This rationale supports the exercise of internal disciplinary actions against strikebreakers. It follows, however, that since § 7 rights are ceded to individuals and not to unions, this waiver should be narrowly construed and not extend beyond the confines of the internal union organization. The Supreme Court, however, has taken a broader view, holding that a union's privilege to impose court-enforced fines, an external penalty, against members who cross the picket line serves a legitimate union interest in strike solidarity out-weighing the individual member's right to refrain from engaging in the strike.81

Union members who cross picket lines established by a union other than their own can be fined by their union as long as the sympathy strike is not proscribed by the collective bargaining agreement.82 Sister unions may not impose fines, under the ambit of the International Constitution, on another union local's membership for refusing to respect the sister local's picket lines.83 In this situation the General Counsel of the NLRB holds the view that the fined union members did not voluntarily subscribe to the rule, and, as such, the rule was invalid as to them.84 Fines imposed upon sympathy strikebreakers in the face of a no strike clause have also been held illegal as violative of public policy.85 However, if the no strike clause reserved the right of the individual employee to respect the picket line, the union may use this reservation to properly impose a disciplinary fine against the strikebreakers under the Allis-Chalmers rationale.86

In three other related contexts the Board has held that the legitimate interests in strike solidarity are outweighed by the

81 See notes 36-40 supra, and accompanying text. Note the lack of articulable standards or criteria for the decision which allows this policy argument to be used. See also NLRB v. Allis-Chalmers, 388 U.S. 175 (1967).


84 Id.


86 Morton Salt Co. v. NLRB, 472 F.2d 416 (9th Cir. 1972). See also Operating Engineers, Local 18, 238 N.L.R.B. No. 58 (1978). (No strike clause did not expressly preclude participation in sympathy actions; therefore, union fine legal.)
public policy arguments of encouraging collective bargaining and the peaceful resolution of labor disputes. First, union-imposed fines on strikebreaking members after an amnesty agreement has been settled are illegal. Second, union-imposed fines upon strikebreaking members in the face of a no strike clause are also illegal. And, third, union-imposed fines of strikebreaking members are illegal if the strike is in violation of NLRA § 8(b)(4).

B. Other "Traitorous" Acts and Activities Not in the Union's Interests

Union-imposed disciplinary fines must serve a legitimate interest and outweigh the incursion into the ambit of NLRA § 7 rights. Thus, the union's imposition of a fine on a member who charges or encourages another to charge, a union with an unfair labor practice is illegal. Likewise, the union imposition of fines against a member who files a lawsuit against the union is illegal. Moreover, in these issues of access to Board and court tribunals the union is deemed to have no legitimate interest and no internal or external disciplinary action can be imposed.

A union is deemed to have a legitimate interest in a member circulating, signing, or filing a decertification petition. Surprisingly, this interest is limited, however, only allowing exercises of internal union disciplinary measures such as expulsion or suspension. Similarly, a member soliciting authorization cards in support of a rival union may be subject to internal disciplin-
ary actions but not external fines.\textsuperscript{95} These exceptions to the "means of external rule enforcement" established in Allis-Chalmers appear without a consistent basis. Rather, it turns on practical considerations of allowing a union to purge "traitors" and yet protect individual NLRA § 7 rights from external fines. These exceptions cannot be reconciled with the courts' view of the statutory duality concept as it relates to the means of rule enforcement exception in Allis-Chalmers or to the arguments on the reasonableness of fines in Boeing.\textsuperscript{94}

A union is not deemed to have a legitimate interest in silencing the testimony of employee-members, and, therefore, disciplinary actions imposed have been held unlawful. This view utilizes the public policy argument and has been applied to testimony before administrative hearings\textsuperscript{97} and arbitration hearings\textsuperscript{98} and includes filing a written statement with such tribunals.\textsuperscript{99} Thus, an employee-member cannot be disciplined for exercising access to outside agencies or tribunals. However, when the testimony is in the form of an initial unsolicited report to an employer regarding a fellow employee's violation of employer-created work rules, a union disciplinary fine is legal since the activity is neither protected by NLRA § 7 rights nor by public policy.\textsuperscript{100} Additionally, a union does not have a legitimate interest allowing disciplinary actions regarding a member's political activities even though they oppose union policies, platforms, or candidates.\textsuperscript{101}

\textsuperscript{95} Tri-Rivers Marine Engineers Union (U.S. Steel Corp.), 189 N.L.R.B. No. 108 (1971); Textile Workers, Local 953, 189 N.L.R.B. No. 87 (1971).

\textsuperscript{96} See notes 47-60 supra, and accompanying text.

\textsuperscript{97} Automotive Salesmen's Ass'n (Spitler-Demmer, Inc.), 184 N.L.R.B. No. 64 (1970).

\textsuperscript{98} Local 788, International Brotherhood of Teamsters, 190 N.L.R.B. No. 5 (1971); Automobile Workers Local 1989, UAW, 249 N.L.R.B. No. 123 (1980).


\textsuperscript{100} Local 5795, Communications Wkrs. of Amer., 192 N.L.R.B. No. 85 (1971).

\textsuperscript{101} Cole v. Hall, 462 F.2d 777 (2d Cir. 1972) (opposition to union policies); Retail Clerks, Local 648 v. Retail Clerks Int'l Ass'n, 299 F. Supp. 1012 (D.D.C. 1969) (opposition to union endorsed candidate); Mitchell v. IAM, 16 Cal. Rptr. 813 (1961) (member disciplined for support of right to work law held improper); Local 282, International Brotherhood of Teamsters, 251 N.L.R.B. No. 32 (1980) (retaliation for dissident activities held improper); see also LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2) (1970): (2) Freedom of Speech and Assembly.—Every member of any labor organization shall have the right to meet and assemble free with other
A union is deemed to have a legitimate interest in the enforcement of union-created work rules outweighing the union member's NLRA § 7 right to refuse to participate in concerted activities. The Scofield decision\(^{102}\) held valid disciplinary actions against members who exceeded a union rule governing production quotas as the rule "left the collective bargaining process unimpaired, breached no collective contract, required no pay for unperformed services, induced no discrimination by an employer against any class of employees, and represented no dereliction by the union of its duty of fair representation."\(^{103}\) To the extent the work rule serves a legitimate union interest it is held a valid subject for union disciplinary action.\(^{104}\) For example, fining members for operating more machines than required by an employer has been upheld\(^{105}\) as have actions against non-supervisory members working with non-members.\(^{106}\)

Disciplinary actions against supervisor-members have presented special problems in resolving the balance. Section 8(b)(1)(B) of the NLRA protects employers "in the selection of representatives for purposes of collective bargaining or the processing of grievances."\(^{107}\) This section of the NLRA adds weight to a finding of an illegal union disciplinary action. In American Broadcasting Companies v. Writers Guild\(^ {108}\) the Court struck the balance against the union, holding disciplinary actions against supervisor-members who perform collective bargaining or grievance handling duties unlawful.\(^ {109}\) The Board has interpreted §

\(^{103}\) Id. at 436. Note that these "standards" do not articulate NLRA § 7 rights.
\(^{104}\) Id.
\(^{106}\) Sheetmetal Wkrs. Int'n'l Ass'n Local 36, 244 N.L.R.B. No. 32 (1979).
\(^{109}\) Id.
8(b)(1)(B) very broadly, holding that any action which "reasonably tends to interfere" with an employer's ability to obtain supervisors from among the union membership who were willing to serve is illegal.\textsuperscript{110} This view effectively insulates supervisor-members from union disciplinary actions except where a union rule is exclusively internal, i.e., fines for failure to attend a union meeting, or where the union imposing the disciplinary action is not the representing union in the employer's collective bargaining negotiations.\textsuperscript{111} Thus, the legitimate interest of the union in cases involving supervisor-members is strictly construed, more often in favor of the supervisor-member under the furthering of public labor policy argument, rather than a strict reading of the statutory language.\textsuperscript{112}

IV. SORTING THROUGH THE MIRE: SUMMARY AND CONCLUSIONS

Analyzing the union disciplinary cases decided thus far under § 8(b)(1)(A), several interesting observations arise. If the disciplinary action is imposed upon a non-member employee it is by definition coercion of NLRA § 7 rights and, therefore, illegal. Applying the balancing approach, the union's action is not protected under NLRA § 8(b)(1)(A)'s proviso, and, therefore, the employee's right to refuse to engage in concerted activity is protected. This principle is applicable to employee-members who resign prior to violating the union rule.

In evaluating disciplinary actions against full members involving the infringement of NLRA § 7 rights, the cases decided thus far present a not so subtle shift in analysis. In these cases the NLRA § 8(b)(1)(A) proviso is given full effect but the reliance upon the infringement of NLRA § 7 rights is given timid application. The courts and the Board rely upon the public labor policy arguments to justify their decisions or upon the NLRA § 8(b)(2) restriction to strike down the union disciplinary action. In fact, the cases which hold union disciplinary actions illegal could have been decided without any reference to NLRA § 7 rights, relying instead almost exclusively upon NLRA § 8(b)(2) or the public

\textsuperscript{110} Printing Pressman's Local 2, 249 N.L.R.B. No. 182 (1980).

\textsuperscript{111} NLRB v. Electrical Wkrs., Local 73, 621 F.2d 1035 (9th Cir. 1980).

\textsuperscript{112} This is a catch-all argument with no established parameters and is used to simply justify, or downplay, the conclusion derived. See notes 36-41 supra and accompanying text.
policy of other provisions in the NLRA.\textsuperscript{113} This leads to several operational conclusions.

First, it appears that the reliance upon the public policy arguments, having no articulated standards, allows the tribunals to simply render decisions to complex issues in generalities and to bypass, when desired, the confines of the statutory duality concept.\textsuperscript{114} Second, the language of NLRA § 8(b)(1)(A) concerning restraint and coercion is not given substantial effect, leading one to conclude that there exists an implied waiver of NLRA § 7 rights with respect to union membership. This implied waiver of NLRA § 7 rights would be of less consequence if the Allis-Chalmers and Boeing Courts had not allowed the effects of this implied waiver to follow a disciplined member beyond the union organizational structure. As such, the Court has implied two waivers of NLRA § 7 rights. One waives NLRA § 7 rights in avoiding \textit{internal} union disciplinary actions, while the other waives NLRA § 7 rights to avoid \textit{external} discipline. This second waiver has no justification.\textsuperscript{115} Arguably, if resignation from union membership constitutes a redemption of NLRA § 7 rights, \textit{external} disciplinary actions should face the full redemption of a member's NLRA § 7 rights. And, third, in regard to supervisors, the language of NLRA § 8(b)(1)(B) is given over-broad effect. This schizophrenic application of statutory language leads to questionable predictability in the analysis.

In practical terms, the only defense an individual employee-member has against union disciplinary actions constraining NLRA § 7 rights is refusal to become a full member or resignation prior to the rule infringement. This implies knowledge on the part of the employee of the membership options, the full range of union disciplinary rules, and the provisions of the labor laws. Further, unions are not required to inform their members of their membership options in regard to union rules, union

\textsuperscript{113} This is not to imply that the cases were decided wrongly, only that the decision process was, at best, sloppy. Moreover, this can be viewed as the Board's procedure to circumvent the restrictions of the statutory duality concept. Section 8(b)(1)(A) protects employees against restraint or coercion of NLRA § 7 rights. In my view, it was not meant as a catch-all vehicle, as not all violations of labor law necessarily involve NLRA § 7 rights.

\textsuperscript{114} By using generalized policy arguments, the tribunals can, just as easily, refuse to render a decision or, given the fact sensitivity of a particular situation, virtually fashion any particular remedy they desire.

\textsuperscript{115} \textit{See} notes 36-60 \textit{supra} and accompanying text.
security clauses, and unfair labor practices. Thus, employee-members are at a disadvantage in circumventing union disciplinary actions. This situation is a product of the lack of effect given to NLRA § 7 rights in the balance with the NLRA § 8(b)(1)(A) proviso and the handicaps placed upon the Board in regard to external penalties.

Thus, the balance is generally skewed in favor of the NLRA § 8(b)(1)(A) proviso. Moreover, by not articulating standards or providing a substantive analytical paradigm the tribunals have created a situation where only grossly outrageous union behavior is enjoined under violations of NLRA § 8(b)(2) or under the public policy exception. This virtually allows the infringement of the NLRA § 7 rights of members which does not fall at the extreme.

This mire of problems can be traced back to one focal point—NLRB v. Allis-Chalmers. By sanctioning external fine enforcement and denying Board scrutiny over the means of external rule enforcement, the Court made a poor policy decision which it further compounded in Boeing.16 From this poor policy decision emanated the emasculation of a union member's NLRA § 7 rights and a shift to reliance on generalized policy arguments. The cumulative effect of this policy decision is a power grant to the unions at the expense of members' NLRA § 7 rights and the creation of an area of potential abuse. The LMRDA provisions are inadequate to protect the individual members' rights, and the state courts lack the necessary expertise in labor-management and member-union problems. The only viable alternative is a check provided by the Board, but not through reliance upon unarticulated policy arguments. A better ap-

16 Justice Brennan's decision in Allis-Chalmers was based on a weak public policy argument. (See notes 36-45 supra and accompanying text.) This decision straitjacketed the Court into a line of decisions that, although arguably consistent, are unworkable. To further compound matters, the Board has seen fit to sidestep the rationale in Allis-Chalmers at times. (See notes 94-96 supra and accompanying text.) This leads one to a conclusion that instead of clarifying NLRA § 8(b)(1)(A) the courts and the NLRB have done the contrary and seem to be unwilling to articulate operational guidelines and standards.
proach is through realigning the balancing test and giving operational effect to members’ NLRA § 7 rights.\textsuperscript{117}

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\textsuperscript{117} This advocates overruling \textit{Allis-Chalmers} and removing the external remedy from a union’s disciplinary arsenal. To undo the line of cases, however, would require extensive rulemaking by the NLRB or legislative intervention. The other alternative is through the case by case articulations of standards by the Board. This approach, however, requires the NLRB to refrain from the generalized public policy argument crutch.