

ALLIS-CHALMERS RECYCLED:
A CURRENT VIEW OF A UNION'S RIGHT
TO FINE EMPLOYEES FOR CROSSING A PICKET LINE

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The purpose of this Article is to review the law regarding union authority to discipline strikebreakers as it has developed on a case by case basis with a critical appraisal of the premises upon which the most significant decisions are based. Because of the recent Supreme Court decisions in *NLRB v. Granite State Joint Board, Textile Workers, Local 1029*,¹ *NLRB v. Boeing Co.*,² and *Booster Lodge 405, Machinists v. NLRB*,³ this seems an appropriate time to carefully view the result of this case-by-case development and to determine (1) if that result reasonably reflects what Congress might have intended when it passed the relevant portions of the National Labor Relations Act⁴ and (2) whether consideration should be given at this time to additional interpretation by Board regulations or legislation relating to this issue.

With regard to this issue, as with regard to many other critical issues under the Act, the statutory language is only peripheral and several seemingly pertinent provisions conflict with one another to result in a lack of conclusive direction from Congress.⁵ Four provisions in the Act seem most relevant. Sec-

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¹409 U.S. 213 (1972).

²412 U.S. 67 (1973).

³412 U.S. 84 (1973).

⁴29 U.S.C. § 158(b)(1)(A) (1970). [The National Labor Relations Act, as amended, is hereinafter referred to as NLRA.]

⁵With respect to critical issues regarding labor relations, Congress is deliberately vague in its statutory pronouncements since to be specific would result in no legislation achieving the necessary majority. See *National Woodworker Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967), and *Electrical Workers v. NLRB*, 366 U.S. 667 (1961), discussing the Supreme Court's view of the definiteness of congressional direction regarding secondary picketing and hot cargo agreements under sections 8(b)(4)(B) and 8(e) respectively. Pertaining to section 8(b)(1)(A), Professor Cox asserted shortly after the passage of the Taft-Hartley Act of 1947 that

tion 7 provides the basic protection to organizational activities by employees.⁶ Section 13 specifically protects the employees' right to strike except as that right is specifically restricted in the NLRA.⁷ Section 8(b)(1)(A), which is most pertinent to this issue, provides generally that it is an unfair labor practice for a union to restrain or coerce employees in the exercise of their section 7 rights, with the proviso that that language was not meant to impair a union's right to prescribe its rules regarding acquisition or retention of membership.⁸ Section 8(b)(2) coupled with section 8(a)(3) provides that a union cannot cause an employer either to discriminate against an employee or to encourage or discourage union membership unless the employee has failed to tender his dues or initiation fees required under a lawful security clause as a condition of membership.⁹ In addition,

[t]he scope and variety of the . . . problems suggest that [s]ection 8(b)(1) may plunge the [National Labor Relations] Board into a dismal swamp of uncertainty. . . . A long period of uncertainty and a heavy volume of litigation will be necessary before the questions of interpretation can be resolved.

Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 33 (1947).

6

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . to engage in other concerted activities for the purpose of collective bargaining . . . and shall also have the right to refrain from any of all such activities

29 U.S.C. § 157 (1970).

7

Nothing in this Act, 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.

Id. § 163.

⁶Section 8(b)(1)(A) provides that it shall be an unfair labor practice for a labor organization or its agents

to restrain or coerce . . . employees in the exercise of the rights guaranteed 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 therein

Id. § 158(b)(1).

⁹Section 8(b)(2) provides that it shall be an unfair labor practice for a union or its agents

section 101(a)(5) of the Labor Management Relations Act provides procedural protection to employees in union disciplinary actions.¹⁰

The Supreme Court's first significant confrontation with the issue of the legality of union discipline of strikebreakers occurred in *NLRB v. Allis-Chalmers Manufacturing Co.*¹¹ That case was indecisively disposed of in a four-one-four opinion. From that indecisive vote and the similarly indecisive action of the Seventh Circuit¹² preceding the Supreme Court's decision, one cannot conclude that the legislative history clearly defines the intent of

to cause or attempt to cause an employer to discriminate . . . against an employee with respect to 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.

Id. § 158(b)(2).

Section 8(a)(3) provides that it shall be an unfair labor practice for an employer

by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment. . . .

Id. § 158(a)(3).

¹⁰The Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. §§ 401-531 (1970), was designed to establish fair and democratic internal union procedures. In regard to union discipline that Act provides that

[a] member may not be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues . . . 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.

Id. § 411(a)(5).

¹¹388 U.S. 175 (1967).

¹²This case was first decided by a panel of the Seventh Circuit which upheld the Board decision. 149 N.L.R.B. 67 (1964). On rehearing that decision was reversed in a four-three opinion, *Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966), which was later reversed by the Supreme Court. 388 U.S. 175 (1967).

Congress and dictates a specific result. It is, however, possible to review the premises upon which the Court's conclusion was based and the subsequent development of the law relating to each of the Court's holdings. This will be the initial objective of this Article.

In *Allis-Chalmers* a union imposed fines of twenty to one hundred dollars upon members who crossed its picket line and went to work during an authorized strike in support of the union's contract demands. Two-thirds of the members had voted by secret ballot to strike. After the charged members were fined, the employer filed an unfair labor practice charge against the union and alleged a violation of section 8(b)(1)(A). The National Labor Relations Board sustained the Trial Examiner's dismissal on the ground that even if the union's disciplinary fines were "restraint or coercion" within the meaning of section 8(b)(1)(A), they were protected by the proviso that such prohibitions do not impair a union's right to prescribe "its own rules with respect to the acquisition or retention of membership"¹³ After the Seventh Circuit reversed the Board,¹⁴ the Supreme Court in turn reversed the Seventh Circuit and upheld the Board's decision.

The Court first stated that it was unrealistic to regard the words "restrain or coerce" of section 8(b)(1)(A) as precisely covering the union conduct in this particular case.¹⁵ Furthermore, the Court held that court enforcement of fines was no more coercive than court enforcement of other obligations of citizens.¹⁶ After discussion of the national labor policy regarding majority rule and a majority union's power to bargain away individual employee rights and the corresponding safeguard of a union's obligation to fairly represent all employees, the Court stated that "[i]ntegral to . . . federal labor policy has been the power in the chosen union to protect itself against erosion of its status . . . through reasonable discipline of members who violate rules and regulations governing membership."¹⁷ "That power," noted the

¹³149 N.L.R.B. at 69.

¹⁴*Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966).

¹⁵388 U.S. at 179.

¹⁶*Id.*

¹⁷*Id.* at 181.

Court, "is particularly vital when members engage in strikes."¹⁸ The Court reviewed the legislative history of the Taft-Hartley amendments which were passed in 1947 to limit the excessive power of unions over employees.¹⁹ From this review of both sections 8(b)(1)(A) and (8)(b)(2), the Court concluded that the language of section 8(b)(1)(A) proscribing action restraining or coercing employees was not applicable to court enforcement of fines under that set of circumstances. It supported this conclusion by pointing out that the contract theory of union membership was in existence at the time of the Taft-Hartley amendments and that Congress considered it an acceptable practice for a union to enforce a fine upon an employee member (including a strikebreaker) for violation of union rules by expulsion from the union.²⁰ From this the Court concluded that to hold that fines could be enforced by expulsion but not by court enforcement would "visit upon the member of a strong union a potentially more severe punishment than court enforcement of fines, while impairing the bargaining facility of the weak union by requiring it either to condone misconduct or deplete its ranks."²¹ The Court specifically noted that it was not considering the Board's conclusion that the union's action in this case fell within the protection of the proviso to section 8(b)(1)(A) but rather was basing its decision on the conclusion that the union's action did not even come within the purview of the statute since it did not "restrain or coerce" employees within the meaning of section 8(b)(1)(A).²² The Court specifically limited this decision to circumstances (1) involving reasonable fines,²³ (2) in which the collective bargaining contracts involved did not require full membership but only required that an employee become and remain a member to the extent of paying his monthly dues,²⁴ and (3) in which the employees involved were full members.²⁵

¹⁸*Id.*

¹⁹Pub. L. No. 80-101, 61 Stat. 136 (1947), *codified at* 29 U.S.C. §§ 141-201 (1970).

²⁰388 U.S. at 182, 192.

²¹*Id.* at 192.

²²*Id.* at 192 n.29.

²³*Id.* at 192-93.

²⁴*Id.* at 196-97.

²⁵*Id.*

Justice White, in his concurring opinion, adopted the Court's reasoning that since expulsion was permitted by Congress under the proviso, there was no reason to conclude that Congress under section 8(b) (1) (A) had outlawed the less severe penalty of fines enforceable in court action.²⁶ Writing for the four dissenting justices, Justice Black concluded that the proviso to section 8(b) (1) (A) could not be read to authorize the Court's holding.²⁷ Justice Black relied upon the literal meaning of "restrain or coerce" and charged the Court with relying not on legislative history, which he described as ambiguous, but rather on its policy judgment that unions, especially weak ones, need the power to impose fines in court.²⁸ Justice Black rejected the Court's contention that unions have a right to impose fines as a lesser penalty than expulsion and noted that, if union membership had little value and if the fines were great, court enforcement might be a more effective punishment than expulsion.²⁹ Justice Black also rejected the Court's conclusion that court enforcement was commonplace in 1947 and challenged the validity of the "contract theory" of enforcing union discipline.³⁰ He described the legislative history underlying sections 8(b) (1) (A) and 8(b) (2) as inconclusive and relied upon the plain meaning of the words "restrain or coerce."³¹ He then took issue with the Court's unwillingness to pass upon the question of whether a union could lawfully enforce a fine in a court action against a "member" whose membership consisted solely of paying financial obligations required under a union shop provision. Justice Black contended that employees would not be aware of this subtle distinction or, if aware, would be unwilling to cross the picket line and rely upon later litigation before the Board to protect them from the collection of fines.³²

²⁶*Id.* at 197-98.

²⁷*Id.* at 200.

²⁸*Id.* at 201.

²⁹*Id.* at 204.

³⁰*Id.* at 205, 207.

³¹*Id.* at 208.

³²*Id.* at 215-16.

I. EXPULSION: A MORE SIGNIFICANT SANCTION THAN A FINE?

Both the majority and minority opinions in *Allis-Chalmers* were based in part on the conclusion that expulsion is generally a more significant sanction than the imposition of a reasonable fine. While the dissent did not accept this as justifying the court enforcement of fines, the majority clearly did.³³ The basis of the majority opinion was that court-enforced reasonable fines for crossing picket lines do not "restrain or coerce" employees within the meaning of section 8(b)(1)(A). Neither opinion discussed at any length the impact of expulsion on an employee.

Sections 8(b)(2) and 8(a)(3) provide that a union may not cause an employer to discriminate against an employee who has been denied membership or whose membership has been terminated on some ground other than this failure to tender periodic dues and initiation fees. Assuming a union has expelled an employee for crossing its picket line during a lawful strike, one wonders what the employee has lost. Social pressure is no doubt exerted upon him. But this would result from his crossing the picket line in the first instance, and while his later expulsion may prolong that pressure indefinitely, the difference is still a matter of degree. An employee who has decided to cross the picket line must be well aware that he will be ostracized by the striking employees.

An expelled employee does lose his right to vote regarding later union decisions, including, for example, strike votes or contract ratification votes.³⁴ From its earliest decisions, however, the Board has held that expulsion from a union is prohibited if it affects an employee's employment rights.³⁵ In *Local 167, Progressive Mine Workers v. NLRB*,³⁶ the Seventh Circuit recently

³³See notes 21, 22 *supra*.

³⁴*NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

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Congressional recognition of a labor organization's right to make its own rules presumes, of course, its right to invoke them—except where implementing of such rules is expressly prohibited, as in the case of affecting an employee's employment rights.

Minneapolis Star Tribune Co., 109 N.L.R.B. 727, 728 (1954).

³⁶422 F.2d 538 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970).

enforced a Board order that a union violated section 8(b)(1)(A) in expelling employees who were represented by a rival union when the expulsion made those employees ineligible to participate in the union's welfare plan. The employees had tendered the equivalent of the dues required for membership, but the union had rejected them.

However, in the past a distinction has been made between benefits granted by a union to its members and benefits negotiated by the union to benefit all the employees it represents. In *NLRB v. Local 286, UAW*,³⁷ the Seventh Circuit refused to enforce a Board order relating to a section 8(b)(1)(A) charge against the union for threatening to deprive employees of group hospitalization because they had refused to pay certain disciplinary assessments and fines which the union had imposed upon them. The court found no violation because under the facts of that case the court concluded that the insurance benefit was a derivative benefit arising from union membership and not a condition of employment.³⁸ The insurance in this instance was purchased by the union out of an increased amount in the dues deducted from the employees' checks for the union.³⁹ Still, when the benefit involved is a condition of employment, the Board would find a union in violation of section 8(b)(1)(A) should it threaten to withhold the condition of employment if union fines are not paid.⁴⁰

In discussing the effects of union expulsion, attention should be given to the Board's extraordinary holding in *United Mine Workers*.⁴¹ In this case, which did not involve union discipline, the General Counsel alleged that the Mine Workers' pension re-

³⁷222 F.2d 95 (7th Cir. 1955).

³⁸*Id.* at 98.

³⁹The differences between the Board and the court of appeals in this case related only to the fact finding issue as to whether the insurance was a condition of employment or a derivative benefit of union membership. *Local 286, UAW*, 110 N.L.R.B. 371 (1954).

⁴⁰*Teamsters Local 729*, 167 N.L.R.B. 147 (1967); *Clothing Workers Union*, 151 N.L.R.B. 584 (1965). See also General Counsel's Administrative Ruling No. SR-656 (1960), which makes this same distinction between benefits from union membership and conditions of employment. 46 L.R.R.M. 1387 (1960).

⁴¹202 N.L.R.B. No. 79, 82 L.R.R.M. 1609 (Mar. 26, 1973).

quirement that pensioners be members in good standing was in violation of section 8(b)(1)(A). The case was appealed to the Board after the Administrative Law Judge had granted the union's motion to dismiss the complaint in view of the Supreme Court's holding in *Pittsburgh Plate Glass Co. v. NLRB*⁴² that retired employees were not "employees" within the meaning of the NLRA. The General Counsel argued that this case was distinguishable from *Pittsburgh Plate Glass* because the good standing requirement would affect *active* employees since they would know that when they reached retirement age they could be eligible for pension benefits only if they had maintained their union membership. Rejecting this distinction, both the Board and the Administrative Law Judge noted that active employees were required to maintain membership under a valid union security clause and to be eligible for certain fund benefits and hence concluded that the impact on active miners was uncertain and speculative.⁴³

The ramifications of this case are frightening unless in the future the Board limits the holding to the facts of the case. The facts do not encompass the situation in which a union has expelled a member and thereby sought to prevent his collection of pension benefits at retirement age. The majority distinguished an earlier case⁴⁴ in which a union was held by the Board to have violated section 8(b)(2) by demanding the discharge of three employees and thus causing one of the employees to be denied hospital benefits. The distinction advanced by the Board that pensions were not involved but rather hospital benefits which have an *immediate* impact as opposed to an impact at retirement is questionable.⁴⁵

The Board in *United Mine Workers* specifically noted and relied upon the fact that no showing was made of the impact of

⁴²404 U.S. 157 (1971). Here the union sought to bargain regarding increased benefits for pensioners. The Court held that the employer was not required to bargain under section 8(a)(5) regarding such increased benefits because the retired employees were not "employees" within the meaning of the NLRA.

⁴³82 L.R.R.M. at 1611.

⁴⁴Local 140, *United Furniture Workers*, 109 N.L.R.B. 326 (1954).

⁴⁵82 L.R.R.M. at 1612 n.6.

lost pension rights on current employees.⁴⁶ It would seem that the impact is self-evident. A similar impact appeared self-evident to the Supreme Court in *NLRB v. Erie Resistor Corp.*⁴⁷ In *Erie Resistor*, the Court upheld the Board position that in extending superseniority to strikebreakers an employer could be found to have violated section 8(a)(3) regardless of motive because of the "inherently discriminating or destructive" nature of the conduct.⁴⁸ The Board had reasoned in *Erie Resistor* that the offer of superseniority to strikebreakers would affect all employees on a lasting basis after the strike was over.⁴⁹ It explained that at one stroke those who had spent long years earning seniority would have it removed and that this action would make future bargaining difficult.⁵⁰ One doubts that there was any specific evidence in the record to support the Board's reasoning, but then none was needed since the result to current employees was self-evident. The impact on current employees of the loss of their pension rights appears equally self-evident. The loss of pension rights appears to be even more destructive than the loss of effective seniority because at retirement, when the pension rights are lost, the employee can do nothing to establish comparable rights in other employment.

On the other hand, if the impact on current employees is not self-evident, which a majority of the Board held in this case, what type of evidence would be necessary to establish that impact? If a majority of the Board would only require testimony of several employees that they were currently concerned that unless they retain their membership in good standing they would lose their pensions, such testimony could readily be supplied. In any event, if this were a controlling consideration, it would seem that a remand to afford the General Counsel an opportunity to produce this evidence would have been essential since

⁴⁶*Id.* at 1611 n.5.

⁴⁷373 U.S. 221 (1963).

⁴⁸*Id.* at 228. A similar effect was recognized by the Supreme Court in *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954), in which the Court sustained the Board order that a union had violated sections 8(b)(1)(A) and 8(b)(2) by having the employer reduce the seniority status of an employee who was delinquent in paying his union dues.

⁴⁹373 U.S. at 230-31.

⁵⁰*Id.*

it was hardly clear prior to the Administrative Law Judge's decision that the Board would have required this.

There are additional problems with the Board's understanding of pension rights in *United Mine Workers*. Carried to its logical extreme, it appears the Board is allowing a union to withhold pension benefits regardless of whether they were earned as terms and conditions of employment or as mere incidents of union membership because those benefits are not enjoyed until after an employee loses his employee status.⁵¹ It is difficult to believe that the Board would hold that a union may cause an employer to cease payments into an employee's retirement program as a legitimate union disciplinary measure. This would violate section 8(a)(2) of the NLRA. But could a union prevail upon an employer or a pension trust not to pay out benefits to an employee after he has retired because he lost his good standing while he was an employee? Based upon the Board's reasoning in *United Mine Workers*, it is difficult to find that such employer conduct would constitute a section 8(a)(2) violation. However, to the employee there is no difference between the result in the first situation and that in the second. Moreover, if the union could in fact lawfully take the second action in directing the cutoff of benefits to the retired employee, could it not also legally advise the employee while he was yet working that it could take this action? Is this not comparable to an employer's telling employees during a union organization campaign that it has made the irrevocable decision to close the plant if the union wins the election? In dictum the Supreme Court in both *NLRB v. Darlington Manufacturing Co.*⁵² and *NLRB v. Gissel Packing Co.*⁵³ noted that such an employer's statement would not

⁵¹In that decision the Board made no issue of the distinction between conditions of employment and incidents of union membership.

⁵²380 U.S. 263 (1965).

Nothing we have said in this opinion would justify an employer interfering with employee organizational activities by threatening to close his plant, *as distinguished from announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision.*

Id. at 274 n.20 (emphasis added).

⁵³395 U.S. 575 (1969). Here the Court stated as regards an employer's right to communicate to his employee during an election campaign that

be in violation of the NLRA. Concededly, there are differences between these two situations. A union is not in a position to finally withhold pension payments to retired employees, whereas the board of directors is empowered to make the irrevocable decision to close down the plant. Nonetheless, one wonders how much comfort an employee could take in this fact if the union stated it would do all within its power to assure a cutoff in pension payments after his retirement. This is especially true if the past record of the union in accomplishing this result has been successful.⁵⁴

The Board's position that the employees in this case were required under a valid union security provision to be members in good standing is also unconvincing as a basis for rejecting the obvious conclusion that the current employees would fear loss of pension rights and be intimidated into keeping their union status. Although a union may legally enter into a union shop agreement, if there is no state limitation under section 14(b),⁵⁵ it could not under section 8(a)(3) and section 8(b)(2), at least until *United Mine Workers*, cause an employer to take any discriminatory action against an employee who had tendered the equivalent of dues

[h]e may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

Id. at 618 (emphasis added).

⁵⁴In a slightly different context in *NLRB v. Servette Inc.*, 377 U.S. 46 (1964), the Supreme Court held that the threat to pamphlet a secondary employer was not a "threat" within the meaning of section 8(b)(4) because it was something the union had a right to do. If under the Board's decision a union would have a right to act to cut off pension payments to retired employees, would it be threatening and coercing employees within the meaning of section 8(b)(1)(A) to so advise those employees of its intended legal action?

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Nothing in this [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

29 U.S.C. § 164(b) (1970).

and initiation fee. The valid union security agreement in this case could require no more, and yet the eligibility for pension benefits in this case was conditioned not on the tender of the equivalent of dues and initiation fee but rather on membership in good standing.

It would appear, then, that unless the Board distinguishes this holding from cases involving union expulsion for disciplinary reasons, unions could have an effective economic weapon by threatening to cut off employees' pensions after they retire if they cross the union picket line. This threat would obviously loom more ominous in some industries than in others since the union would have more potential control over payments in some industries than in others. At the risk of overgeneralization, it would seem that union potential for accomplishing this result would be greater with the stronger unions. A weak union would not likely be able to cause an employer against its will to take this kind of action. Accordingly, this would afford strong unions yet another powerful weapon against its most susceptible employees—those nearing retirement age—without affording much strength, if any, to weaker unions. In *Allis-Chalmers*, the Supreme Court found and relied heavily upon a congressional intent in section 8(b)(1)(A) to provide a national policy that would have exactly the opposite result, namely, to provide strength to weaker unions rather than to stronger unions.⁵⁶

In view of these alarming and undesirable results, it seems likely that the Board will not apply the *United Mine Workers* decision expansively to employees who lose their membership in good standing as a result of union disciplinary action. Hopefully, should the Board apply *United Mine Workers* to disciplinary action, the courts would not tolerate it and would not enforce Board decisions based upon this reasoning. The Board has consistently held that a union cannot affect an employee's terms and conditions of employment by expelling employees.⁵⁷ This trend should not be reversed because of the limited holding of the Supreme Court in *Pittsburgh Plate Glass* that retired employees are not "employees" within the meaning of the NLRA.⁵⁸

⁵⁶388 U.S. at 184.

⁵⁷See note 40 *supra*.

⁵⁸See note 42 *supra*.

Regardless of the effects of expulsion on union members, expulsion can have negative effects for the union. Under section 9 a union must fairly represent all employees in the unit it is authorized to represent and a union's breach of that obligation can be remedied either by action in the state or federal court⁵⁹ or by charges filed with the Board.⁶⁰ In fact, in view of the necessity of showing some illegitimate motive behind a union's failure to fairly represent a particular employee, an expelled employee would probably be better able to obtain relief through these channels than an employee whom the union did not discipline. Accordingly, it seems clear that the law provides substantial remedial channels for relief to an expelled employee should the union attempt to mistreat him by failing to represent him properly either through the grievance procedure or in negotiations.

In addition, the Board has held in *Local 4186, United Steelworkers*⁶¹ that even under a lawful union shop security clause a union cannot insist upon payment of dues from an employee whom it has expelled. In *Steelworkers*, the Board upheld the Trial Examiner's finding that the union violated section 8(b) (1)(A) by threatening to request an expelled employee's discharge unless he paid his membership dues while simultaneously continuing disciplinary sanctions imposed as a result of his having filed a decertification petition.⁶² In this case the union ini-

⁵⁹Vaca v. Sipes, 386 U.S. 171 (1967).

⁶⁰Hughes Tool Co., 147 N.L.R.B. 1573 (1964); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

⁶¹181 N.L.R.B. 992 (1970).

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Whenever a petition shall have been filed . . . by an employee . . . alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative . . . or (ii) *assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section* . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . .

29 U.S.C. § 159(c) (1970) (emphasis added).

tially expelled the employee. Then, in subsequent proceedings, it modified its sanction to a suspension of his rights to attend union meetings for a period of more than a year and an indefinite suspension of his right to hold union office. The Board had held in earlier decisions that a union could lawfully suspend⁶³ or expel⁶⁴ employees who filed decertification petitions to provide for its own self-preservation. Nonetheless, the Board in this case held that there was no justification, either in the proviso of 8(b)(1)(A) or in consideration of a labor union's need for self-preservation, for the union to both limit the employee's membership rights and, at the same time, threaten to enforce the security clause if he did not continue to pay his dues.⁶⁵ It is apparent from these cases that the Board has held that a union cannot enforce an employee's obligation under a lawful security clause to pay his dues by demanding discipline or discharge of the employee by the employer if the employee has not been afforded full membership rights of a member in good standing. This position of requiring full membership rights before permitting the union to require the payment of any dues appears somewhat harsh in view of the prior holding that an employee who chooses not to become a member under an agency shop arrangement can be denied certain of the rights of membership but can nonethe-

⁶³United Steelworkers, Local 4028, 154 N.L.R.B. 692 (1965), *enforced*, 373 F.2d 443 (9th Cir. 1967), *cert. denied*, 392 U.S. 904 (1968).

⁶⁴Tawas Tube Prods., Inc., 151 N.L.R.B. 46 (1965).

⁶⁵See also Printing Pressmen, Local 3, 188 N.L.R.B. 420 (1971), in which the Board adopted pro forma the Trial Examiner's finding that the union had violated section 8(b)(1)(A) by threatening to cause an employer to discharge an employee and section 8(b)(2) by its later action of requesting the employer to discharge the employee because of the employee's failure to pay the equivalent of his dues. The Trial Examiner had found the union was not entitled to the dues because it had not offered to restore the employee to membership in good standing. The union had not excepted to those findings of the Trial Examiner. This case related to union fines imposed for alleged failure to perform required picketing duty and back dues for the period of suspension which the union required the employee to pay before it would remove him from a status of "coventry" in which union employees were directed not to speak to him. The Trial Examiner concluded that when and if the union unconditionally restored the employee to good standing membership, including release from "coventry," the employee would be required to tender dues to it, but not before.

less be compelled to pay the full dues and initiation fee.⁶⁶ An employee who is subjected to lawful union discipline which results in his being denied some of those rights apparently stands in better stead in being able to refuse payment of dues required under the contract than an employee who has chosen to reject the union.

In addition to the above, under the recent decisions in *NLRB v. Granite State Joint Board, Textile Workers, Local 1029*⁶⁷ and *Booster Lodge 405, Machinists v. NLRB*,⁶⁸ the Supreme Court has upheld the position that an employee cannot be subjected to union fines once he has resigned his union membership. The reasoning of these cases would appear to be equally applicable to employees who have been expelled by the union. In *Scofield v. NLRB*,⁶⁹ relied upon by the majority in *Granite State*, the Supreme Court held that section 8(b) (1) permits a union to enforce adopted rules pertaining to union interest "against union members *who are free to leave the union and escape the rule.*"⁷⁰ In *Scofield*, the Court held that the union's action in (1) fining employees who currently accepted payment for working in excess of the union's production ceiling in violation of the union's work rules and (2) enforcing those fines against full members in court actions was not in violation of section 8(b) (1) (A). Accordingly, if a union expels a member, it not only loses continued monetary support from that former member, but it also loses its disciplinary authority over him.

In summary, when an employee is expelled from a union, the union can exert social pressure on the employee, exclude the employee from participation in any of the union decision making processes, and deny financial benefits which are direct incidents

⁶⁶See *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), in which the Supreme Court did not object to the union practice that nonmembers in an agency shop would be required to pay full dues but nonetheless would be excluded from participation in the internal affairs of the union such as attending union meetings or voting upon ratification of contracts. It goes without saying that they could not hold positions as officers in the union.

⁶⁷409 U.S. 213 (1972).

⁶⁸412 U.S. 84 (1973).

⁶⁹394 U.S. 423 (1969).

⁷⁰*Id.* at 430 (emphasis added).

of union membership. It cannot, with the possible serious exception of pension benefits, discussed at length above, deprive the employee of any benefits which are conditions of employment. It must continue to represent the employee fairly, to bargain for his benefit, and to process grievances on his behalf. Moreover, for periods when the employee is not afforded the full membership rights of a member in good standing, it cannot require that he pay his dues to the union; and, if the member is expelled, the union has lost its disciplinary power to fine him.

Based upon this analysis one can better appraise the Supreme Court's view in *Allis-Chalmers* that expulsion, at least when strong unions are involved, is a more severe penalty than a court-enforced fine. Perhaps this has validity if social pressure is the significant means for enforcing the union's will upon the recalcitrant employee. However, though perhaps to a lesser degree, social pressure could well be relied upon as a means to enforce a union's will upon an employee in any situation in which the employee was not expelled but fined or even in which no formal disciplinary action was taken by the union. In regard to the right to participate in the union's internal affairs, employees who would be most interested in being active in internal union affairs would generally be the ones least likely to cross the picket line. With respect to the usual majority of employees who are inactive, the removal of this right might be viewed as of no consequence. The loss of incidents of membership such as union-sponsored welfare programs and insurance programs will obviously vary depending on the extent that the particular union provides these benefits and their specific value to the employee in question. The potential right of a union to act to remove retired employees from pension programs, if it were ultimately found lawful, would be particularly damaging, as noted above, when the union had sufficient strength to accomplish that result. After expulsion, the union's obligation to fairly represent the employee would remain unimpaired and the union would lose the possibility of requiring the employee to pay his dues. In regard to this latter point, only unions which have lawful union security provisions could require such payments. It is likely, except in the possible situation of collusion with the employer, that unions which have obtained such union security clauses would be relatively stronger than those unions which have not been able to obtain such a contract provision. To the extent that this generalization is valid, this lessened ability to collect dues would have greater impact on stronger unions than it would on weaker unions. In

Allis-Chalmers, the Supreme Court concluded that expulsion would be a more severe remedy if a strong union were involved rather than a weak one since a weak union would be more inclined to condone the misconduct lest it deplete its ranks.⁷¹ However this conclusion should be somewhat tempered by the realization that the strong union, at least with respect to collecting dues, would be more adversely affected by expelling employees than a weaker union since a weak union without a security agreement would not be in a position to collect dues from a recalcitrant employee anyway, whereas a strong union with the security agreement could at least have counted on receiving the dues. Finally, a union's loss of power to discipline expelled employees could undermine the power and authority of the union to adequately represent its people.

II. FINES: RESTRAINT OR COERCION OF EMPLOYEES?

The second point of *Allis-Chalmers* that deserves further comment is the Court's conclusion that fines do not "restrain or coerce" employees within the meaning of section 8(b) (1) (A). This conclusion was based at least in part on the Court's assumption that expulsion was a more severe punishment than a fine. Since that time the validity of this assumption has been substantially reduced by subsequent opinions of the Supreme Court.⁷² In *Allis-Chalmers*, the Board concluded that fines for crossing picket lines were in fact "restraint or coercion" within the meaning of section 8(b) (1) (A) but that they were permissible under the proviso which permits unions to prescribe their own rules with respect to acquisition or retention of membership.⁷³ Consistent with its view of "restraint or coercion," the Board had earlier held in *Local 138, Operating Engineers*⁷⁴ that a union could not impose fines on mem-

⁷¹388 U.S. at 192.

⁷²See text accompanying notes 84, 85, 86 *infra*.

⁷³Local 248, UAW, 149 N.L.R.B. 67 (1964), *enforcement denied sub nom. Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966), *rev'd*, 388 U.S. 175 (1967).

⁷⁴148 N.L.R.B. 679 (1964).

There can be no doubt that a fine is by nature coercive, and that the imposition of a fine by a labor organization upon a member who files charges with the Board does restrain and coerce that member in the exercise of his right to file charges. The union's conduct is

bers for failing to exhaust union remedies before filing an unfair labor practice charge with the Board. Shortly thereafter, the Board further held in *Marine & Shipbuilding Workers*⁷⁵ that a union was in violation of section 8(b)(1)(A) in expelling a member for failing to exhaust union remedies before filing an unfair labor practice charge. This decision was upheld by the Supreme Court in *NLRB v. Marine & Shipbuilding Workers*,⁷⁶ its first union fine case subsequent to the *Allis-Chalmers* decision. In this case, although not directly discussing the question of whether expulsion was "restraint or coercion," the Court limited itself to the question of whether the section 8(b)(1)(A) proviso protected the union action.

In another closely related area of law, the Board has held that though expulsion constituted coercion within the meaning of section 8(b)(1)(A), a union is protected by the proviso in expelling a member who has filed a decertification petition against the union.⁷⁷ The Board distinguished this situation from that in *Local 138, Operating Engineers*,⁷⁸ by pointing out that when a member filed a decertification petition the member attacked the very existence of the union and could, if permitted to retain his membership status, be privy to the union's strategy and tactics while attempting to destroy the union's representative capacity.⁷⁹ In cases after the Supreme Court's *Allis-Chalmers* decision, the Board held that, while a union for its own self-preservation may expel an employee for filing a decertification petition, it could not fine the employee for that action.⁸⁰

no less coercive where the filing of the charge is alleged to be in conflict with an internal union rule or policy and the fine is imposed allegedly to enforce that internal policy.

Id. at 682.

⁷⁵159 N.L.R.B. 1065 (1966), *enforcement denied*, 379 F.2d 702 (1967), *rev'd*, 391 U.S. 418 (1968).

⁷⁶391 U.S. 418 (1968).

⁷⁷*Tawas Tube Prods., Inc.*, 151 N.L.R.B. 46 (1965). *See also Price v. NLRB*, 373 F.2d 443 (9th Cir. 1967), in which the court of appeals upheld the Board's position that a union could lawfully suspend an employee who had filed a decertification petition against it.

⁷⁸148 N.L.R.B. 679 (1964).

⁷⁹151 N.L.R.B. at 48.

⁸⁰*Molders, Local 125*, 178 N.L.R.B. 208 (1969), *enforced*, 442 F.2d 92 (7th Cir. 1971).

It is apparent from these cases that even after *Allis-Chalmers* the Board still thought that fines were coercive within the meaning of section 8(b)(1)(A) but were protected under some circumstances by the proviso to that section. In addition, the Supreme Court has itself backed away from its *Allis-Chalmers* conclusion that fines are not coercive. In a subsequent opinion, *Scofield v. NLRB*,⁸¹ the court did not discuss whether court-enforced fines were coercive under section 8(b)(1)(A). Rather the Court held that the union fine imposed upon members for breaching the internal union rule regarding production ceilings was lawful, not because the fine was not coercive, but because it involved enforcement of a properly adopted union rule which the Court found reflected a legitimate union interest, impaired no federal labor policy, and was enforceable only against union members who were free to leave the union and escape the rule.⁸² This reasoning closely paralleled the reasoning of the Board in its original *Allis-Chalmers* decision which was based upon the scope of the proviso of section 8(b)(1)(A).⁸³ Similarly, in *NLRB v. Granite State Joint Board, Textile Workers, Local 1029*,⁸⁴ the Supreme Court recently held that a union could not fine employees after they had resigned from the union. Here again no attention was paid to the position taken by the Court in *Allis-Chalmers* that fines were not coercive within the meaning of section 8(b)(1)(A). This is par-

⁸¹394 U.S. 423 (1969).

⁸²*Id.* at 436.

⁸³

Respondents have properly maintained the distinction between the treatment of the individual as a member of the union and treatment of him as an employee. They have imposed the fine only on their own members. It is not alleged that the Respondents ever attempted to affect the jobs or working conditions of any of the fined individuals. *Nor is it alleged that the rule prohibiting members from crossing a picket line during a strike is not the legitimate concern of a union or properly the subject matter of internal discipline.* It may be said then that the Respondents were engaged in enforcing their own rules with respect to the acquisition or retention of membership. Since, *under the proviso*, section 8(b)(1)(A) does not impair the right of a labor organization to do this, it follows that the Respondents did not violate that section.

Local 248, UAW, 149 N.L.R.B. 67, 69 (1964), *enforcement denied sub nom. Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966), *rev'd*, 388 U.S. 175 (1967) (emphasis added).

⁸⁴409 U.S. 213 (1972).

ticularly noteworthy because in *Allis-Chalmers* the Court had been acting in apparent reliance upon the contract theory of union membership. Under the pure version of that theory a union would be unable to collect fines from employees for incidents which occurred after they were members of the union because at that time there would be no consent to the union constitution and bylaws—the “contract” which the court enforces under such a theory. Accordingly, a fine could not be lawfully collected from a resigned member except perhaps, as discussed above, under a threat of losing pension benefits after retirement. The other forms of union pressure, such as incidents and rights of union membership, would already have been voluntarily waived by the employee by his resignation from the union. Social pressure upon the resigning member obviously would not be more effective solely because he had chosen to leave the union rather than suffer expulsion from the union. Finally, in *NLRB v. Boeing Co.*,⁸⁵ the Supreme Court’s most recent case on this matter, the Court expressly admitted that although “all fines are coercive to a greater or lesser degree,”⁸⁶ it had based its earlier opinions on the conclusion that section 8(b)(1)(A) was “not intended . . . to apply to the imposition by the union of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act.”⁸⁷

In summary, both the Board and the Supreme Court have withdrawn from the initial reasoning in *Allis-Chalmers* that fines are not “coercive.” While in *Boeing* the Court adhered to its position that it was still not relying on the section 8(b)(1)(A) proviso as the basis for its conclusion that the union’s action in imposing fines did not violate section 8(b)(1)(A), the Court clearly recognized fines to be coercive and relied on the same factors the Board had used in its earlier opinions in which it protected union fines under the proviso.

III. LIMITATIONS ON THE APPLICATION OF ALLIS-CHALMERS

A. *Voluntary Membership as a Requirement*

The majority of the Court in *Allis-Chalmers* specifically noted that under the contract involved in that case employees had a

⁸⁵412 U.S. 67 (1973).

⁸⁶*Id.* at 73.

⁸⁷*Id.*

choice of becoming full members or only becoming financial members by paying the equivalent of dues and initiation fees.⁸⁸ The Court rejected the point made in the en banc opinion of the Seventh Circuit that full membership was not the result of individual voluntary choice but of the insertion of the security provision in the contract under which a substantial minority of the employees may have been forced into membership.⁸⁹ The Court specifically found, based in part upon the lack of any evidence to the contrary, that the employees who had been fined in that case were all "full members."⁹⁰

The question exists whether this option of an agency shop arrangement is necessary in order for the court to uphold the validity of a union fine against a member for crossing a lawful picket line. If it is, a union is disadvantaged, under this portion of the law, by a union shop provision which under its terms requires not just the payment of dues and initiation fees but also the actual act of becoming a member of the union. It would seem overly technical to make this distinction, especially in view of the fact that under sections 8(b)(2) and 8(a)(3) a union cannot cause an employer to take any discriminatory action against an employee even if he is not a full member of the union unless he fails to tender the equivalent of dues and initiation fee. The only possible exception to this general statement is pension payments for retired employees, discussed above; but this potential means of coercion would be equally available against full members or financial members. Accordingly, unless a full membership requirement in a union shop agreement could be specifically enforced under section 301 of the Labor Management Relations Act,⁹¹ the union shop provision under this Act is not significantly different in legal effect from an agency shop provision. Under both, a union can only effectively enforce through employer pressure an employee's financial obligation.

The extent that an average employee is aware of this limited union enforcement power is questionable. More likely than not

⁸⁸388 U.S. at 196.

⁸⁹*Id.* at 196 n.11.

⁹⁰*Id.* at 196.

⁹¹29 U.S.C. § 185 (1970).

he will believe that the contract language which requires full membership can readily be enforced to its full extent. This argument resembles that provided by the Seventh Circuit opinion which was later rejected by the Supreme Court. In that opinion, the court of appeals relied upon this same likelihood of employee ignorance and concluded that, even when the contract provided employees a choice, full membership was not the result of individual choice but of the union security language in the contract.⁹² In answer to the Seventh Circuit's reasoning, the Supreme Court in *Allis-Chalmers* stated, in language which may be dispositive of this question, that "the relevant inquiry . . . is not what motivated a member's full membership, but whether the Taft-Hartley amendments prohibited disciplinary measures against a full member who crossed the picket line."⁹³ This language could be construed to apply to union shop provisions which require full membership as well as to agency shop provisions which afford an employee a choice.⁹⁴

In view of the lack of legal difference between the agency and union shops, no distinction regarding union disciplinary power should be made based on the two forms of union security. It appears unfair that a union which has negotiated the strongest form of lawful union security clause should, due to legally useless distinction, find itself with less authority to control its members than a union which has negotiated the lesser form of union security. This author has found no cases in which the Board or the courts have discussed the possible difference in union rights under union shop or agency shop provisions. All of the Supreme Court cases relating to union fines involved contracts under which employees

⁹²NLRB v. *Allis-Chalmers Mfg. Co.*, 358 F.2d 656, 660 (7th Cir. 1966), *rev'd*, 388 U.S. 175 (1967).

⁹³388 U.S. at 196.

⁹⁴In *Booster Lodge 405*, the parties had a maintenance of membership clause which required new employees, as a condition of employment, to become members of the union unless they notified both the union and the company within forty days of accepting employment that they did not wish to join. Members were also required to maintain their membership during the life of the contract. 412 U.S. at 85 n.1. In that case, there was discussion of this issue, but the strike which gave rise to the litigation occurred after one contract had expired and was aimed at achieving a new contract. Consequently, no contract with this provision was effective at that time.

were required by the union security provision to be no more than paying members.⁹⁵

B. Fines Imposed Only On Members

In *Allis-Chalmers* and *Scotfield*, the Supreme Court specifically noted, in upholding the union's fines, that the fines were imposed only on union members.⁹⁶ The recent decisions of *NLRB v. Granite State Joint Board, Textile Workers, Local 1029*⁹⁷ and *Booster Lodge 405, Machinists v. NLRB*⁹⁸ followed this earlier language of the Court. In *Granite State*, the Court held that a union's power over an employee ends when he lawfully resigns from the union.⁹⁹ In that case, when the collective bargaining agreement expired, the union membership, including the employees who were subsequently fined, voted to strike. Furthermore, while participating in a meeting held shortly after the strike, at least some of those employees did not oppose a union resolution that any member aiding or abetting the employer during the strike would be subject to a two thousand dollar fine.¹⁰⁰

⁹⁵*NLRB v. Granite State Joint Bd., Textile Workers, Local 1029*, 409 U.S. 213 (1972); *Scotfield v. NLRB*, 394 U.S. 423 (1969); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

⁹⁶388 U.S. at 196; 394 U.S. at 430.

⁹⁷409 U.S. 213 (1972).

⁹⁸412 U.S. 84 (1973).

⁹⁹

Where a member lawfully resigns from a union and thereafter engages in conduct which the union 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 in the street.

409 U.S. at 213.

¹⁰⁰Before the First Circuit, the Board conceded in oral argument that all of the employees who ultimately resigned and were subjected to union fines for crossing the picket line had voted to strike. Furthermore, the only direct evidence on the record before the court of appeals regarding the participation of the fined employees in the two thousand dollar fine vote was that of the second employee to resign who testified that he was present when the fine vote was taken and did not oppose it. *NLRB v. Granite State Joint Bd., Textile Workers, Local 1029*, 446 F.2d 369, 370 n.2 (1st Cir. 1971), *aff'd*, 409 U.S. 213 (1972).

The court of appeals had accepted the union's argument that the strike vote bound the employees to support this particular strike until its conclusion.¹⁰¹ The union cited the Supreme Court's language in *Allis-Chalmers* to the effect that the power to impose fines is "particularly vital when the members engage in strikes"¹⁰² and that "the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent."¹⁰³ The court of appeals concluded that participation in the strike vote and fine vote meetings constituted a waiver by the employees of their rights under section 7 to refrain from participation in that particular strike.

The Supreme Court, on the other hand, said it would give little weight to the fact that the resigning employees had participated in the vote to strike.¹⁰⁴ It noted that the first two members to resign did so from one to two months after the strike had begun and that the others did so from seven to twelve months after the strike had begun.¹⁰⁵ The Court also noted that the duration of the strike may have increased the specter of hardship to the striker's family and specifically concluded that it was not deciding to what extent the contractual relationship between the union and the member could curtail the freedom to resign.¹⁰⁶ The Court stated that when members are not restrained from resigning "the vitality of section 7 requires that the member be free to refrain in November from the actions he endorsed in May"¹⁰⁷

In *Booster Lodge 405*, the union had fined employees for crossing the picket line and returning to work. The union attempted to distinguish this set of facts from those in *Granite State* by arguing that even though the union's constitution did not expressly restrict the right to resign during a strike, it did impose on members an obligation to refrain from strikebreaking.¹⁰⁸ The union

¹⁰¹*Id.* at 372-73.

¹⁰²*Id.* at 373.

¹⁰³*Id.*

¹⁰⁴409 U.S. at 217.

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 217-18.

¹⁰⁸412 U.S. at 88-89.

asserted that that provision had been consistently interpreted in the past as binding a member, notwithstanding his resignation, to abstain from strikebreaking for the duration of a strike.¹⁰⁹ The Court rejected this argument by noting that nothing in the record indicated that union members were informed beforehand that the no-strikebreaking provision was interpreted to impose such an obligation on a resignee. It further stated that the union's position could be sustained only by first finding "that the Union constitution by implication extended its sanctions to nonmembers, and that such sanctions were consistent with the [National Labor Relations] Act."¹¹⁰ The Court refused to find an implied postresignation commitment and so never reached the second question of whether such a commitment would be consistent with the NLRA. Justice Blackmun in his concurring opinion noted that unlike *Granite State*, none of the employees in *Booster Lodge 405* who resigned had been given notice of the strikebreaking penalty either before the strike vote or before their participation in the strike.¹¹¹

The Court, in *Granite State* and *Booster Lodge 405*, appeared to ignore its earlier language in *Allis-Chalmers* regarding the essential nature of a union's right to fine or expel strikebreakers. At first glance, it now appears that an employee, before he transgresses a union rule, need only resign from the union to avoid the union's disciplinary processes. However, a close reading of the Court's decisions reveals that those decisions have not dealt with the problem of limiting a union's power to curtail a member from resigning. Until the Board or the courts say otherwise, such union power may be substantial.

Absent any limitation in either the collective bargaining agreement or the union constitution and bylaws, the Court in *Granite State* appeared to have left open the possibility that a strike vote supported by the membership could under some circumstances preclude employees from resigning their membership immediately after the start of the strike to avoid union fines for crossing the picket line. The Court merely stated that in the absence of a restraint on resignation, section 7 requires that a member "be free to refrain in November from the actions he endorsed in May

¹⁰⁹*Id.* at 89.

¹¹⁰*Id.*

¹¹¹*Id.* at 91.

...¹¹² This language cannot be literally applied because the Court stated this after particularly noting that the first binding resignation took place one or two months after the strike began. This is especially true in view of the Court's further comment that the likely duration of the strike may increase the specter of hardship to an employee's family.¹¹³

If either the courts or the Board were to rely on this distinction in a future case, problems would present themselves. First, how long must an employee wait after the strike vote and the inception of the strike to be free to resign his union membership and be free of union discipline in crossing the picket line? Secondly, would this time period vary depending upon the individual circumstances of the employee and his family? No doubt some employees could hold out more successfully than others in any given strike. Thirdly, would the details of the strike vote be controlling? In *Granite State*, all the employees voted for the strike at the outset. But would it make any difference if the employees who later crossed the picket line voted against the strike in either a close or lopsided strike vote? Would this individual rejection of the strike insulate those employees against union discipline or would they be bound by the majority? If individual action is controlling and the union relies on a secret ballot, how reliable would the employee's later testimony be regarding his vote once he became aware that if he testified that he had voted for the strike, the union discipline would be upheld? This also raises the problem of overseeing the validity of the voting process. The Board has of necessity set up an elaborate procedure for assuring the validity of elections to determine the representative status of a union. To what extent would the court have to require a simulation of this procedure? If the ballot were not secret, could the vote be binding on the employees or would the specter of group pressure, not to mention the possibility of coercive action, invalidate this process as representative of the individual choice?¹¹⁴

¹¹²409 U.S. at 217-18.

¹¹³*Id.* at 217.

¹¹⁴In the analogous circumstances of an employer poll to determine union majority status, the Board has accepted the District of Columbia Circuit's position, taken in *Operating Eng'rs, Local 49 v. NLRB*, 353 F.2d 852 (D.C. Cir. 1965), that for the poll to be valid, in addition to other safeguards, the poll must be conducted by secret ballot. *Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967).

Absent any limitation in either the collective bargaining agreement or the union constitution, the Court in both *Granite State* and *Booster Lodge 405* specifically left open the possibility that a union practice in limiting acceptable times for resignation could impose a binding limitation on the right of employees to resign. The Court specifically noted that its decisions were limited to circumstances in which there were no restraints on the resignation of members.¹¹⁵ In *Granite State*, the Court mentioned with approval that the court of appeals had dismissed the union's argument that it had a practice of accepting resignations only during an annual ten-day escape period because there was no evidence that the employees knew of this practice.¹¹⁶ In *Booster Lodge 405*, the Court specifically noted that there had been nothing in the record to indicate that the members were informed of an interpretation of a provision in the union constitution imposing an obligation on a resignee.¹¹⁷

Assuming no limitation in either the constitution or bylaws but assuming the parties have included a union shop agreement in their contract, would this contractual agreement bind the employees to retain their membership for the period of the contract? In *Granite State*, the parties did not have a union shop agreement.¹¹⁸ In *Booster Lodge 405*, the parties had a maintenance of membership provision in their contract but the strike occurred between contracts.¹¹⁹ When the strike occurs to further the union's bargaining position for a new contract, after the expiration of the old, as in *Booster Lodge 405*, it would appear that the union security agreement would expire along with the former contract and could be of no effect.¹²⁰ In contract negotiations, however, a union security clause could be a factor if the parties agreed to continue

¹¹⁵409 U.S. at 217; 412 U.S. at 88.

¹¹⁶409 U.S. at 217 n.5.

¹¹⁷412 U.S. at 89.

¹¹⁸409 U.S. at 219 n.3.

¹¹⁹412 U.S. at 88 n.8.

¹²⁰The proviso language to section 8(a)(3) which permits such union security agreements requires that there be an agreement between the employer and a labor organization to support this exception to the section 8(a)(3) prohibition of discriminatory conduct designed to encourage union membership.

operating under the former contract for a limited period during the contract negotiations.

Although the parties might have an applicable lawful union shop agreement, this apparently could not be construed as a contract requirement binding on the employees to be full members of the union. In *Allis-Chalmers*, the Court in some of its language appeared to consider the fact that employees had the equivalent of an agency shop opportunity to choose not to be full members as supporting its conclusion that the court-enforced fines in that case were not coercive within the meaning of section 8(b)(1)(A).¹²¹ It would seem inconsistent with the Court's reasoning in that case to conclude that the addition of compulsory full membership in the union rather than just financial membership would now become a critical element depriving employees of their section 7 right to effectively resign from the union to avoid its disciplinary action. Such a conclusion would also appear to conflict with the accepted proposition that under sections 8(b)(2) and 8(a)(3) a union shop affects employment rights only to the extent of requiring an employee to pay his financial obligations to the union. A union cannot seek discriminatory employer action against an employee for failing to become a full member so long as he has in fact tendered the equivalent of his dues and initiation fee.¹²² If this is the only obligation which Congress intended that the union could enforce against the employee, it would seem unreasonable that the union could now use this contract to compel an employee to remain susceptible to union disciplinary fines.

The most likely means for the union to compel continued membership would be through its constitution and bylaws. One can anticipate that all unions which utilize disciplinary fines will amend their constitutions and bylaws to provide specific limitations on members' rights to resign.¹²³ The problem remains whether or not the courts will uphold such constitutional restrictions. If indeed they uphold all such restrictions, they will render *Granite State* and *Booster Lodge 405* ineffective. Yet under the pure contract theory of fine enforcement it would appear that to the

¹²¹388 U.S. at 196.

¹²²29 U.S.C. §§ 158(a)(3), (b)(2) (1970).

¹²³In *Booster Lodge 405*, the Court noted that at the 1972 international union convention the union did make its interpretation of the strikebreaking proscription explicit. 412 U.S. at 89 n.9.

extent such limitations do not invade or frustrate an overriding labor or public policy, such fines ought to be enforceable. Such an interpretation, however, would ignore the language in *Scofield v. NLRB*¹²⁴ that restricts the enforcement of such fines to those union members who are free to leave the union and escape the rule.¹²⁵ To permit a union to amend its constitution and thereby limit the circumstances under which a member may resign and avoid union disciplinary action seems inconsistent with the Court's conclusion in *Granite State* that the members cannot provide by vote that employees who resign and cross the picket line will be subject to fines.

Another possible result of *Granite State* should be mentioned. *Local 4186, United Steelworkers*¹²⁶ made it clear that if a union expels a member under a union shop agreement, it can no longer require payment of dues from that expelled member until he is reinstated to full membership. It would seem likely that if an employee resigned from the union, the union would be able to continue requiring the payment of dues under such a union security agreement. If this were not so, all requirements of a union shop could be completely avoided by an employee's resignation from the union.

Suppose that during a long strike by a union whose prior contract included a union or an agency shop agreement, when the employer's offer included no proposal to change that provision, a large percentage of the employees resign the union to return to work. The union would likely lose the strike and capitulate to the employer. If the employer were then to change its last offer to remove the union or agency shop clause, it might be held to have breached its obligation to bargain in good faith under section 8(a) (5).¹²⁷ Yet if the employer signs the contract with the union shop

¹²⁴394 U.S. 423 (1969).

¹²⁵*Id.* at 430.

¹²⁶181 N.L.R.B. 992 (1970).

¹²⁷While it may be a difficult question as to whether an employer would be in breach of its obligation to bargain in good faith in withdrawing a portion of its offer to the union after the union lost the strike, even if this conduct constituted an unfair labor practice, the Board remedy would be totally ineffective because it clearly could not order the employer to include this prior clause in the contract in view of the NLRA's limitation that the "obligation [to bargain in good faith] does not compel either party to agree

clause in it, the employees would be required to financially support the union for the duration of the contract. Moreover, under the Board's contract bar rules, they would be unable to raise the question of the majority status of the union for the remainder of the term of the contract.¹²⁸

C. Reasonableness of Fines

The above commentary relates entirely to "reasonable fines." The Court in *Allis-Chalmers* specifically limited its decision to circumstances in which a "reasonable" fine was involved.¹²⁹ After *Allis-Chalmers* the Board initially took the position in *Machinists, Lodge 504*¹³⁰ that Congress did not intend to have the Board regulate the size of the fines and establish standards with respect to their reasonableness. In so concluding, the Board relied at least in part on the apparently now avoided position of the Supreme Court in *Allis-Chalmers* that court-enforced fines were not coercive under section 8(b) (1) (A). The Board also took note of the fact that the Supreme Court in its opinion had observed that state courts, in reviewing the imposition of union discipline, find ways to prevent discipline which involves a severe hardship.¹³¹

The Board has adhered to its contention that it has no authority to review the reasonableness of the size of the fine the union

to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (1970). See *Porter Co. v. NLRB*, 397 U.S. 99 (1970).

¹²⁸In the interest of promoting stability in labor relations, the Board has adopted certain rules which prevent one from questioning the representation status of an incumbent union. A current collective bargaining agreement will bar an election among employees unless a rival petition is filed within the thirty day "open" period defined as not more than ninety days before nor within sixty days of the termination date of the contract. *Leonard Wholesale Meats, Inc.*, 136 N.L.R.B. 1000, 1001 (1962).

¹²⁹

There may be concern that court enforcement may permit the collection of unreasonably large fines. However, even were there evidence that Congress shared this concern, this would not justify reading the Act also to bar court enforcement of reasonable fines.

388 U.S. at 192-93.

¹³⁰185 N.L.R.B. 365 (1970).

¹³¹388 U.S. at 193 n.32.

imposes under section 8(b)(1)(A).¹³² However, under slightly different circumstances in which the union struck an employer having as a small part of its business a military division fulfilling government contracts, and at the government's urging, the union agreed to have employees at that installation work during the strike, the Board found the union to have violated section 8(b)(1)(A) when it required each employee to sign a document promising to pay the union one-third of his gross daily wages for the duration of the strike as a condition for receiving a union pass to work.¹³³ The union required this document of members and nonmembers alike and enforced the signing of the agreement by threats of "big boys on the picket line." In finding the violation, the Board noted that the contribution was sought from both members and nonmembers alike and provisions for enforcement were by both threats and actual attempts to prevent employees from working.¹³⁴

While this decision, based on its unique set of facts, was enforced by the Sixth Circuit,¹³⁵ the Board's more general position that it has no authority under the Act to review the reasonableness of union fines had not been well accepted until, as subsequent discussion will show, the Supreme Court's opinion in *NLRB v. Boeing Co.*¹³⁶ The District of Columbia Circuit in *Booster Lodge 405, Machinists v. NLRB*¹³⁷ refused to accept the Board's conclusion that it had no authority to review the reasonableness of union fines. The court of appeals construed *Allis-Chalmers* to be applicable only to reasonable fines and cited the language in *Scofield* in which the Supreme Court referred to enforcement of a proper union rule "by reasonable fines."¹³⁸ Moreover, just prior to the Supreme

¹³²Printing Pressmen, Local 7, 192 N.L.R.B. 914 (1971); Printing Pressmen, Local 60, 190 N.L.R.B. 268 (1971); Communications Workers, Local 6135, 188 N.L.R.B. 971 (1971); Christian Labor Ass'n, 187 N.L.R.B. 762 (1971).

¹³³National Cash Register Co., 190 N.L.R.B. 581 (1971), *modified*, 466 F.2d 945 (6th Cir. 1972).

¹³⁴*Id.* at 584.

¹³⁵National Cash Register Co. v. NLRB, 466 F.2d 945 (6th Cir. 1972).

¹³⁶412 U.S. 67 (1973).

¹³⁷459 F.2d 1143, 1155-59 (D.C. Cir. 1972), *aff'd on other grounds*, 412 U.S. 84 (1973).

¹³⁸*Id.* at 1156.

Court's granting certiorari in *Booster Lodge 405*, the Ninth Circuit adopted the District of Columbia Circuit's position that reasonableness of fines is a factor which the Board has authority to consider in determining if a union has violated section 8(b)(1)(A) in imposing a fine on its members for crossing its picket line.¹³⁹ Despite the earlier language in *Allis-Chalmers* and *Scofield*, in *Boeing* the Supreme Court reversed the District of Columbia Circuit and upheld the Board's position that it had no jurisdiction to review the reasonableness of a union fine.¹⁴⁰

Exhaustive review of the merits of the Supreme Court's decision in *Boeing* is beyond the scope of this Article. However, one wonders what national labor policy justifies the Board's decision in *Printing Pressmen, Local 190*¹⁴¹ permitting a union to fine an employee two thousand dollars for crossing its picket line to work during a one-day union strike. In its prior language in *Scofield*, the Court had held that fines could lawfully be enforced only if they reflected a legitimate union interest and only if they impaired no policy Congress had embedded in the labor laws.¹⁴² This author sees no legitimate union interest in enforcing an unreasonable fine nor any reason that congressional policy should permit the enforcement of such a fine.

Even if state courts could provide relief in not enforcing such an unreasonable fine, this relief would no doubt vary from state to state and would result in nonuniform standards of "reasonableness" for fines. Moreover, as noted by Justices Douglas and Blackmun in their dissenting opinion in *Boeing*, employees would be required to hire counsel to resist the union's court collection in order to be free from union collection of unreasonable fines.¹⁴³ The Board process with free counsel would make it easier for individuals to resist such collections.¹⁴⁴

¹³⁹*Morton Salt Co. v. NLRB*, 472 F.2d 416 (9th Cir. 1972).

¹⁴⁰412 U.S. at 78 (1973).

¹⁴¹192 N.L.R.B. 914 (1971).

¹⁴²394 U.S. at 436.

¹⁴³412 U.S. at 81-82.

¹⁴⁴Professor Summers is the leading commentator on the question of state court enforcement of union fines. In *Booster Lodge 405*, he was cited approvingly by the District of Columbia Circuit, 459 F.2d at 1152 n.14. In his most recent writing on the subject, Professor Summers stated that "[t]he

The current state of the law under the Supreme Court rulings would not seem satisfactory from the union vantage point either. In regions of the country in which unions have successfully organized the employees, unions might well have difficulty in collecting any significant fines in state court actions.¹⁴⁵ Also, the Court minimized the Board's expertise¹⁴⁶ in this area by suggesting that state courts are often able to draw upon their experience in areas other than labor law, in particular, their expertise in misdemeanor cases.¹⁴⁷ This would seem to suggest that only minimal fines, as would ordinarily be imposed in a misdemeanor action, would fall within the Supreme Court's view of "reasonable" fines as enforced by the state courts. Such fines would not serve the purpose of deterring employees from crossing a picket line to earn their full incomes during a union strike.

This shortcoming in the current status of the law would not be overcome by a reversal of the Supreme Court's opinion in *Boeing*. Such a reversal would create a further question of the impact of federal preemption on state court enforcement of union fines. But such a question need not present any severe problem. In *Street, Electric Railway & Motor Coach Employees v. Lockridge*,¹⁴⁸ a bare majority of the Supreme Court adhered to the

danger that the legal rights of a disciplined member will go by default because of the cost of assisting them in court is obvious" Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 220 (1960).

¹⁴⁵The state cases cited by the Supreme Court in *Boeing* all came from industrial states such as California, Pennsylvania, New Jersey, Maryland, and Wisconsin where unionism is well established and accepted. 412 U.S. at 76-77 n.12.

¹⁴⁶Reflecting at the outset of his dissenting opinion in *Boeing*, Chief Justice Burger commented that

[i]t is odd, to say the least, to find a union urging on us severe limitation on NLRB authority, and telling us that state courts are the proper forum to resolve questions regarding the reasonableness of fines imposed on workers for violation of union rules. For years, there has been unrelenting union opposition to state court "intervention" into industrial disputes and union activities.

Id. at 78.

¹⁴⁷*Id.* at 77.

¹⁴⁸403 U.S. 274 (1971).

Court's prior decision under *San Diego Building Trades v. Garmon*¹⁴⁹ in which the Court held that, as a general rule, so long as the action involved is arguably protected under section 7 or prohibited under section 8 of the NLRA, state courts are preempted from acting. If the Board had jurisdiction to pass on the reasonableness of union fines, fines which were arguably unreasonable could not be enforced by the state courts since they would arguably be unfair labor practices prohibited under section 8(b)(1)(A). This would have the desirable result of enforcing some uniformity throughout the states with respect to the standards for reasonableness of union fines. On the other hand, this preemption should not unduly interfere with union rights to collect reasonable fines since, if the fines were reasonable, the Board should so conclude and dismiss the complaint under section 8(b)(1)(A). Such a dismissal could not reasonably be construed as an indication that the union activity in fining employees is protected activity since that would also preempt state courts from enforcing lawful disciplinary action which has been within the traditional jurisdiction of the state courts. Rather it would appear to be activity which is neither protected nor unprotected and which should be subject to state court enforcement under *Garmon*.¹⁵⁰

However, even if the doctrine of preemption were applied as noted, there would yet exist no federal law to compel the enforcement of reasonable union fines either by the Board or by state or federal courts. Under no theory would it constitute an unfair labor practice for an employee to refuse to pay a reasonable fine and so the Board could not compel payment. No theory has yet been devised under which federal courts would have jurisdiction to enforce such fines. State court enforcement would continue to suffer from the limitation noted above in regions in which unions

¹⁴⁹359 U.S. 236 (1959).

¹⁵⁰Admittedly the *Garmon* rule is currently subject to reconsideration by the Supreme Court in view of the Court's closely split decision in *Lockridge*. But the alternative proposed by the majority of the dissenting Justices in *Lockridge* of shifting to an actually protected or actually prohibited test, 403 U.S. at 325-26, while capable of causing substantial difficulties regarding other questions of preemption beyond the scope of this article, would not detrimentally affect the results of the preemption doctrine as applied to this issue.

have not been successful in organizing. This difficulty would appear to require additional legislation to resolve.

The related question of what should constitute a reasonable fine is also beyond the scope of this paper. As the District of Columbia Circuit noted, the Board would have to fashion guidelines to resolve this question on a case by case basis, as it was required to do by the Supreme Court in *NLRB v. Radio & Television Broadcast Engineers, Local 1212*¹⁵¹ regarding its resolution of section 10(k) jurisdictional disputes between rival unions.¹⁵²

D. Complexity of the Law

One of the difficulties cited by the minority of the Supreme Court in *Allis-Chalmers* was the difficulty that a union member would have in discovering his legal rights under section 8(b)(1)(A).¹⁵³ This is a particularly troublesome problem throughout all of labor law since the area has evolved into such complexity that even trained labor specialists have difficulty in remaining familiar with all the ramifications of the application of the law to today's labor relations problems. However, this problem is most acute with respect to areas of the law which relate specifically to the rights of an individual union member or employee nonmember relative to both his union and his employer. The likelihood of having ready access to the services of a well-trained labor specialist or of at least being aware of the location of the nearest Board regional office for consultation is much greater for both the union and the employer than it is for the employee. This is particularly distressing when one realizes that the NLRA was designed predominantly for the purpose of protecting individual employees in their employment relationships.

An employee, confronted with the simple question of whether he should honor his union's plea not to cross a picket line or his employer's urging to cross the line and perform his work, is held accountable for knowing a vast number of legal ramifications arising under several shades of factual differences. The employee's risk in acting incorrectly on this decision is great. If he incorrectly chooses to cross the picket line, the union could lawfully

¹⁵¹364 U.S. 573 (1961).

¹⁵²29 U.S.C. § 160(k) (1970).

¹⁵³388 U.S. at 203.

discipline him for breach of its instruction not to cross the line and such discipline could involve a fine of any magnitude. That fine could be enforced at least by expulsion from the union, if not by the state court. Such expulsion might jeopardize his pension rights in light of *United Mine Workers* and would no doubt destroy any rights he might have had as incidents of union membership. Moreover, the union could exclude him from internal union affairs in the future including participation in union decisions regarding strike votes and contract ratification votes. If, on the other hand, he chooses to honor his union directive and not cross the picket line, he is subject under varying circumstances to being discharged for having participated in an unprotected activity¹⁵⁴ or being permanently replaced as an economic striker¹⁵⁵ with only the right to be placed upon a preferential hiring list for jobs which may open up in the future.¹⁵⁶

Often the employee is unable to determine for himself to which of these employer actions he may be subjecting himself. For example, the kind of strike is a factor. The Board has held that a union violates section 8(b)(1)(A) by fining employees for refusing to join a strike which is in breach of its no strike clause with the employer.¹⁵⁷ The Board held that the public policy in favor of enforcement of collective bargaining contracts outweighs the union's right to discipline members for violating its rules. This raises all the complications of interpreting the meaning of the no strike clause in the contract. It requires that the employee assume this responsibility on his own behalf and that he be correct in his conclusion or be subject to the consequences. If the union strike is in breach of the no strike clause, the employee in honoring the strike would be participating in an unprotected activity and would be subject to employer discipline.¹⁵⁸ Subtleties often make such a decision difficult. In *Rocket Freight Lines Co. v. NLRB*,¹⁵⁹

¹⁵⁴*Kaynard v. Transport Workers Union*, 306 F. Supp. 344 (E.D.N.Y. 1969).

¹⁵⁵*NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

¹⁵⁶*Laidlaw Corp.*, 171 N.L.R.B. 175 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

¹⁵⁷*Glaziers Local 1162*, 177 N.L.R.B. 393 (1969).

¹⁵⁸*NLRB v. Rockway News Supply Co.*, 345 U.S. 71 (1953).

¹⁵⁹427 F.2d 202 (10th Cir.), *cert. denied*, 400 U.S. 942 (1970).

the union's conduct in fining members for crossing its picket line after the local union had approved its contract with the employer was found by both the Board and the court of appeals not to have been in violation of section 8(b)(1)(A) because the international union had rejected the contract and the Board and the court found that the parties understood the contract was to be conditioned upon the international's approval.

Interpretation of the meaning and application of the no strike clause or other related contract terms is difficult. In one case, the Board held that union fines designed to enforce observance of a sister union's picket line were in violation of section 8(b)(1)(A) because the contract explicitly prohibited any strike at the employer's premises and such fines were aimed at achieving a breach of that prohibition.¹⁶⁰ In subsequent cases, the Board refused to infer a no strike provision in a contract which did not expressly include such a provision.¹⁶¹ In another case, the contract specifically provided that the no strike clause would not be violated by individual union members' refusing to report to work because of a picket line of another union which had a bargaining agreement with the employer. In that case the Board held that the union did not violate its contract with the employer by imposing fines on members who crossed the picket line of another union which represented another unit of employees of the employer.¹⁶² The difficulty in foreseeing the ultimate legality or illegality of the action to fine employees is illustrated by this latter case. The contract only protected employees who refused to cross the picket line of "another union which has a collective bargaining agreement with the employer."¹⁶³ The picket line involved was that of a union representing another unit of the employer's employees but the contract had expired between that union and the employer and the union was striking to obtain a new contract. Technically, that union did not have a collective bargaining agreement with the employer at that time. Nonetheless, the Board seemed to ignore this literal language of the contract. Perhaps the Board should

¹⁶⁰Local 12419, United Mine Workers, 176 N.L.R.B. 628 (1969).

¹⁶¹Communications Workers, Local 9511, 188 N.L.R.B. 433 (1971); American Newspaper Guild, 186 N.L.R.B. 877 (1970).

¹⁶²Machinists Lodge 284, 190 N.L.R.B. 208 (1971), *modified*, 472 F.2d 416 (9th Cir. 1972).

¹⁶³*Id.* at 210.

have deferred this question of contract interpretation to an arbitrator,¹⁶⁴ but instead it chose to summarily conclude that this contract language was applicable and prevented the union's fines from violating section 8(b)(1)(A).

It is inconceivable that an employee even with the contract in hand, in this case, could have comfortably predicted the outcome of the Board proceeding and could have known how the law would determine the validity of a union fine against him for crossing the picket line. Individual employees can not be expected to understand and apply this law to their peculiar circumstances with any substantial likelihood of understanding their rights and responsibilities and the risks they will incur resulting from their choice of action. While it may be impossible to assure that everyone will be able to make knowledgeable choices of action, the law as it presently exists relating to section 8(b)(1)(A) falls far short in this regard.

IV. CONCLUSION

Each of these cases, *Allis-Chalmers*, *Scofield*, *Granite State*, *Boeing*, and *Booster Lodge 405*, as well as the Board's rulings in related cases, such as *United Mine Workers*, appear to be rationally decided opinions, when viewed individually. As stated, at the outset, these issues are not issues which are clearly resolved by the legislative history of the Act, and reasonable judges at all levels and Board members can and have differed on their outcome.

These cases collectively have fashioned the following law relating to the rights of unions to discipline employees for crossing its picket line. First, under *Allis-Chalmers* and *Granite State*, a union can fine its members who cross its picket line, but if the members lawfully resign from the union before crossing the picket line, the union cannot fine them. Under *Boeing*, it makes no difference under the NLRA whether or not those fines are reasonable in amount. Any fine is lawful if it is against union members for strikebreaking. This obviously creates an incentive for union members to leave the union during the height of battle,

¹⁶⁴In *Collyer Insulated Wire Co.*, 192 N.L.R.B. 1053 (1971), the Board took the position that under some circumstances it would defer questions of contract interpretation which underlie a charge of an unfair labor practice to an arbitrator.

an action which could substantially undermine the union's strike effort. Moreover, it would create an unworkable labor relations system for the employer for years to come. Its impact is similar to that in *Erie Resistor*.¹⁶⁵ In that case, the Supreme Court found that an employer could not offer superseniority to strikebreakers. The Court relied at least in part on the Board's contention that such superseniority, unlike hiring strike replacements, would divide the employees into two camps and detrimentally affect labor relations for years to come. Yet it is safe to assume that the employees who resigned the union to cross the picket line would remain, long after the strike, in a separate camp from the striking union employees so that labor relations would be detrimentally affected for years to come.

While under *Boeing* a union can impose any size fine without regard to its reasonableness, free from any jurisdiction of the Board, there are disadvantages for the union to do so. As noted above, state courts continue to be the source for enforcement of fines and, in those areas of the country in which unions might need such disciplinary power the most, the state courts would appear to be the least likely to enforce a significant fine.¹⁶⁶ Even where state courts will enforce reasonable fines, this fact alone makes excellent campaign material for employers in opposing union organizational campaigns. This intangible campaign weapon may outweigh the disciplinary benefits unions might attain by using fines, or at least unreasonable fines.

The law does not necessarily work to the complete benefit of the employers either, because once the employee has resigned from the union, the union's ability to discipline him disappears. If employees should choose a wildcat strike, it would appear, in light of *Granite State*, that if they resigned their union membership before they acted, the union would be helpless in its efforts to call the employees back. Indeed, the union's only remaining right would be to collect their dues under its union or agency shop arrangement.

When the union is threatened with employees resigning and removing themselves from its disciplinary power, it could perhaps, under the current state of the law, take effective action against those employees who viewed retirement rights as par-

¹⁶⁵NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

¹⁶⁶See note 145 *supra* & accompanying text.

ticularly valuable, by threatening to jeopardize their retirement benefits after they retire. Though this is the logical outgrowth of *United Mine Workers*, the Board or the courts would probably not permit that case to be so applied. Consequently, this right, as it should be, would likely be unavailable for disciplinary purposes. Lawful conduct to prevent mass resignations would then be nonexistent.

Together with these cases, one should consider *Teamsters Local 901*,¹⁶⁷ in which the Board held that it would not reverse its long standing rule that a union, which uses force or violence in violation of section 8(b)(1)(A) to prevent an employee from working, would not be liable under the NLRA to compensate for the pay the employee lost at work as a result of the illegal union action. With this Board holding, the use of force or violence might look appealing. The union could not be held, by the Board at least, responsible for damages resulting from that violence. Most employees would not be likely to hire their own counsel to pursue such relief in state courts, especially if they have been significantly intimidated.

This brief conclusion is admittedly an oversimplification of the law. The law has become so complex in its development, as reflected in the overall body of this Article, that a laborer would have absolutely no hope of being able to understand it and, most importantly, of being able to apply it to his circumstances and then to understand his rights and responsibilities under it.

In summary, an interpretation of section 8(b)(1)(A) has evolved which provides an incentive to employees to leave the union to further their own interests and which provides as well an incentive to a union to take unreasonable action against employees nearing pension age or illegal action utilizing force and violence against all employees. While each case viewed individually could be said to reflect a reasonable judgment as to congressional intent under section 8(b)(1)(A), the cases viewed collectively create a labor relations law relating to strike conduct which clearly could not have been within the view of Congress when section 8(b)(1)(A) was enacted.

However, the law is not entirely settled at this time because under *Granite State* and *Booster Lodge 405*, the Supreme Court

¹⁶⁷202 N.L.R.B. No. 43 (Mar. 20, 1973).

has left unanswered the prospect of a union's limiting the right of employees to resign in its constitution and bylaws or otherwise. This problem should be resolved only after a careful investigation of the necessity of union fines to maintain solidarity during strikes. This necessity has not yet been documented either affirmatively or negatively. On very slim evidence the Court concluded in *Allis-Chalmers* that the right to fine strikebreakers was essential to the right to strike. With no more evidence the Court ignored its own conclusion to this effect in the more recent *Granite State* and *Booster Lodge 405* cases. This information should be considered in light of section 13 of the NLRA in which Congress clearly indicated that it intended to protect the right to strike except to the extent that it was specifically restricted in the Act.¹⁶⁸

In the absence of any definitive legislative history, it is essential to determine the validity of the Supreme Court's conclusion in *Allis-Chalmers* that the right to fine strikebreakers is essential to the right to strike. If this is a valid conclusion nothing in the legislative history would indicate that Congress intended by section 8(b)(1)(A) to restrict a union's disciplinary power in such a way as to destroy the section 13 right to strike. On the other hand, if this is not a valid conclusion, a fine would be "coercive" as currently recognized by the Board¹⁶⁹ and the Supreme Court,¹⁷⁰ and limitations consistent with preserving the right to strike were probably intended by Congress to be imposed upon unions in their use of such disciplinary actions.

In view of the fact that the Board and the courts are currently confronted with the problem of determining the circumstances, if any, under which a union can lawfully restrict its members from resigning, the Board should utilize its long neglected rule-making powers to conduct a substantial legislative investigation to determine the necessity of union disciplinary authority to the right to strike. The Board should also reconsider the entire area of law which has evolved under section 8(b)(1)(A) in order to develop, to the extent that it still has freedom to do so under the legislative history and the Supreme Court

¹⁶⁸29 U.S.C. § 163 (1970).

¹⁶⁹See notes 73, 74 *supra* & accompanying text.

¹⁷⁰See text accompanying notes 84, 85, 86 *supra*.

rulings, rules relating to this area of the law which, when viewed as an entirety, would conform to existing practicalities and also which could be understood and relied upon by the working man who, in the last analysis, warrants the protection of the NLRA.