

LABOR LAW: NLRB PERMITS AGENCY SHOP UNION TO
SUE MEMBERS TO COLLECT FINES IMPLEMENTING
A PRODUCTION-CEILING

THE National Labor Relations Board's most flexible weapon to circumscribe union unfair labor practices in section 8 (b) (1) (A) of the Taft-Hartley Act, which prohibits "restraint and coercion" of the employee in the exercise of his right to refrain from union activity.¹ In a proviso to that section, however, Congress explicitly refused to extend the unfair practice restrictions into the internal affairs of unions.² The Board relied upon this proviso in *Local 283, UAW*³ to support its decision that a suit for collection of fines imposed by an agency shop union on its members for failure to adhere to a production-ceiling by-law was not a section (8) (b) (1) (A) violation.

The by-law in question limited the amount of incentive pay union members could receive in any pay period.⁴ They were not forced to stop working when they reached the ceiling level but could "bank" earnings from excess production and draw upon the bank when individual output fell below the permissible maximum. The banking procedure was an effective stimulus to under-production for

¹ See *Marlin Rockwell Corp.*, 114 N.L.R.B. 553 (1955); Note, 44 VA. L. REV. 741, 742 (1958).

"It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in Section 157 . . . : 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. . . . Labor Management Relations Act (Taft-Hartley Act) § 8 (b) (1) (A), 61 Stat. 140 (1947), 29 U.S.C. § 158 (b) (1) (A) (1958).

Section 157 of the act states: "Employees shall . . . also have the right to refrain from any or all activities *except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).*" (Emphasis added.) 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

² See note 1 *supra*.

³ 4 CCH LAB. L. REP. ¶ 12835 (145 N.L.R.B. No. 109, Jan. 17, 1964).

⁴ Although nonmember employees were not governed by the union rules, a security clause in the collective agreement established an agency shop arrangement whereby all employees were required to support the union. The monthly service fee paid by the nonmember could not exceed the monthly dues of the union member. *Id.* at 20389 (dissenting opinion).

About one half of the plant employees worked on a piecework basis under which they could earn more than the machine rate provided for in the collective agreement. The ceilings promulgated by the union ranged between forty-five and fifty cents an hour above the machine rate. *Id.* at 20384.

workers who could substantially avoid lay-offs, sick leave, and mechanical difficulties.⁵ While the company placed no limits on employee earnings, it voluntarily cooperated in the administration of the banking system.⁶ In fact, these ceilings were considered in the negotiation and operation of the plant wage structure.⁷

The petitioners, all union members, were fined for repeatedly drawing more than the maximum pay allowable under the ceiling rule. State court litigation was then instituted by the union to collect the fines.⁸ Subsequently, the instant complaint was filed alleging that the employees' right to refrain from union activity was being restrained by the unilaterally imposed ceilings and by the union's attempt to collect the fines through means other than internal procedures.⁹ A majority of the Board dismissed the petition on the basis that the proviso to section 8 (b) (1) (A) expressly allows the establishment of labor organization rules with respect to membership and therefore protects this by-law which deals with a legitimate member interest. The opinion also indicated that the range of section 8 (b) (1) (A) was limited to acts of violence, intimidation and reprisal and would not be extended to proscribe general economic pressures. Two members took exception to deciding the case on either of the above grounds, one concurring in the result by finding that the complaining parties were not in fact coerced, as they had voluntarily joined the union.

The NLRB limited the application of section 8 (b) (1) (A) for a decade after its inception to cases involving the harsher forms of oppressive union tactics.¹⁰ In 1957 the Eisenhower Board varied

⁵ "The record shows that . . . an employee can reach the production ceiling in five hours, and that employees have read books, played cards, and talked in the remaining time." *Id.* at 20389 (dissenting opinion).

⁶ The company maintains bookkeeping records in accordance with the system; allows the union access to the records; pays the union stewards for the time expended in checking the records; and does not discipline the employees for not producing in excess of the ceilings. *Id.* at 20385.

⁷ *Ibid.*

⁸ No evidence as to the outcome of these suits was before the Board.

⁹ In *Minneapolis Star & Tribune Co.*, 109 N.L.R.B. 727 (1954), the Board held that a union fine was permissible activity. The one distinction between the instant case and *Minneapolis Star & Tribune* is the fact that the union brought suit on the fine.

¹⁰ GREGORY, *LABOR AND THE LAW* 557 (2d rev. ed., Supp. 1961); 1959 DUKE L.J. 624; Comment, 34 WASH. L. REV. 421 (1959). See, e.g., *Local 294, Int'l Bhd. of Teamsters*, 116 N.L.R.B. 842 (1956) (violence); *International Woodworkers*, 116 N.L.R.B. 507 (1956), enforced, 243 F.2d 745 (5th Cir. 1957) (threats of violence); *Local 140, United Furniture Workers*, 113 N.L.R.B. 815 (1955), enforced, 233 F.2d 539 (2d Cir. 1956) (mass picketing); *New Jersey Bell Tel. Co.*, 106 N.L.R.B. 1322 (1953), enforced, 215 F.2d 835 (2d Cir. 1954) (economic reprisal).

from this pattern in holding that peaceful picketing by a minority union was a violation of the section.¹¹ Although the Supreme Court affirmed the reversal of the Board's position,¹² the principle that non-violent and traditional union acts can be violative of section 8 (b) (1) (A) later received clear Supreme Court endorsement in *International Ladies' Garment Workers' Union v. NLRB* (Bernhard Altman).¹³ The majority's adoption of the trial examiner's conclusion that section 8 (b) (1) (A) *even without the proviso* does not apply to the kind of coercion which results from the application of internal discipline is in apparent conflict with the *Bernhard Altman* reasoning.¹⁴ A clearer understanding of the scope of the section would have resulted had the majority rejected or explained this conclusion.¹⁵ Instead, they avoided a determination of the effect of the broad

During this time the Board held that by section 8 (b) (1) (A) "Congress was aiming at means, not at ends." *Perry Norvell Co.*, 80 N.L.R.B. 225, 239 (1948). The reluctance to proscribe traditional union activity was an incentive to the narrow interpretation the Board had given § 8 (b) (1) (A). Note, 44 Va. L. Rev. 741, 744-45 (1958).

¹¹ *Drivers, Local 639*, 119 N.L.R.B. 232 (1957), *rev'd.*, 274 F.2d 551 (D.C. Cir. 1958), *aff'd*, 362 U.S. 274 (1960). See also *International Ass'n of Machinists*, 119 N.L.R.B. 307 (1957), *modified*, 263 F.2d 796 (9th Cir. 1959).

¹² *NLRB v. Drivers' Union*, 362 U.S. 274 (1960). The issue in the Supreme Court decision was complicated by the addition to the Taft-Hartley law of § 8 (b) (7), 73 Stat. 542 (1959), 29 U.S.C. § 158 (Supp. IV, 1959-1962), which expressly prohibited the conduct which the Board had found was violative of § 8 (b) (1) (A). As one commentator noted: "Not unreasonably a majority . . . realized that if they upheld the Board in its *Curtis* decision, then there would be two sets of rules covering the same conduct—organizational or recognition picketing—in different ways." GREGORY, *op. cit. supra* note 10, at 558-59.

¹³ 366 U.S. 731 (1961).

In this case the union was held to have restrained employees unlawfully by executing an agreement to act as exclusive representative when only a minority of the workers had authorized the union to represent their interests.

¹⁴ CCH LAB. L. REP. ¶ 12835, at 20385-86.

¹⁵ One narrow distinction which might be drawn between the present case and *Bernhard Altman* is that § 8 (b) (1) (A) was intended to cover physical violence and reprisal, whether applied directly or indirectly against the employee, and economic pressure, but only when applied indirectly through the employer. Comment, 34 WASH. L. REV. 421, 431 (1959).

The majority draws no distinction, and seems to be advancing the questionable proposition that the section without the proviso is equivalent to the section with the proviso. The bases of this argument are the statements of Senator Ball, a sponsor of the Taft-Hartley Act, quoted in the majority opinion: "It was never the intent of the sponsors of the amendment to interfere with the internal affairs or organization of unions." And later: "All we are trying to do is cover the coercive and restraining acts of the union in its efforts to organize unorganized employees." 4 CCH LAB. L. REP. at 20386. But, in fact, the Board has not always accepted the words of the sponsors as decisive. The prohibitions of § 8 (b) (1) (A) have not been limited to purely organizational situations. *Gimbel Bros.*, 100 N.L.R.B. 870 (1952). See generally 93 CONG. REC. 4130-50 (1947) (Senate debate); 93 CONG. REC. 6361, 6373-77 (1947) (joint conference report); S. REP. No. 105, 80th Cong., 1st Sess. 50 (1947).

language in *Bernhard Altman*¹⁶ by finding that the fines were permissible activity within the proviso.

The dissenting member, after maintaining that the fines levied by the union did constitute restraint and coercion, argued mainly that the proviso was not applicable in this case because the subject matter of the by-law was of "mutual concern" to the employees and the employer. The mutual concern doctrine arose in *Allen Bradley Co. v. NLRB*,¹⁷ a case in which the Board does not acquiesce. The Seventh Circuit Court of Appeals reasoned in *Allen Bradley* that when the *substance* of a union rule went beyond membership and dealt with the employment relationship, a union penalty against those members who did not observe the rule would be an infringement of the employee's right to abstain from unionism.¹⁸

Considering the role of the ceilings in the collective negotiations and the company's cooperation in the banking procedure, one could argue that the by-law in the instant case was quasi-contractual. At the very least, the employer's acts are indictive of a knowing concession of some of management's prerogatives in production setting. Therefore, since the mutual concern doctrine certainly does not encompass union sanctions of members for refusal to adhere to the terms and conditions of the collective bargaining agreement,¹⁹ this decision is reconcilable with the *Allen Bradley* dicta. However, to defend the instant case on this narrow ground would have the innocuous effect of union insistence that its internal regulations be

¹⁶ "It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed upon employers . . ." 366 U.S. at 738. *Contra*, National Maritime Union, 78 N.L.R.B. 971 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950) (comparison of § 8(b)(1)(A) and § 8(a)(1), the general provision proscribing employer unfair practices); see *Pacific Maritime Ass'n*, 89 N.L.R.B. 894 (1950).

¹⁷ 286 F.2d 442 (7th Cir. 1961), *reversing* 127 N.L.R.B. 44 (1960).

¹⁸ The *Allen Bradley* case primarily held that the proviso to § 8(b)(1)(A) did not eliminate as a proper subject for collective bargaining a company proposal to limit the union's right to discipline members. After overturning the Board's finding of an employer unfair practice for refusal to bargain, the court in dicta stated that enforcing a rule which in any way deprives a member of the right to work whether by "fine, discharge or otherwise" is unlawfully coercive. 286 F.2d at 446.

It is undisputed that where the *sanctions* imposed on the violators of union rules affect the employment status the union is committing an unfair practice. See *United Stone Workers*, 121 N.L.R.B. 914 (1958) (threat to job tenure); *National Lead Co.*, 106 N.L.R.B. 545 (1953) (discharge from employment for failure to pay fines).

¹⁹ See Summers, *Legal Limitations on Union Discipline*, 6 HARV. L. REV. 1049 (1951).

If the union cannot restrain an employee who refuses to work union hours or for union wages, the whole concept of exclusive representation would be thereby invalidated.

incorporated in the collective agreement. The end product in fields of union strength would merely be codification of present union rules.²⁰ In the less organized industries the *Allen Bradley* approach adopted by the dissent and inherent in the above distinction would emasculate intra-union sanctions imposed to present a united economic front.²¹

A second basis suggested²² for finding that the fine did not come within the proviso is that the fine was not enforced by internal procedures alone, but was made collectible as a debt.²³ To counter this argument the majority asserts that nothing in the legislative history suggests that Congress intended to prohibit unions from using the courts to collect disciplinary fines.²⁴ However, the congressional objective in including the proviso was not to sanctify the provisions of the membership arrangement or union activity arising thereunder.²⁵ Thus, had petitioners been faced solely with the alternative of pay-

²⁰ In practice, most existing union rules which are of concern to the employer are already subject to negotiation. The history of the ceilings in the negotiations between this employer and union is illustrative. 4 CCH LAB. L. REP. at 20385. The union is under a legal obligation to bargain in good faith with respect to wages, hours and other terms and conditions of employment. Taft-Hartley Act, 61 Stat. 140, 143 (1947), 29 U.S.C. §§ 158 (b) (3), 159 (a) (1958). Furthermore, bargaining need not be confined to statutory subjects. N.L.R.B. v. Borg-Warner Corp., 356 U.S. 342 (1958); cf. Van de Water, *The Broader Effects of the Taft-Hartley Act on Make-Work Practices in Industry*, 3 U.C.L.A. L. REV. 27 (1955). Compare note 18 *supra*.

²¹ See Summers, *supra* note 19, at 1049, 1064; 1962 DUKE L.J. 468, 471.

²² This was the argument of the General Counsel.

²³ See UAW v. Woychik, 5 Wis. 2d 528, 93 N.W.2d 336 (1958). *Contra*. Local 248, UAW v. Wisconsin Employment Relations Bd., 11 Wis. 277, 105 N.W.2d 271 (1960). There is a federal pre-emption problem in a state court's taking jurisdiction of a suit when the rights of the parties may rest upon whether or not an unfair labor practice was committed. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

²⁴ The legislative evidence includes the passage of the Labor-Management Reporting and Disclosure Act of 1959 with more stringent restrictions on expulsion than on union fines. 73 Stat. 519 (1959), 29 U.S.C. § 401 (Supp. IV, 1959-1962).

²⁵ See Westinghouse Elec. Corp., 96 N.L.R.B. 522 (1951), *enforced*, 203 F.2d 173 (9th Cir. 1953); Eclipse Lumber Co., 95 N.L.R.B. 464 (1951), *enforced*, 199 F.2d 684 (9th Cir. 1952); Electric Auto Lite Co., 92 N.L.R.B. 1073 (1950), *enforced per curiam*, 196 F.2d 500 (6th Cir. 1952), *cert. denied*, 344 U.S. 823 (1953); Note, 45 GEO. L.J. 250, 251-52 (1956); cf. Local 138, Int'l Union of Operating Eng'rs, 123 N.L.R.B. 1393 (1959); Mountain Pac. Chapter of the Associated Gen. Contractors Inc., 119 N.L.R.B. 883 (1957). *Contra*, American Newspapers Publishers Ass'n v. NLRB, 193 F.2d 782 (7th Cir. 1951).

Since internal union discipline is based upon contract theory, *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958), one can argue that the purpose of the proviso was to reaffirm the common law doctrine that the courts would not interfere with the right of a union and its constituents, as separate entities, to make a membership contract. See *Feinne v. Monahan*, 196 Misc. 407, 92 N.Y.S.2d 112 (Sup. Ct. 1949); 1962 DUKE L.J. 468, 469. *But see* *James v. Marinship Corp.*, 25 Cal. 2d 321, 155 P.2d 329 (1944) (unions cannot arbitrarily exclude individuals on racial basis); Summers, *supra* note 19, at 1054-55, 1057-58 (critical of the contract theory).

ing the fine or being subject to the union's unquestioned power of expulsion,²⁶ they would have been restrained by union discipline only in the sense exempted by the proviso. But, when the union sought the aid of the courts to collect the fines, the members were restrained by pressures beyond the internal mechanisms, and there is no statutory language to absolve such a suit of its potentially coercive character.²⁷ The mere existence of a by-law, even one pertaining to a legitimate member concern, should not alone be determinative of the legality of union conduct.²⁸

To say that suit for the collection of a fine is not exempted by the proviso without first determining whether a member who had the option of rejecting union membership can be coerced by a union fine is reversing the scheme of section 8 (b) (1) (A).²⁹ In an agency shop situation, as existed in the present case, the choice of the employee is between paying dues and receiving a voice in union affairs or paying dues without the right to select and guide union leadership. The price of freedom from membership obligations is loss of control of the bargaining representative.³⁰ In refusing to pay that price the petitioners assumed the risk of internal discipline.³¹ The principle of majority rule, inherent in the act, would be severely

²⁶ See, e.g., *Margolis v. Burke*, 53 N.Y.S.2d 157 (Sup. Ct. 1945); *United States Rubber Co., & United Rubber Workers*, 21 War Lab. Rep. 182 (1945). But see *Mitchell v. International Ass'n of Machinists*, 196 Cal. App. 2d 796, 16 Cal. Rptr. 813 (Dist. Ct. App. 1961) (union may not expel a member for advocating right to work legislation), 1962 DUKE L.J. 468.

²⁷ A literal reading of the proviso can lead to no other interpretation since all that is protected from impairment is the union right to prescribe rules with respect to the acquisition or retention of membership therein. See note 1 *supra*. The Board itself has argued that fines are merely steps in determining membership status. *Allen Bradley Co. v. NLRB*, 286 F.2d 442, 446 (7th Cir. 1961).

²⁸ *Marlin Rockwell Corp.*, 114 N.L.R.B. 553, 556 (1955).

²⁹ See note 1 *supra*. The proviso is an added defense once a union act is found to be restraining. If the union conduct was not restraining in the first instance, then there is no need for a consideration of the effect of the proviso.

³⁰ Nonetheless, the representative is under an obligation to represent the nonmember employee fairly. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1959), *enforced*, 284 F.2d 861 (2d Cir. 1960); GRODIN, *UNION GOVERNMENT AND THE LAW* 197 (1961); Comment, 4 B.C. IND. & COMM. L. REV. 661, 675 (1963).

³¹ Freely entering into a union can only imply an assumption of the risks which a reasonable man would normally expect to attach to union membership. Thus, the case where the union attempts to enforce a bylaw which deprives members of civil liberties can easily be distinguished. See Local 925, Int'l Union of Operating Eng'rs, NLRB Release No. R-870 (June 25, 1962). "If the trade policy behind union discipline conflicts with the law of the state . . . the union policy must give way." GRODIN, *op. cit. supra* note 30, at 130.

Protection against union invasion of membership basic rights has been afforded by the Labor-Management Reporting and Disclosure Act of 1959. 73 Stat. 519, 29 U.S.C.

undermined if the petitioners or any other minority group were allowed the privileges of membership without the attendant obligations.

The preferable approach, therefore, seems to be that of the concurring member who argued that in this agency shop context there was no coercion because these employees subjected themselves to the regulations and disciplines of union membership.³² Analyzing the problem in this manner raises the inference that if there had been a union shop the charge of restraint would have been sustained.³³ But, section 7 rights may be legally limited by a section 8 (a) (3) agreement requiring membership in a union.³⁴ Had there been less digression in both the majority and dissenting opinions this case would have crystallized the issues for future controversies. The question which, when answered authoritatively, may hold the key to understanding the limitations on internal union pressures is whether union shop agreements operate solely to force non-union employees to contribute to a union's treasury or whether the membership referred to in section 8 (a) (3) includes *coerced* participation in union activities.³⁵

§ 401 (Supp. IV, 1959-1962). There is no indication that due process was not adhered to in the enacting and enforcement of this by-law.

³² The case of a worker who joined the union and was then prevented from resigning, as is possible under maintenance of membership contracts, was not considered. However, one can infer from the tone of the concurring opinion that such an employee would not be viewed as a volunteer. 4 CCH LAB. L. REP. at 20388.

³³ The majority would not consider the addition of a union shop security clause as material, since by their reasoning the fines and the suit for enforcement were not intended to be proscribed by § 8 (b) (1) (A) and, in any case, were exempted by the proviso.

The dissenting member argues that an agency shop is the substantial equivalent of the union shop. "[T]he contract provisions left so little to choice that, as a practical matter, the employees were compelled to join the union. . . ." 4 CCH LAB. L. REP. at 20389 n.19. Cf. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96 (1963) (Florida ban on agency shop upheld).

³⁴ "[N]othing 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 . . ." Taft-Hartley Act, 61 Stat. 140 (1947), 29 U.S.C. § 158 (a) (3) (1958).

³⁵ Compare *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954), and *NLRB v. Biscuit & Cracker Workers*, 222 F.2d 573 (2d Cir. 1955), and *Union Starch & Ref. Co.*, 87 N.L.R.B. 779 (1949), with *Local 100, United Ass'n of Journeymen v. Borden*, 373 U.S. 690 (1963), and *NLRB v. Clara-Val Packing Co.*, 191 F.2d 556 (9th Cir. 1951).

The controversy between the broad and narrow readings of § 8 (a) (3) points out the fallacy of viewing the agency shop as merely a form of compulsory unionism. *Contra*, authorities cited note 33 *supra*. The limitation on § 7 rights, see note 1 *supra*, will be meaningless if a union must abandon all restrictions which might otherwise be fairly placed on *members* in order to collect a service fee from the nonmember employee.