

# COMMENTS

## LABOR LAW: UNION FINING AS AN UNFAIR LABOR PRACTICE UNDER SECTION 8(b)(1)(A)

*Courts recently have utilized section 8(b)(1)(A) to strike at the traditional power of a labor union to fine its members, holding that certain fines impinge on rights guaranteed by the Taft-Hartley Act. This comment examines the problems involved in determining which fines are unfair labor practices and attempts to show how a section 8(b)(1)(A) remedy can be effectively integrated with previous state and federal regulation of internal union affairs.*

**L**ABOR UNIONS have traditionally exercised great powers of discipline over their members,<sup>1</sup> with the two major disciplinary devices

---

<sup>1</sup>The extent of union discipline may be shown by a study of union constitutions and bylaws. Two major sources are: U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1350, DISCIPLINARY POWERS AND PROCEDURES IN UNION CONSTITUTIONS (1963) [hereinafter cited as Dep't Labor Bull. No. 1350] which studied 158 union constitutions; and Summers, *Disciplinary Powers of Unions*, 3 IND. & LAB. REL. REV. 483 (1950), a study of 154 international unions. Although both of these works are primarily concerned with the procedural aspects of union discipline, they point out that unions have rules governing a wide variety of member activities. Examples of specific offenses for which discipline is imposed include: (1) Work-connected offenses: 59 unions prohibit working on a job while a strike is in progress and 31 punish work stoppages in violation of a contractual agreement. *Id.* at 509. Other offenses vary with the union; for example, the Garment Workers Union imposes fines on members who drop garment labels on the floor. Dep't Labor Bull. No. 1350, at 28. (2) Union loyalty offenses: 69 unions discipline members for supporting rival organizations. Summers, *supra* at 509. 64 unions discipline a member for failing to exhaust internal union remedies before seeking outside assistance. Dep't Labor Bull. No. 1350, at 28. (3) Financial offenses: "Any officer found guilty of accepting any bribe or present from any corporation, contractor or association shall be fined . . . suspended . . . or expelled." *Id.* at 29. (4) Personal morals offenses: members of Locomotive Firemen and Enginemen Union may be fined or expelled for "immoral practices, wife abandonment, or improper treatment of family." Summers, *supra* at 492. (5) Political activity offenses: "When such [legislative] policy has been declared, no member of the Brotherhood shall appear before any legislative committee, legislature, State, provincial, or Federal executive, or take any action . . . in opposition to such a program in any capacity except that of a private citizen; nor shall he, in the name of the Brotherhood, engage in any political campaign for a candidate for public office after such candidate has been endorsed by the Brotherhood." Dep't Labor Bull. No. 1350, at 33. *Cf.* De Mille v. American Fed'n of Radio Artists, 175 P.2d 851 (Cal. Dist. Ct. App. 1946), *aff'd*, 31 Cal. 2d 139, 187 P.2d 769 (1947), *cert. denied*, 333 U.S. 876 (1948) (union's right to fine member for refusal to pay assessment earmarked for use in opposing anti-labor legislation upheld). (6) Miscellaneous offenses: The Carpenter Union's constitution authorized fines for members who refuse to parade on Labor Day. Dep't Labor Bull. No. 1350, at 27.

being expulsion and fining. Initial judicial attempts to regulate union discipline placed restraints on expulsion<sup>2</sup> but imposed few limitations on union fining power. However, the growth of unions and their increased reliance on the fining device<sup>3</sup> has led to a contemporary awareness of the need to regulate fining as well.<sup>4</sup> Thus, as a reflection of this dawning cognizance, fining has recently come under attack as being, in certain instances, an unfair labor practice under section 8 (b) (1) (A) of the Taft-Hartley Act.<sup>5</sup> This comment will trace the development of section 8 (b) (1) (A) as it was expanded to meet the problem of union fining and will then attempt to illustrate how specific factors in each case may be determinative of whether a particular fine should be an unfair labor practice.

#### APPLICATION OF SECTION 8 (b) (1) (A) TO UNION FINING

In 1947, the Taft-Hartley Act amended section 7 of the existing Wagner Act<sup>6</sup> to include a provision giving employees the right to refrain from union activities.<sup>7</sup> Section 8, which had previously

<sup>2</sup> The limitations on expulsion were primarily imposed within the context of closed shop unionism, where expulsion meant the loss of a job. See Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1014-20 (1930). This classic presentation indicates that at the time of the writing (1930) there were three tests which the courts used to determine whether union discipline was lawful: "(1) That rules and proceedings must not be contrary to natural justice; (2) The expulsion must be in accordance with the rules; (3) The proceedings must have been free from malice (bad faith)." *Id.* at 1014. (Emphasis added.) See generally Aaron & Komoraff, *Statutory Regulation of Internal Union Affairs*, 44 ILL. L. REV. 425, 631 (1949); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951); *Developments in the Law—Judicial Control of Action of Private Associations*, 76 HARV. L. REV. 983 (1963).

<sup>3</sup> See Summers, *Disciplinary Powers of Unions*, 3 IND. & LAB. REL. REV. 483, 487 (1950). Fining is generally considered by unions as being superior to expulsion as a means of discipline, for if a large number of members were expelled they could become threats to union standards by cutting union rates or assuming the role of strikebreakers. Fining also strengthens the union financially and affords a means for the transgressing worker to repent. *Ibid.*

<sup>4</sup> See Labor Management Reporting and Disclosure Act (Landrum-Griffin Act) § 101 (a) (5), 73 Stat. 522 (1959), 29 U.S.C. § 411 (a) (5) (1964) (procedural restrictions put on union fining); S. 3081, 89th Cong., 2d Sess. (1966) (introduced to amend the Taft-Hartley Act in order to restrict union rules relating to the imposition of sanctions for exceeding production quotas); H.R. 3020, 80th Cong., 1st Sess. §§ 8 (c) (5), 7 (b), 8 (c) (1) (1947) (unenacted Taft-Hartley provisions regulating fining discussed); *Hearings Before the Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess. 2066-69 (1947) (letters concerning fining abuses inserted by Senator Ball).

<sup>5</sup> Labor Management Relations Act, 61 Stat. 140 (1947), 29 U.S.C. § 158 (b) (1) (A) (1964).

<sup>6</sup> National Labor Relations Act, 49 Stat. 449 (1935).

<sup>7</sup> Section 7 presently provides that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other* concerted activities

limited employer restraints of employee organizational rights,<sup>8</sup> was also amended by the addition of section 8 (b) (1) (A). That section declares that union restraint or coercion which impinges on the newly created section 7 right to refrain from union endeavors constitutes an unfair labor practice.<sup>9</sup> However, the protection extended by section 8 (b) (1) (A) is limited by a proviso which states that a labor union could prescribe its own rules with respect to the acquisition and retention of membership.<sup>10</sup>

Initially, section 8 (b) (1) (A) actions were limited to cases where an employee's section 7 rights had been denied by means of physical violence, intimidation and economic reprisal in the form of mass picketing or job discrimination effected by union coercion.<sup>11</sup> The courts conceived the thrust of section 8 (b) (1) (A) to be a proscription of such violent methods and blatant job discriminations,<sup>12</sup> and union fining thus remained unregulated so long as it accorded with the union's own bylaws and constitution.<sup>13</sup>

---

for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." National Labor Relations Act (Taft-Hartley Act) § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964) (the italicized words represent the amendment).

<sup>8</sup> Section 8 (a) (1) presently provides as follows: "(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . ." 61 Stat. 141 (1947), 29 U.S.C. § 158 (a) (1) (1964).

<sup>9</sup> Section 8 (b) (1) (A) provides that "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *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." 61 Stat. 141 (1947), 29 U.S.C. § 158 (b) (1) (A) (1964).

<sup>10</sup> *Ibid.*

<sup>11</sup> See, e.g., Local 294, Teamsters Union, 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 sub nom.* Communication Workers v. NLRB, 215 F.2d 835 (2d Cir. 1954) (economic reprisal). See generally GREGORY, LABOR AND THE LAW 557 (2d rev. ed. Supp. 1961).

<sup>12</sup> See, e.g., Perry Norvell Co., 80 N.L.R.B. 225 (1948); National Maritime Union, 78 N.L.R.B. 971, 986 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950) (means used is the essence of a section 8 (b) (1) (A) violation). "By section 8 (b) (1) (A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peacefully by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal. In that Section, Congress was aiming at means, not at ends." Perry Norvell Co., *supra* at 239.

<sup>13</sup> Cf. International Typographical Union, 86 N.L.R.B. 951, 957 (1949), *enforced in relevant part*, 193 F.2d 782, 800 (7th Cir. 1951), *cert. denied*, 344 U.S. 816 (1952).

In the 1954 case of *Minneapolis Star & Tribune Co.*,<sup>14</sup> the National Labor Relations Board determined the applicability of section 8 (b) (1) (A) to union fining for the first time. There, a union member had not picketed during a strike. The union retaliated by causing the employer temporarily to discharge the offender and when he returned to work, the union dropped him to the bottom of its seniority list and fined him 500 dollars.<sup>15</sup> The member thereafter filed unfair labor charges against the employer and the union and the Board found that both the discharge and the loss of seniority were unfair labor practices. However, it was held that the fine was *not* an unfair labor practice because it was in accord with a union bylaw.<sup>16</sup> Thus, the section 8 (b) (1) (A) proviso sanctioning union membership rules was deemed applicable and was construed to preclude any "interference with the internal affairs of a labor organization."<sup>17</sup>

For the next decade, the Board rendered no decisions on the question of the applicability of section 8 (b) (1) (A) to union fines. However, the General Counsel, relying on *Minneapolis Star*, repeatedly ruled that fines in accord with union bylaws were internal affairs and outside the purview of the Taft-Hartley Act.<sup>18</sup> During this period, union members who felt that they had been disciplined unjustly had to resort to state and federal district courts for relief under other protective doctrines.<sup>19</sup>

---

"[B]y including this *proviso* Congress unmistakably [*sic*] intended to, and did, remove the application of union's membership rules to its members from the proscriptions of section 8 (b) (1) (A) *irrespective of any ulterior reasons motivating the union's application of such rules or the direct effect thereof on particular employees.*" 86 N.L.R.B. at 957. (Emphasis added.)

<sup>14</sup> 109 N.L.R.B. 727 (1954).

<sup>15</sup> *Id.* at 737.

<sup>16</sup> The bylaw related to the trial and fining of members who were guilty of gross disobedience. *Id.* at 738.

<sup>17</sup> *Id.* at 729. The Trial Examiner's report included an examination of the congressional history of the Taft-Hartley Act and concluded that "congressional recognition of a labor organization's right to make its own rules presumes, of course, its right to invoke them—except where the implementing of such rules is expressly prohibited . . ." *Id.* at 738.

<sup>18</sup> See, e.g., *N.L.R.B. Gen. Counsel Adm. Ruling*, Case No. F-862, 44 L.R.R.M. 1113 (1959) (union fine for refusing to obey union leaders upheld through the 8 (b) (1) (A) proviso); *N.L.R.B. Gen. Counsel Adm. Ruling*, Case No. M-45, 39 L.R.R.M. 1307 (1957) (fine for filing an unfair labor charge is not an unfair labor practice under section 8 (b) (1) (A)); *N.L.R.B. Gen. Counsel Adm. Ruling*, Case No. K-103, 37 L.R.R.M. 1103 (1955) (union fine for filing charges without first exhausting internal remedies is protected by 8 (b) (1) (A) proviso).

<sup>19</sup> See, e.g., *McCraw v. United Ass'n of Journeymen*, 341 F.2d 705 (6th Cir. 1965)

In 1959, as a result of the findings of the McClellan Committee,<sup>20</sup> Congress passed the Labor Management Reporting and Disclosure Act (Landrum-Griffin)<sup>21</sup> which placed certain union internal practices under close scrutiny and established an extensive regulatory scheme designed to insure union democracy. Title I of the act guaranteed labor union members freedom of speech and assembly,<sup>22</sup> the right to institute suit against and appear as witnesses against a union, and the right to petition the legislature concerning labor activities.<sup>23</sup> Title I also required the union to observe certain procedures before a member could be disciplined.<sup>24</sup> Initial proposals would have provided for enforcement of these provisions by the

---

(member fined for going to the Board with a grievance found relief in the federal courts under Landrum-Griffin provisions). The state courts also built up expertise in certain areas. See, e.g., *Madden v. Atkins*, 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958) (member's right to engage in union political activities could not be impaired by union discipline). See generally Summers, *The Law of Union Discipline: What the Courts do in Fact*, 70 YALE L.J. 175 (1960).

<sup>20</sup> See Murphy, *The Background of the Bill of Rights and its Provisions* in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 277 (Slovenko ed. 1961); Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 1086 (1960); Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 MINN. L. REV. 199 (1960).

<sup>21</sup> 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1964).

<sup>22</sup> Section 101 (a) (2) provides: "Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." 73 Stat. 522 (1959), 29 U.S.C. § 411 (a) (2) (1964).

<sup>23</sup> Section 101 (a) (4) provides: "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof . . ." 73 Stat. 522 (1959), 29 U.S.C. § 411 (a) (4) (1964).

<sup>24</sup> Section 101 (a) (5) provides: "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." 73 Stat. 522 (1959), 29 U.S.C. § 411 (a) (5) (1964).

NLRB<sup>25</sup> but the final enactment divided enforcement between the Secretary of Labor<sup>26</sup> and the federal district courts.<sup>27</sup>

<sup>25</sup> The initial plan had been to integrate the regulation of internal union affairs into the Taft-Hartley Act. See Rothman, *supra* note 20, at 201-05 (history of ACLU attempts to achieve a statutory enactment of a bill of rights for union members). The original House version, H.R. 3020, 80th Cong., 1st Sess. (1947), of the Taft-Hartley Act had in fact provided similar limitations on unions.

Proposed section 8(c)(5) made it an unfair labor practice for an organization to "fine or discriminate against any member, or subject him to any discipline or penalty, on account of his having criticized, complained of, or made charges or instituted proceedings against, the organization or any of its officers, or on account of his having supported or failed to support any candidate for civil office or for any office in the labor organization, or on account of his having supported or failed to support any proposition submitted to the labor organization, or to citizens generally for a vote." 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 53-54 (1948) [hereinafter cited as 1 LEG. HIST. LMRA].

Proposed section 7(b) further provided that "members of any labor organization shall have the right to be free from unreasonable or discriminatory financial demands of such organization, to freely express their view either within or without the organization on any subject matter without being subject to disciplinary action by the organization, and to have the affairs of the organization conducted in a manner that is fair to its members and in conformity with the free will of a majority of the members." 1 LEG. HIST. LMRA 49-50.

Finally, proposed section 8(c)(1) provided that it should be an "unfair labor practice to interfere with, restrain, or coerce individuals in the exercise of rights guaranteed in section 7(b) . . ." 1 LEG. HIST. LMRA 52, 53.

Why these provisions were dropped from the final version of the Taft-Hartley Act is not adequately disclosed in the legislative history, but there is an indication that § 9(f)(6)(e), which required unions to make a statement of the provisions of their constitutions and bylaws in reference to the imposition of fines, was passed to eliminate the need for the proposed additions outlined above. 1 LEG. HIST. LMRA 550. Ironically, § 9(f)(6) was the antecedent to the Labor Management Reporting and Disclosure Act and was repealed by §§ 201(d) and (e) of that act.

In *Roberts v. NLRB*, 350 F.2d 427 (D.C. Cir. 1965), the court took another view, asserting that "the legislators may have thought that the proposal [8(c)(5)] was worded too broadly and abandoned for that reason. Moreover, the legislators may have decided it was unnecessary to make specific that it [fining] might be an unfair labor practice under section 8(b)(1) . . ." *Id.* at 428 n.1.

<sup>26</sup> Section 304(a) of the Landrum-Griffin Act provides as follows: "Upon the written complaint of any member or subordinate body of a labor organization alleging that such organization has violated the provisions of this title [reports of trusteeship] (except section 301) the Secretary [of Labor] shall investigate the complaint and if the Secretary finds probable cause to believe that such violation has occurred and has not been remedied he shall, without disclosing the identity of the complainant, bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunction) as may be appropriate. Any member or subordinate body of a labor organization affected by any violation of this title (except section 301) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate." 73 Stat. 531 (1959), 29 U.S.C. § 464(a) (1964).

<sup>27</sup> Section 102 of the Landrum-Griffin Act provides that "any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate." 73 Stat. 523 (1959), 29 U.S.C. § 412 (1964). This enforcement section has precipitated much of the criticism concerning the Landrum-Griffin Act. The civil remedy afforded has been

Perhaps influenced by the congressional concern for member rights manifested by the passage of the Landrum-Griffin Act, the Board and the courts greatly expanded the scope of section 8 (b) (1) (A) to include within its proscriptions union activities which were non-violent in character.<sup>28</sup> In 1961, in *International Ladies' Garment Workers Union v. NLRB*,<sup>29</sup> the Supreme Court seemed to sanction this expansion in cases involving nonviolent union activity,<sup>30</sup> stating in broad language that Congress, by the passage of section 8 (b) (1) (A), had intended to impose upon unions the same restrictions which the Wagner Act had imposed upon employers with respect to employee rights.<sup>31</sup>

Another decision of great import in the expansion of section 8 (b) (1) (A) occurred in 1961 with the Seventh Circuit decision in *Allen Bradley Co. v. NLRB*.<sup>32</sup> In that case the protective scope of the proviso sanctioning union membership rules was severely limited.<sup>33</sup> Whereas all union rules and bylaws had previously been

---

termed "illusory" and a myth because the plaintiff must provide his own counsel and, moreover, legal costs are not recoverable. Thus, it is argued that few union members can effectively utilize this provision. Klein, *Internal Relations—UAW Public Review Board Report*, 18 RUTGERS L. REV. 304, 341 (1964).

<sup>28</sup> See, e.g., Rubber Workers Union (Business League of Gadsden), 150 N.L.R.B. No. 18, 57 L.R.R.M. 1535 (1964) (unfair labor practice for union to refuse to process grievance because of race); UMW, 143 N.L.R.B. 795 (1963) (unfair labor practice for union to advise employee to quit because others would not work with him); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963) (unfair labor practice for union not to represent employee); Perry Coal Co., 125 N.L.R.B. 1256 (1959), *enforced as modified*, 284 F.2d 910 (7th Cir. 1960), *modification denied*, 291 F.2d 126 (7th Cir. 1961), *cert. denied sub nom.* UMW v. NLRB, 366 U.S. 949 (1961) (unfair labor practice to send letter to employees stating that union membership was a condition of employment).

<sup>29</sup> 366 U.S. 731 (1960).

<sup>30</sup> The court held that a minority union had violated § 8 (b) (1) (A) by attempting to act as exclusive bargaining authority. *Id.* at 738.

<sup>31</sup> *Ibid.* In 1960, just one year prior to the *International Ladies Garment Workers* decision, the Supreme Court had apparently acquiesced to a limited application of § 8 (b) (1) (A). See *NLRB v. Drivers Union*, 362 U.S. 274 (1960), where the Supreme Court held that peaceful picketing by a minority union was not an unfair labor practice. The Court stated that "§ 8 (b) (1) (A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes." *Id.* at 290.

<sup>32</sup> 286 F.2d 442 (7th Cir. 1961), *enforcement denied*, 127 N.L.R.B. 44 (1960). The Board has not acquiesced in the Seventh Circuit's reversal. *Local 283, UAW*, 145 N.L.R.B. 1097, 1102 (1964), *hearing granted sub nom.* Scofield v. NLRB, 50 CCH Lab. Cas. 32595 (7th Cir. 1964), *rev'd and remanded sub nom.* UAW v. Scofield, 382 U.S. 205 (1965).

<sup>33</sup> The *Allen Bradley* litigation began when 14 employees worked during a strike and were fined \$100 each. Initially they filed 8 (b) (1) (A) charges with the NLRB. 286 F.2d at 443. However, these charges were dismissed by the General Counsel.

treated as if they related to the acquisition and retention of membership,<sup>34</sup> the Seventh Circuit now held that only those rules which directly related to the acquisition and retention of membership were internal affairs. The court held that rules and bylaws which attempted to "deprive a member of his right to work and his employer of the benefit of his services"<sup>35</sup> were not internal affairs but legitimate objects for collective bargaining and thus subject to provisions of the Taft-Hartley Act.<sup>36</sup>

Within this evolutionary milieu the NLRB, beginning in 1964, has again been faced with the problem of determining the applicability of section 8 (b) (1) (A) to union fining. At present, decisions have been rendered in only a few distinct factual areas. However, they indicate a deep split between the Board and the reviewing circuits as to the permissible scope of the application of section 8 (b) (1) (A) to the area of union fining. These decisions will be reviewed below.

a) *Fines for exceeding production quotas*

In *Local 283, UAW (Wisconsin Motor Co.)*,<sup>37</sup> members of an agency shop violated a union rule which limited the amount of incentive pay which a worker could earn. The union instituted suit to collect fines of fifty to one hundred dollars imposed on mem-

---

Twelve employees then petitioned the Wisconsin Employment Relations Board to enjoin collection of the fines. *Ibid.* The lower court granted the injunction but the Wisconsin Supreme Court reversed in *Wisconsin Employment Relations Bd. v. Lodge 78, Int'l Ass'n of Machinists*, 11 Wis. 2d 292, 105 N.W.2d 278 (1960), *cert. denied*, 365 U.S. 878 (1961). The remaining two employees unsuccessfully filed suit in a District of Columbia federal court to compel the General Counsel to issue the complaint. *Bandlow v. Rotham*, 278 F.2d 866 (D.C. Cir.), *cert. denied*, 364 U.S. 909 (1960). Allen Bradley, in an effort to prevent recurrence of such union fining, attempted to insert a provision in a 1959 collective bargaining agreement which would have denied the union the right to fine. 286 F.2d at 443-44. When the union refused, stating union fining was an internal rule and not subject to collective bargaining, the company refused to continue contract talks. *Id.* at 444. The Board in *Allen Bradley Co.*, 127 N.L.R.B. 44 (1960), held this to be an unfair labor practice by the company under section 8(a)(1) and 8(a)(5), but was reversed by the Seventh Circuit. 286 F.2d 442 (1961).

<sup>34</sup> See notes 12, 14 and 15 *supra* and accompanying text.

<sup>35</sup> 286 F.2d at 446.

<sup>36</sup> See § 8 (d) of the Taft-Hartley Act, 61 Stat. 142 (1947), 29 U.S.C. § 158 (d) (1964), which provides that management has the right to bargain collectively with the unions concerning terms and conditions of employment.

<sup>37</sup> 145 N.L.R.B. 1097 (1964), *hearing granted sub nom.* Scofield v. NLRB, 50 CCH Lab. Cas. 32595 (7th Cir. 1964), *rev'd and remanded sub nom.* UAW v. Scofield, 382 U.S. 205 (1965). The Supreme Court reversed the circuit court's refusal to allow the union to intervene in the review proceeding.

bers who failed to adhere to this production quota. The Board held that section 8 (b) (1) (A) was not intended to proscribe economic pressures such as fining<sup>38</sup> and, moreover, even if section 8 (b) (1) (A) did apply to such coercion, that section's membership rule proviso protected the exertion of union discipline since it was in accord with provisions of the union bylaws.<sup>39</sup> One member, Leedom, vigorously dissented and argued that under section 7 a member had the right to refrain from union activity.<sup>40</sup> Further, he asserted that the fine was an unfair labor practice constituting a form of economic coercion.<sup>41</sup> Leedom discarded the argument that the fine was protected by the proviso. Rather, he adopted the reasoning of *Allen Bradley*<sup>42</sup> and concluded that the bylaw was in effect an assailable union attempt to control production and wages, subjects related to employment and not directly to the acquisition and retention of membership.<sup>43</sup>

A similar case, *Bay Counties District Council of Carpenters*,<sup>44</sup> involved union production quotas set in the construction industry. When a few workers violated these rules, they were fined from eight to fifty dollars. The union attempted to collect these fines by refusing to credit money paid for union dues until the fines were paid. The Board held, with Leedom again dissenting, that this *collection procedure* was an unfair labor practice under section 8 (b) (1) (A).<sup>45</sup> However, the Ninth Circuit remanded the case,<sup>46</sup>

---

<sup>38</sup> 145 N.L.R.B. at 1101. The Trial Examiner concluded that the fining imposed was coercive but that it was not the kind of coercion with which § 8 (b) (1) (A) was concerned. *Id.* at 1127.

<sup>39</sup> *Ibid.*

<sup>40</sup> Leedom contended that there must have been a section 7 right involved, for otherwise the majority would not have had to discuss the proviso. *Id.* at 1107 n.23.

<sup>41</sup> Leedom interpreted the word "*reprisal*" used in *NLRB v. Drivers Union*, 362 U.S. 274 (1960), as meaning not only physical but economic reprisal and specifically including financial exactions. 145 N.L.R.B. at 1107. He then went on to analogize the economic pressure of a fine to those pressures exerted by the threat of loss of employment, the latter of which has long been recognized as economic intimidation. *Id.* at 1107 n.24. See, e.g., *Marlin Rockwell Corp.*, 114 N.L.R.B. 553, 562 (1955).

<sup>42</sup> See notes 32-36 *supra* and accompanying text.

<sup>43</sup> 145 N.L.R.B. at 1109-12.

<sup>44</sup> 145 N.L.R.B. 1775 (1964), *rev'd and remanded sub nom.* *Associated Home Builders of Greater East Bay, Inc. v. NLRB*, 352 F.2d 745 (9th Cir. 1965).

<sup>45</sup> *Id.* at 1776. The Trial Examiner had noted as a "dispositive factor that these employees are covered by *union shop contracts*, compelling them to maintain membership in Respondents, in the language of section 8 (a) (3) of the Act [Taft-Hartley], 'as a condition of employment.' Stated otherwise, they were vulnerable to discharge if their dues payments were not made." *Id.* at 1778. The Trial Examiner had also concluded that "a union rule forbidding members to produce or work beyond a specified quota would not appear on its face to be a rule concerning the *acquisition*

stating that the Board had erred in not determining whether the *fine itself* was an unfair labor practice under section 8 (b) (1) (A).<sup>47</sup> The court also stated that it viewed the proviso to that section as inapplicable because the fine had no direct relevance to the acquisition or retention of membership; rather, they were characterized as rules relating to terms and conditions of employment.<sup>48</sup> Thus, coupling the correlative reasoning of Leedom's dissents and the Ninth Circuit's ruling in *Bay Counties*, the immunity of union fines for exceeding production quotas has been considerably eroded.

b) *Fines for filing charges with the NLRB without first exhausting internal union remedies*

In *Local 138, Int'l Union of Operating Eng'rs*,<sup>49</sup> a union member had been fined two hundred dollars for filing an unfair labor practice charge with the NLRB.<sup>50</sup> The Trial Examiner concluded that Skura, the union member, was fined as an act of "retaliation and coercion" in order to discourage resort to the Board.<sup>51</sup> The Board,

---

*or retention of membership. . . . However, for the purposes of this decision, I shall assume that this proviso is to be interpreted broadly, contrary to the customary narrow construction of provisos, and that a rule of this nature may be stretched to fall within the proviso." Id. at 1783. Needless to say, Commissioner Leedom dissented for the reasons set forth in his Local 283, UAW dissent, notes 40-43 supra and accompanying text. 145 N.L.R.B. at 1777.*

<sup>49</sup> *Associated Home Builders of Greater East Bay, Inc. v. NLRB*, 352 F.2d 745 (9th Cir. 1965).

<sup>47</sup> *Id.* at 747. The court noted that the Trial Examiner relied on *Local 283, UAW*, but stated that "in our search for court authority upon this point we have found but one case which would support the position taken by the Board in this case and in *Local 283* . . . . That case is . . . [American Newspapers Publishers Ass'n v. NLRB, 193 F.2d 782 (7th Cir. 1951)]. In view of the disposition which that court made of the case in remanding it to the Board, it is not clear that what was there said was other than dictum." *Id.* at 749-50.

<sup>48</sup> *Id.* at 749. "The rules relating to the limitation of production are plainly rules adopted for the purpose of establishing the terms and conditions of employment of union members. The rule is not directed merely to the employees; it has a direct impact upon the employer." *Id.* at 750. However, the court seemingly remanded on the alternate ground that since union production quotas established terms and conditions of employment, they were subjects of collective bargaining and the union had therefore violated § 8 (b) (3), which makes it an unfair labor practice to refuse to bargain collectively with an employer. *Id.* at 752.

<sup>49</sup> 148 N.L.R.B. 679 (1964). See Note, 65 COLUM. L. REV. 1108 (1965), criticizing the decision as being too restrictive of union discipline.

<sup>50</sup> 148 N.L.R.B. at 680. The charge was later withdrawn when the Board's regional director advised Skura that a complaint would not issue. *Id.* at 679.

<sup>51</sup> *Id.* at 684 n.16. There is no provision of the Taft-Hartley Act which states that filing charges or testifying before the Board may not be a proper pretext for the imposition of union sanctions. This is to be contrasted with § 8 (a) (4), which makes it an unfair labor practice for an employer "to discharge or otherwise discriminate

while not questioning this conclusion,<sup>52</sup> held that even if the fine was based, as the union contended, upon Skura's failure to follow a union bylaw which required exhaustion of intra-union remedies,<sup>53</sup> it nevertheless violated section 8 (b) (1) (A) as being coercive of the right to file charges guaranteed in section 7.<sup>54</sup> The NLRB further ruled that by adopting and attempting to enforce such a bylaw

---

against an employee because he has filed charges or given testimony under this Act." 61 Stat. 141 (1947), 29 U.S.C. § 158 (a) (4) (1964). An early attempt to provide for similar limitations on unions is found in the original House version of the Taft-Hartley Act, H.R. 3020, 80th Cong. 1st Sess. § 8 (c) (5) (1947), but was not passed.

<sup>52</sup> However, the NLRB did note that "under the circumstances it was not unreasonable for the Trial Examiner to conclude that on the basis of the whole record that it would have been futile for Skura to press his claim of discrimination within the Union, and that the Union's internal procedures were neither clear nor adequate." 148 N.L.R.B. at 684 & n.16.

<sup>53</sup> In 1961, sixty-four union constitutions contained provisions for the application of sanctions in cases where a member failed to "exhaust" union remedies before seeking outside assistance. Dep't Labor Bull. No. 1350, at 28.

Two "exhaustion" requirements are often confused: (1) The familiar provision in union constitutions which forbids suit against the union under penalty of discipline unless the member first requests redress through all union procedures, trials, hearings, and appeals. COX, LAW AND THE NATIONAL LABOR POLICY 103-04 (U. of Calif. Monograph Series 5, 1960). The policy behind this union rule is the tenet that internal resolution of problems is necessary if the unions are to maintain a united front in the struggle against management. (2) Another "exhaustion" theory, distinct from the first, is the judicial doctrine that a court will not entertain a member's action against a voluntary association until the member has "exhausted" all reasonable remedies within the organization. *Id.* at 104. A basic policy underlying this doctrine is that by having the unions manage their own "housekeeping," the burden of litigation on the courts is lessened. See Montemuro, *The Doctrine of Exhaustion of Union Remedies*, 2 DUKE B.J. 148 (1952) (history of court exhaustion rule); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1086-92 (1951) (utilization of exhaustion requirement by state courts); Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 207-12 (1960) (policies of and exceptions to the judicial exhaustion rule); Witmer, *Civil Liberties and the Trade Union*, 50 YALE L.J. 621, 630 (1941) (approving wisdom of the judicial exhaustion rule). See generally *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1069-80 (1963); Annot., 87 A.L.R.2d 1099 (1963); Annot., 168 A.L.R. 1462 (1947).

<sup>54</sup> 148 N.L.R.B. at 681-82. Previously, the NLRB had protected access to the Board when members were denied rights by means of violence, threats of violence, or economic coercion in the form of job discrimination. See, e.g., *Shipwrecking, Inc.*, 136 N.L.R.B. 1518-19, 1529 (1962) (threat of job discrimination); *Bordas & Co.*, 125 N.L.R.B. 1335 (1959), *enforced*, 288 F.2d 132 (D.C. Cir. 1961) (threats of expulsion from union for filing charges); *Local 450, Int'l Union of Operating Eng'rs*, 122 N.L.R.B. 564, 567-68 (1958), *enforced*, 281 F.2d 313, 317 (5th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961) (threats of expulsion and consequent loss of job in order to compel withdrawal of charges); *Local 294, Int'l Bhd. of Teamsters*, 116 N.L.R.B. 842, 844 (1956) (bribery to induce withdrawal of charges); *International Ass'n of Bridge Workers*, 112 N.L.R.B. 1059, 1060 (1955) (threats of job discrimination in retaliation for testifying); *Textile Workers Union*, 108 N.L.R.B. 743, 749 (1954), *enforced*, 227 F.2d 409, 411 (D.C. Cir. 1955), *cert. granted on other grounds*, 350 U.S. 1004, *cert. denied on other grounds*, 352 U.S. 864 (1956) (threats of physical violence and job discrimination to compel members to stop testifying at Board hearings).

restricting access to the Board, the union had ventured beyond the province of internal rules and thus forfeited the protection of the proviso.<sup>55</sup> The Board also found that section 101 (a) (4) of the Labor Management Reporting and Disclosure Act,<sup>56</sup> which guarantees the right of any member to institute an action in any court or administrative agency, established a federal policy that union rules which deny access to these bodies are contrary to public policy and void.<sup>57</sup>

Affirming the Board's ruling in a companion case,<sup>58</sup> the District of Columbia Circuit held in *Roberts v. NLRB*,<sup>59</sup> that it was an unfair labor practice for a union to impose a 450 dollar fine against a member because he had filed unfair labor practice charges with the Board without first exhausting his internal union remedies. The court discounted reliance on the proviso of 8 (b) (1) (A) because the imposition of the fine was "too remote from a rule with respect to the acquisition or retention of membership to be protected by the

<sup>55</sup> 148 N.L.R.B. at 682.

<sup>56</sup> 73 Stat. 522 (1959), 29 U.S.C. § 411 (a) (4) (1964). See note 23 *supra*.

<sup>57</sup> 148 N.L.R.B. at 683. The Board pointed to Professor Cox's view as expounded in COX, LAW AND THE NATIONAL LABOR POLICY 103-04 (U. of Calif. Monograph Series 5, 1960), that § 101 (a) (4) of the Landrum-Griffin Act "was plainly intended to outlaw union rules disciplining members for bringing suit against the union," 148 N.L.R.B. at 683, and that union rules which seek to compel exhaustion should be void as against public policy. Cox, *op. cit. supra* at 103-04. "No private organization should be permitted to restrict any person's access to courts of justice. This right should be as absolute as the right to appear in court as a witness, to petition a legislature, or to communicate with a member of Congress." *Id.* at 104. Under this thesis § 101 (b) and § 609 of the Landrum-Griffin Act should have applied. Section 101 (b) provides that "any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect." 73 Stat. 519 (1959), 29 U.S.C. § 411 (b) (1964). This section thus would give force to § 609, which provides that "it shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section." 73 Stat. 541 (1959), 29 U.S.C. § 529 (1964). *But see* Witmer, *Civil Liberties and the Trade Union*, 50 YALE L.J. 621, 630 (1941), where the author states: "Freedom of litigation, for instance, is hardly so essential a part of the democratic process that the courts should be asked to strike down all hinderances to its pursuit." See O'Donoghue, *Protection of a Union Member's Right to Sue Under the Landrum-Griffin Act*, 14 CATHOLIC U.L. REV. 215, 222-23 (1965), a criticism of the Board's action in the *Skura* case as being a flagrant disregard of the provision in § 101 (a) (4) requiring a four-month exhaustion period prior to resort to the courts.

<sup>58</sup> H. B. Roberts, 148 N.L.R.B. 674 (1964), *aff'd*, 350 F.2d 427 (D.C. Cir. 1965). The Board report had simply stated that the case was governed by Local 138, Int'l Union of Operating Eng'rs, 148 N.L.R.B. 679 (1964), decided the same day. H. B. Roberts, *supra* at 676.

<sup>59</sup> 350 F.2d 427 (D.C. Cir. 1965).

*mere language* of the proviso."<sup>60</sup> The court discussed the applicability of section 101 (a) (4) of the Landrum-Griffin Act and concluded that the provision for a four-month period during which a member should make use of internal union procedures prior to resort to the courts<sup>61</sup> did not preclude the Board from acting within that period if it so desired.<sup>62</sup> Thus, the nascent case law in

<sup>60</sup> *Id.* at 428 n.2.

<sup>61</sup> It is not clear from the legislative history of § 101 (a) (4) who may restrict the members from appealing outside the union for the four-month period prescribed by law. O'Donoghue, *supra* note 57, at 223-34, concludes that § 101 (a) (4) was understood differently in the Senate and the House. The Senate viewed it as placing restrictions on the unions and not the courts, but the House came to the conclusion that the rule restricted both courts and unions. *Id.* at 234. See 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1432 (1959) (remarks of Senator Kennedy); *id.* at 1600-01 (remarks of Representative Foley); *id.* at 1811 (remarks of Representative Griffin).

The congressional indecision as to which exhaustion policy, note 53 *supra*, was imposed by § 101 (a) (4) is reflected in the decisions of the courts. The initial judicial view was that Congress intended to allow unions to continue to require their members to exhaust internal remedies if this exhaustion could be completed within a four-month period. Conversely, unless the member had in fact exhausted his remedies courts adopting this view were constrained to dismiss the suit as premature. *Smith v. General Truck Drivers Union*, 181 F. Supp. 14 (S.D. Cal. 1960), which, however, involved an action begun prior to the passage of the Landrum-Griffin Act. See also *Mamula v. United Steel Workers*, 414 Pa. 294, 200 A.2d 306, *cert. denied*, 379 U.S. 17 (1964) (applying the rule that exhaustion of internal remedies is a condition precedent to resort to state courts). *Cf. Wirtz v. Local 125, Int'l Hod Carriers*, 231 F. Supp. 590 (N.D. Ohio 1964) (exhaustion as a condition precedent applied to action by Secretary of Labor). *But see Note*, 48 VA. L. REV. 78, 92-94 (1964) (criticizing this view).

A second view was that Congress had enacted the rule that unions could require a four-month exhaustion period but by inserting the term "reasonable" in § 101 (a) (4), the courts were left free to develop their own tests in determining whether relief prior to the expiration of four months was appropriate. This view accorded with the pre-1959 decisions of many state courts, which had formulated numerous exceptions to the judicial practice of exhaustion. See Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 207-12 (1960). See, e.g., *Detroy v. American Guild of Variety Artists*, 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961). The following have been held to constitute sufficient reasons for not requiring exhaustion of union remedies prior to resort to the courts: (1) When the remedial procedure of the union is uncertain and not specifically brought to the attention of the aggrieved party and immediate injury which will be difficult to compensate in money damages is likely. *Detroy v. American Guild of Variety Artists*, *supra* at 81. (2) When the pursuit of a union's appeal procedures would likely prove futile. *Farowitz v. Associated Musicians*, 330 F.2d 999, 1002-03 (2d Cir. 1964), *enforced*, 241 F. Supp. 895 (S.D.N.Y. 1965). (3) When the appeal procedures within the union are unreasonable under the circumstances. *Sheridan v. United Bhd. of Carpenters*, 191 F. Supp. 347, 353 (D. Del. 1961), *rev'd on other grounds*, 306 F.2d 152 (3d Cir. 1962). (4) When irreparable harm would result if immediate action is not taken. *Gartner v. Soloner*, 220 F. Supp. 115, 119 (E.D. Pa. 1963); see *Note*, 16 HASTINGS L.J. 590, 594 (1965).

<sup>62</sup> 350 F.2d at 430. The statutory language of § 101 (a) (4), 73 Stat. 522 (1959), 29 U.S.C. § 411 (a) (4) (see note 23 *supra*), by including the terminology "before instituting legal or administrative proceedings" would seem to indicate that Congress intended to apply this provision to the Board. However, the remarks of Senator

the area indicates that not only will the failure to exhaust internal remedies be insufficient as a defense to unfair fining practices, but also that the Board may in its discretion act upon such matters before the expiration of the four-month intra-union period.

c) *Fines for violations related to picket line activity*

*Local 248, UAW (Allis-Chalmers Mfg. Co.)*,<sup>63</sup> involved fines ranging from twenty to one hundred dollars imposed on union members who crossed picket lines after a valid strike vote had been taken. A majority of the Board held that such a fine was an internal affair and therefore protected by the proviso to section 8 (b) (1) (A).<sup>64</sup> The Seventh Circuit, in affirming the Board's decision,<sup>65</sup> held that Congress did not intend that section 7 should protect a member who crossed a picket line from being fined when such a crossing was in defiance of a valid decision by the union majority to strike.<sup>66</sup> To

---

Kennedy, 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT AND DISCLOSURE ACT OF 1959, at 1432 (1959), and Representative O'Hara, *id.* at 1632, indicate that the § 101 (a) (4) proviso was not to apply to the Board. *But see id.* at 1667 (remarks of Representative McCormack). The Board itself was careful to state in *Local 138, Int'l Union of Operating Eng'rs* that even if the exhaustion requirement were to apply to the Board, it would have been futile for Skura to have proceeded further. 148 N.L.R.B. at 684 n.16. The Board also noted that the union's internal procedures were neither clear nor adequate, citing as authority *Detroy v. American Guild of Variety Artists*, *supra* note 61. 148 N.L.R.B. at 684 n.16. See also Petitioner's Reply Brief, pp. 2-4, *Roberts v. NLRB*, 350 F.2d 427 (D.C. Cir. 1965).

<sup>63</sup> 149 N.L.R.B. 67 (1964), *aff'd sub nom. Allis-Chalmers Mfg. Co. v. NLRB*, 60 L.R.R.M. 2097 (7th Cir. 1965), *rev'd on rehearing*, 358 F.2d 656 (7th Cir. 1966).

<sup>64</sup> "Here too, the Respondents have properly maintained the distinction between 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." 149 N.L.R.B. at 69.

Commissioner Leedom again dissented, stating that "I think it will come as a surprise to the affected individual when he is told that a union fine designed to induce him to respect picket lines and stay away from his job does not touch him as an employee but only as a union member. One of the indispensable factors in any employment relationship is the employee's willingness to come to work." *Id.* at 73.

Leedom also asserted that "*Minneapolis Star and Tribune Co.* . . . relied on by the majority, is in my opinion of doubtful precedential value. . . . In that case the Trial Examiner rather summarily rejected the General Counsel's contention that the imposition of a fine violated Section 8 (b) (1) (A) and the Board was equally summary in affirming him, citing only . . . [International Typographical Union, 86 N.L.R.B. 951 (1949)]. That cited case, however, despite some broad language dealt *only* with the right of a union to threaten expulsion and was decided on the ground that in view of the proviso such a threat could not be considered as 'coercion.'" *Id.* at 74 n.8.

<sup>65</sup> *Allis-Chalmers Mfg. Co. v. NLRB*, 60 L.R.R.M. 2097 (7th Cir. 1965), *rev'd on rehearing*, 358 F.2d 656 (7th Cir. 1966).

<sup>66</sup> 60 L.R.R.M. at 2099.

reach this decision, the court took note of the legislative history of the Taft-Hartley Act and analogized the worker's defiant conduct to wildcat strikes which were expressly denied protection under section 7.<sup>67</sup> On rehearing, however, the Seventh Circuit sitting *en banc* reversed.<sup>68</sup> A four-judge majority based their decision on a literal reading of sections 7 and 8 (b) (1) (A), reasoning that a fine was a species of economic reprisal clearly prohibited by section 8 (b) (1) (A).<sup>69</sup> Similarly, the majority limited the protection of the 8 (b) (1) (A) proviso to bylaws concerning gaining and expelling of members; a rigidly literal interpretation of the requirement of "rules with respect to the acquisition and retention of membership."<sup>70</sup> The three dissenting judges spoke in equally sweeping, albeit converse, terms. Section 7 rights, they argued, should be limited to employees who were not members of unions; when employees join unions for collective bargaining purposes, they forego the right to belong to labor organizations on their own terms.<sup>71</sup>

The *Allis-Chalmers* decision indicates the extent to which the courts have departed from the permissive deference formerly accorded matters of "internal union affairs." Fining has become a recognized instrument of coercion in derogation of the individual rights accorded union members, and the courts appear quite willing to discard the talisman of internal affairs in order to ensure those statutory guarantees. The NLRB, however, has indicated greater

---

<sup>67</sup> *Id.* at 2099-2101. The court also alluded to policy justifications for its decision, reasoning that § 101 (a) (2) of the Landrum-Griffin Act "clearly protects the rights of a union reasonably to discipline members who violate contract clauses." *Id.* at 2100-01. See also Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1078 (1951). *But cf.* NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953) (employee has a § 7 right to refrain from striking); Clara-Val Packing Co., 87 N.L.R.B. 703, 704 (1949) (unfair labor practice to induce employer discrimination in order to punish workers who crossed picket lines); International Long Shoremen, 79 N.L.R.B. 1487 (1948) (unfair labor practice to use violence to coerce employees into not crossing picket lines).

<sup>68</sup> *Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966).

<sup>69</sup> *Id.* at 2500. "The statutes in question present no ambiguities whatsoever, and therefore do not require recourse to legislative history for clarification." *Ibid.* The dissenters pointed out that the Supreme Court never rendered such a literal reading of § 8 (b) (1) (A), citing NLRB v. Drivers Union, 362 U.S. 274 (1960), where the Supreme Court had found it necessary to examine the legislative history of § 8 (b) (1) (A) in some detail to determine the issue of whether "peaceful picketing" by a union was an unfair labor practice. 358 F.2d at 667.

<sup>70</sup> *Id.* at 660. The court noted that its original decision was in conflict with the Seventh Circuit decision in *Allen Bradley*, see notes 32-36 *supra* and accompanying text, and that the statement in *Allen Bradley* that union fines for crossing picket lines imposed a sanction on the exercise of a § 7 right was not dictum. *Id.* at 661.

<sup>71</sup> *Id.* at 668.

reluctance to scrutinize fining procedures where the fine is not imposed to punish the filing of unfair labor practice charges against the union.<sup>72</sup>

#### STANDARDS FOR DETERMINING IF A FINE IS AN UNFAIR LABOR PRACTICE

The above decisions illustrate that union fines can be, in certain instances, unfair labor practices. The nonviolent nature of a fine is no longer a sufficient imprimatur to support fining as a legitimate means of union membership control; nor does the proviso to section 8 (b) (1) (A) protect every fine from an unfair labor practice charge merely because provision is made for fining in union constitutions and bylaws. In an attempt to afford some predictability as to the future disposition of cases protesting fines, the key decisional factors should be discerned and isolated. It is submitted that a close scrutiny reveals that certain considerations are in most cases accorded significant weight by the courts and the Board in their determinations, although no one factor may be regarded as pivotal. Rather, the foregoing decisions indicate that the entire factual spectrum will be given detailed examination prefatory to a decision.

##### 1) *Uniform considerations*

Any determination of the validity of a union fine must begin with a consideration of whether the individual action which precipitated the fine is protected by a provision or policy of the Taft-Hartley Act. Thus, certain activities such as wildcat striking, although arguably a type of conduct protected under section 7, are so opposed to the national labor policy of maintaining industrial peace that no protection is extended the member faced with a union fine for such conduct.<sup>73</sup> Conversely, individual activities such

---

<sup>72</sup> The Board has implied that only when the union fine was imposed for filing charges would there be an exception to the principle that union disciplinary action is protected by the proviso to § 8 (b) (1) (A). *Tawas Tube Prods. Inc.*, 151 N.L.R.B. No. 9, 58 L.R.R.M. 1330 (1965). The decisions in *Associated Home Builders of Greater East Bay, Inc. v. NLRB*, 352 F.2d 745 (9th Cir. 1965), and *Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966), indicate that the circuit courts consider the exception much broader.

<sup>73</sup> See House Committee Report on H.R. 3020, 80th Cong., 1st Sess. § 7 (1947), which stated: "The committee has revised this section by writing into it in express terms that employees who strike or engage in similar activities in violation of collective bargaining agreements, or who engage in unfair labor practices under section 8, or in concerted activities that are unlawful under section 12, forfeit the protection of the Labor Act." 1 LEG. HIST. LMRA 318. Although H.R. 3020, § 12 was not en-

as the right to file unfair labor practice charges not only constitute a section 7 right but are positively encouraged<sup>74</sup> because without freedom of administrative access, the Board would be hampered in effectuating its protective mandate.<sup>75</sup> Thus such activities have been held to be completely outside the union's power to obstruct by means of fining.<sup>76</sup>

Once it is determined that the fined activity is protected under section 7, the issue facing the court is whether the fine is a form of economic coercion used to curtail that protected activity in violation of section 8 (b) (1) (A). Initially, the nonviolent aspect of the fine was considered to preclude definitively its proscription.<sup>77</sup> When section 8 (b) (1) (A) was judicially expanded to include nonviolent activities, the inquiry was shifted to the application of the proviso.<sup>78</sup> In fact, however, the proviso does not specifically address

---

acted in the final version of the Taft-Hartley Act, the Conference Committee Report stated that § 8 (b) (1) (A) was intended to cover the activities mentioned in proposed § 12. 1 LEG. HIST. LMRA 546. See *United Rubber Co.*, 21 War Lab. Rep. 182 (1945), where 700 members were fined for engaging in a wildcat strike. When 570 refused to pay, the National War Labor Board ordered the fines deducted from their pay checks. *Cf. Hatch v. Grand Lodge of R.R. Trainmen*, 233 Ill. App. 495 (1924) (implies that disciplining wildcat strikers may not only be a power but a positive duty of a union).

<sup>74</sup> See, e.g., *Local 238, Wood Lathers' Union*, 2 LAB. REL. REP. (61 L.R.R.M.) 1172 (N.L.R.B. Jan. 18, 1966) (fine for filing unfair labor charges without first exhausting union internal remedies was deemed violative of § 8 (b) (1) (A) even though the member fined was neither employee nor applicant for employment of employer involved in case); *Local 1510, Milwrights & Machinery Erectors*, 152 N.L.R.B. No. 132, 59 L.R.R.M. 1310 (1965) (remarks by union official implying imposition of fine if union member brings charges to the Board is an unfair labor practice). See also *Farmbest, Inc.*, 154 N.L.R.B. No. 146, 60 L.R.R.M. 1159 (1965) (union violated § 8 (b) (1) (A) by merely questioning employee concerning content of testimony he expected to give at a Board proceeding). *But cf. Local 703, Int'l Hod Carriers*, 150 N.L.R.B. No. 155, 58 L.R.R.M. 1305 (1965) (mere existence of a provision for fining for resort to governmental agency prior to exhaustion is not an unfair labor practice).

<sup>75</sup> In the field of discipline for filing decertification petitions, which also seem to have been encouraged by the Taft-Hartley Act, the Board has been more hesitant in providing protection. See, e.g., *Local 4028, United Steelworkers*, 154 N.L.R.B. No. 54, 60 L.R.R.M. 1008 (1965); *Tawas Tube Prods.*, 151 N.L.R.B. No. 9, 58 L.R.R.M. 1330 (1965) (union suspensions for filing decertification petition held not an unfair labor practice). *But cf. Mid-States Metal Prods., Inc.*, 156 N.L.R.B. No. 90, 2 LAB. REL. REP. (61 L.R.R.M.) 1159 (Jan. 17, 1966) (violence and coercion through employer discrimination as discipline for filing decertification petition is an unfair labor practice).

<sup>76</sup> It has been held that not only does the Board have authority to protect employees who use the Board's processes but that the Board has an affirmative duty to protect such employees. *Pedersen v. NLRB*, 234 F.2d 417 (2d Cir. 1956) (employer discharged a worker for going to the Board).

<sup>77</sup> See note 11 *supra* and accompanying text.

<sup>78</sup> See notes 35-36, 39, 43, 48, 55, 60, 70 *supra* and accompanying text.

itself to the question of a union's discipline of its members. Rather, it mentions only the union's right to determine its membership.<sup>79</sup> The courts<sup>80</sup> and commentators<sup>81</sup> initially filled this gap by concluding that the proviso to section 8(b)(1)(A) must have been meant to exclude from NLRB scrutiny all union discipline which accorded with a union constitution or bylaw. The trend of the decisions has been to narrow the scope of the proviso's protection, however, and recent decisions have seemingly been resolved by deciding how directly a particular rule relates to the statutory language of acquisition and retention of membership.<sup>82</sup> Since the criterion of "directness" is fraught with imprecision, the decisions have in all probability turned on more specific factors.

## 2) *Specific factors*

### (a) *Contract theory and a member's obligation under union bylaws*

A court wishing to decide the validity of a fine may choose to examine the bylaw sanctioning the fine in an attempt to determine if it should bind the worker. Such an inquiry has often turned on the threshold question of whether the worker contracted to be bound by the rule at issue. This in turn involves a consideration of the "contract theory" of membership rights and obligations.<sup>83</sup> In the past, courts have sanctioned union discipline on the theory that an individual who joined a union entered into a "voluntary association" and contracted to abide by the association's rules and bylaws.<sup>84</sup> Today this contract theory is of limited utility in the case

---

<sup>79</sup> The legislative history of the Taft-Hartley Act indicates that a narrower role was foreseen for the proviso to § 8(b)(1)(A). It was originally enacted to guarantee the union's right to choose and expel its members without fear of an unfair labor practice charge so long as that union decision did not result in a worker's being discharged. 2 LEG. HIST. LMRA 1141-42 (remarks of Senators Taft, Pepper and Ball). This analysis of the proviso's function was apparently adopted by the Seventh Circuit in *Allis-Chalmers Mfg. Co. v. NLRB*, 2 LAB. REL. REP. (61 L.R.R.M.) 2498 (7th Cir. March 11, 1966). See notes 68-70 *supra*.

<sup>80</sup> See note 12 *supra* and accompanying text.

<sup>81</sup> See Sugarman, *Rights of the Individual Employee Under the Taft-Hartley Act*, N.Y.U. 3D CONF. ON LABOR 355, 357-58 (1950).

<sup>82</sup> See notes 36, 43, 48, 55, 60, 70 *supra* and accompanying text.

<sup>83</sup> See Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1001-07 (1930), ridiculing as artificial the theory of a separate contract for each member. *But see* Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 179-84 (1960), criticizing the contract theory but noting that it has been used by the courts to rationalize judicial interference to protect members' "contract" rights.

<sup>84</sup> See, e.g., *Local 283, UAW*, 145 N.L.R.B. 1097, 1104-05 (1964) (concurring

of a union shop since, unlike a contractual relationship, the union can *require* prospective employees to join the association and remain members in good standing as a condition of employment.<sup>85</sup> Such a context rebuts any presumption that a worker voluntarily agreed to be bound by the union rules.<sup>86</sup> The theory may have some efficacy in an agency shop situation,<sup>87</sup> however, since there theoretically exists some freedom of choice in that any worker may

---

opinion), *hearing granted sub nom. Scofield v. NLRB*, 50 CCH Lab. Cas. 32595 (7th Cir. 1964), *rev'd and remanded sub nom. UAW v. Scofield*, 382 U.S. 205 (1965); *Allis-Chalmers Mfg. Co. v. NLRB*, 2 LAB. REL. REP. (61 L.R.R.M.) 2498, 2502 (7th Cir. March 11, 1966) (dissenting opinions); *cf. UAW v. Woychik*, 5 Wis. 2d 528, 93 N.W.2d 336 (1958) (union constitutions and bylaws held to constitute a contract between union and its members in suit for collection of union fine for crossing picket line). See also *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958). "This contractual conception of the relation between a member and his union widely prevails in this country . . ." *Id.* at 618.

<sup>85</sup> A union shop is a union security agreement between labor and management of a given plant by which employees need not be union members as a condition of hiring but must join the union within a specified time, and remain members in good standing during the period of the contract. The Taft-Hartley Act imposes limits upon the use of the union shop in § 8(a)(3), which provides in part that "no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(3) (1964).

<sup>86</sup> The greater possibility of coercion under a union shop arrangement was recognized in *Bay Counties District Council of Carpenters*, 145 N.L.R.B. 1775 (1964), *rev'd and remanded sub nom. Associated Home Builders of Greater East Bay, Inc. v. NLRB*, 352 F.2d 745 (9th Cir. 1965), where the Trial Examiner at the Board level held that where the issue was *collection* of a fine through the exaction of excess dues from member paychecks, the fact that it was a union shop was a dispositive factor in determining unfair coercion since nonpayment of dues could result in discharge. 145 N.L.R.B. at 1778. This approach was adopted by the Seventh Circuit on rehearing in *Allis-Chalmers Mfg. Co. v. NLRB*, 2 LAB. REL. REP. (61 L.R.R.M.) 2498 (7th Cir. March 11, 1966), the court holding that it was an unfair labor practice to fine union members who crossed picket lines "where . . . membership is the result not of individual voluntary choice but of the insertion of a union security provision in the contract under which a substantial minority of the employees may have been forced into membership." *Id.* at 2501. *But see* the dissent in *Allis-Chalmers Mfg. Co. supra*, which indicated that in fact the union shop in question did not require employees to become members but only to pay dues and that here the complaining employees had voluntarily become members. *Id.* at 2508.

<sup>87</sup> An agency shop is an arrangement whereby employees pay "support" money to the union for the costs of representation and contract administration but are not required to maintain union membership. The practice was upheld as lawful under the Taft-Hartley Act in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); *cf. Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, *aff'd on rehearing*, 375 U.S. 96 (1963) (the state courts are to decide whether an agency shop violates a state right-to-work law).

choose to merely pay support money rather than to join the union. If a worker does join, the presumption of voluntariness would thus be un rebutted.<sup>88</sup> A similar argument as to voluntariness of a member's bylaw obligations may be made in a state which has a right-to-work law.<sup>89</sup> Since there is no requirement that membership be maintained, the worker can initially be presumed to have voluntarily joined a union.<sup>90</sup>

It is evident from the foregoing that the contract theory is both artificial and often remote from the realities of a compulsive union shop. Although the invocation of this theory has precedential underpinnings, its vitality has been vitiated by a realization of these shortcomings. The courts have thus looked to other considerations as determinative of a resolution of the validity of fining practices at issue in recent cases, although a contractual inquiry may be posed as a perfunctory initial question.

(b) *Notice, procedural due process and exhaustion*

In addition to whether a worker agreed to be bound by a union's rules, the courts have taken note of how a rule was in fact applied in each individual case. Initially, the question is one of fair notice. The member may not have realized, or been able to ascertain, that his act violated any union rule. At present, bylaws delineating activities subject to fine are often worded in general terms such as a fine for conduct unbecoming a union member.<sup>91</sup> Such

---

<sup>88</sup> It has been suggested that if the worker had been a member of a union shop rather than an agency shop the unfair labor charge may have been sustained. 1964 DUKE L.J. 638, 642.

See also *Allen Bradley Co. v. NLRB*, 286 F.2d 442 (7th Cir. 1961), where the fact that the union in question had no maintenance of membership requirement (approximating an agency shop) was not held dispositive and union fining power was limited. See notes 32-36 *supra* and accompanying text.

<sup>89</sup> Under § 14(b) of the Taft-Hartley Act, 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1964), nineteen states have, as of 1966, passed laws which prohibit union security agreements requiring membership in a labor organization as a condition of employment. These laws were upheld by the Supreme Court as constitutional in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

<sup>90</sup> See Brief for Petitioner, p. 18 n.10, *Roberts v. NLRB*, 350 F.2d 427 (D.C. Cir. 1965). It is thus arguable that in those states where union membership is not required by state law any worker who joins a union must have done so "voluntarily" and thus should be bound by the union rules. However, this approach fails to consider the possibility that, apart from state laws, certain jobs may still be performed almost exclusively by union members. Thus, if a construction worker desires work in a right-to-work state he must in some cases obtain it through a union.

<sup>91</sup> For examples of such bylaws, see Summers, *Disciplinary Powers of Unions*, 3 IND. & LAB. REL. REV. 483, 493 n.28, 505-08 (1950).

broad indictments scarcely afford adequate notice as to what constitutes such conduct. Other bylaws may set forth the offense clearly but delineate no standards for punishment.<sup>92</sup> Since both omissions open the door to arbitrary union action, a court could view either as sufficiently infirm to justify a ruling that a fine in such a situation would be an unfair labor practice.

Even if the worker is sufficiently apprised of an offense and its possible punishment, a court may decide that lack of procedural due process within the union hearing apparatus could require a finding of an unfair labor practice. In support of a requirement that procedural due process be afforded, the courts and the Board can draw support from procedural requirements set forth as an expressed standard of national labor policy in section 101 (a) (5) of the Landrum-Griffin Act.<sup>93</sup> Thus, it appears eminently proper to require union fining procedure to meet the minimum standards imposed by that section—service of specific charges, a reasonable time to prepare a defense and a full and fair hearing.

In determining whether in fact a fair hearing was provided, a court might also consider past indications of member-union friction. Thus, in *Roberts v. NLRB*<sup>94</sup> the fact that the fined member had previously represented an opposition candidate in a union election and had attempted to postpone Roberts' installation as president may have influenced the court in concluding that it would have been futile for the member to continue his union appeals and that a fine for failing to continue to seek redress through intra-union channels was an unfair labor practice.<sup>95</sup>

(c) *The amount of the fine*

The amount of the fine may also be influential in a judicial decision as to its validity. The less the amount the more likely it is that a court will either find that the fine is not "coercive" under section 8 (b) (1) (A) or will characterize it as a permissible "internal rule" falling within the proviso. Thus, a one dollar fine for missing

---

<sup>92</sup> As of 1961, 75 unions had no enforcement machinery for fine collection. Dep't Labor Bull. No. 1350, at 12. This may indicate that implicit in the imposition of fines is the existence of measures to compel compliance.

<sup>93</sup> 73 Stat. 522 (1959), 29 U.S.C. § 411 (a) (5) (1964). See note 24 *supra*.

<sup>94</sup> 350 F.2d 427 (D.C. Cir. 1965).

<sup>95</sup> The court explicitly limited its "approval of the Board's construction of its powers to the case before us, where the fine was not imposed because of the member's harassing conduct as a member . . ." *Id.* at 430.

a meeting is justifiable as promoting a legitimate union interest in asserting its authority to promote internal discipline.<sup>96</sup> However, a 500 dollar fine for the same offense would in all likelihood cause a court to conclude that the union had coercively transgressed the bounds of internal rules and committed an unfair labor practice. A second consideration which may be implicitly relevant is whether the amount of the fine is equated with the worker's ability to pay. Thus, a 500 dollar fine might be acceptable if applied to an international union president whereas it would not be if it were applied to a worker earning thirty-two dollars per week.<sup>97</sup>

(d) *Collection of the fine*

It might also be relevant and instructive for the Board or reviewing court to consider whether the procedures for collection might comprise an independent violation of the Taft-Hartley Act. Prior to 1947, given a closed-shop situation, the normal method of fining enforcement was by threatening expulsion from the union, which would in turn mean loss of employment. With the passage of the Taft-Hartley Act, this enforcement method was foreclosed by the virtual elimination of the closed shop. Section 8 (b) (2) precluded union collection of a fine through the conduit of causing or attempting to cause an employer to discriminate against an employee for failure to pay union obligations other than normal dues and initiation fees.<sup>98</sup> When the union attempted to utilize the device of applying money paid for dues or initiation fees to fines, section 8 (b) (2) was also applied to preclude such collections as unfair

---

<sup>96</sup> Cf. *De Mille v. American Fed'n of Radio Artists*, 175 P.2d 851 (Cal. Dist. Ct. App. 1946), *aff'd*, 31 Cal. 2d 139, 187 P.2d 769 (1947), *cert. denied*, 333 U.S. 876 (1948).

<sup>97</sup> See *McGinley v. Milk & Ice Cream Salesmen Union*, 351 Pa. 47, 40 A.2d 16 (1945), where union members were fined \$1000 for theft and forgery of cards sent out to ascertain member preferences regarding an appointive office. The court observed that the fine amounted to expulsion, since the average earnings of the members fined were thirty-two dollars a week and the fines were ordered to be paid within seven days.

See also *Rubens v. Weber*, 237 App. Div. 15, 260 N.Y.S. 701 (1932) (\$1000 fine by musicians union imposed upon prominent member for violating minimum wage scale upheld).

<sup>98</sup> Section 8 (b) (2) provides: "(b) It shall be an unfair labor practice for a labor organization or its agents— . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . . or 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 . . . ." 61 Stat. 141 (1947), 29 U.S.C. § 158 (b) (2) (1964).

labor practices.<sup>99</sup> Other union attempts to enforce fines, such as terminating insurance plans or refusing to process grievances, have also resulted in successful prosecution of unfair labor charges.<sup>100</sup>

Recently, the unions have attempted to skirt problems of collection engendered by Taft-Hartley by instituting suits in state courts on the theory that a member's obligations under a membership contract enables the union to collect fines as a debt.<sup>101</sup> This approach has met with limited success, but some courts have required a bylaw provision stipulating collection procedures which may be judicially enforced.<sup>102</sup> It would seem that only in such a situation could the "membership contract" analogy be interposed as apposite precedent for enforced collection. Enactment of a bylaw which would characterize the fine as a contractual obligation might, in situations other than a union shop context,<sup>103</sup> be an efficacious method of enforcement. However, other impediments to collection on a debt theory may be forthcoming. If a union successfully sues in a state court for a judgment and subsequently attempts to collect by garnishing the employee's wages, this might provide a pretext for the employer to discharge the worker as a bad debt risk. Such action might lay both the union and the employer open to unfair labor practice charges because functionally, this action could be viewed as a union-induced discharge for failure to pay a union-imposed obligation other than dues or initiation fees.<sup>104</sup>

<sup>99</sup> See, e.g., *Journeyman Plasterers' Protective & Benevolent Soc'y v. NLRB*, 341 F.2d 539 (7th Cir. 1965) (unfair labor practice to demand reinstatement fee which in fact was a guise to recover fine); *NLRB v. National Automotive Fibres, Inc.*, 277 F.2d 779 (9th Cir. 1960) (per curiam) (discharge of employee for failure to pay fines constitutes an unfair labor practice); *Pen & Pencil Workers Union*, 91 N.L.R.B. 883 (1950) (unfair labor practice for union to coerce the discharge of a worker for failure to pay union fine). As of 1961, however, eight union constitutions tied fines to dues by stipulating that the payment of fines had to precede payment of dues. Another eight union constitutions defined fines and assessments to mean dues. Dep't Labor Bull. No. 1350, at 13.

<sup>100</sup> See, e.g., *Local 479, Amalgamated Clothing Workers*, 151 N.L.R.B. No. 65, 58 L.R.R.M. 1439 (1965) (union committed unfair practice under § 8(b)(1)(A) by threatening employees with loss of insurance benefits unless they paid fines for non-attendance at meetings).

<sup>101</sup> See, e.g., *United Glass Workers v. Seitz*, 65 Wash. 2d 619, 399 P.2d 74 (1965) (collection denied—only provision in union bylaws for enforcing recovery of fine was by suspension); *Local 756, UAW v. Woychik*, 5 Wis. 2d 528, 93 N.W.2d 336 (1958) (collection of one dollar fines for failure to picket upheld by court); cf. *Buscarellò v. Guglielmelli*, 60 L.R.R.M. 2009 (N.Y. Sup. Ct. 1965).

<sup>102</sup> See cases cited note 101 *supra*.

<sup>103</sup> See notes 83-90 *supra* and accompanying text.

<sup>104</sup> *But see* 58 L.R.R.M. 59-60 (1965), containing the NLRB General Counsel's report which found no violation in a union's garnishment of wages to collect state

(e) *Alternatives to fining*

A final consideration is whether specific disciplinary situations present reasonable alternatives for the union which would make the use of the fine unnecessary as a means of membership control. In the context of the closed shop, expulsion was at one time considered more severe than fining since it entailed the probable loss of job and union benefits as well as the normal deprivation of social contacts and friends.<sup>105</sup> Presently, however, the expulsion power may be only an illusory right in the hands of the union. It does remove the member from meetings, but the union still must represent the worker and, due to Taft-Hartley safeguards, cannot demand his discharge. Moreover, it has been argued with some efficacy that there is little social solidarity left in modern unionism.<sup>106</sup>

Alternative means of discipline, such as refusing to provide references for members or denying seniority rights, are often infirm in that they may in themselves constitute independent violations of section 8 (b) (1) (A).<sup>107</sup> Fining is superior to these methods, for with few exceptions<sup>108</sup> it does not run afoul of the restrictions placed on coercing employees to discriminate. At the same time, because a fine is a measured form of discipline, it lends itself to written presentation in specific bylaws. This characteristic makes it easier for the union to overcome the problems of notice to the worker<sup>109</sup>

---

court judgment following a suit to collect a fine and a subsequent discharge of the employee because of an employer policy against garnishments. This finding may be limited by the facts for the employer was able to produce evidence that (1) other attachments had been levied against the employee; (2) he had a poor record of attendance; (3) the worker had been suspended once for insubordination and had given false information on an employment form concerning a past arrest.

<sup>105</sup> See Summers, *Disciplinary Procedures of Unions*, 4 IND. & LAB. REV. 15, 28 (1950).

<sup>106</sup> See SULTAN, *THE DISENCHANTED UNIONIST* (1963), where the differences between modern unionism and the past are highlighted. "The contrast can be partially grasped if one listens to the lyrics of union ballads, songs inspired by the struggles of the thirties and earlier decades, but now a matter of historical curiosity for the coffee house set . . . . The strike is no longer symbolized by beams and bricks . . . . The table pounding and purple prose are giving way to the professional and his dry statistics." *Id.* at vii-viii.

<sup>107</sup> See, e.g., *NLRB v. Hod Carriers Union*, 351 F.2d 151 (9th Cir. 1965) (union violated § 8 (b) (1) (A) by wrongfully refusing to refer union member); *NLRB v. Teamsters Union, Local 41*, 225 F.2d 343 (8th Cir. 1955) (denial of seniority rights cannot be utilized for disciplinary purposes); *Local 542, Int'l Union of Operating Eng'rs*, 139 N.L.R.B. 1169, 1174 (1962), *aff'd*, 328 F.2d 850 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964) (union violated § 8 (b) (1) (A) by blacklisting employees who had crossed picket line during a strike).

<sup>108</sup> See note 104 *supra* and accompanying text.

<sup>109</sup> See notes 91-93 *supra* and accompanying text.

and at the same time sets forth standards which will aid a court in reviewing possible abuses of regularized procedures.

#### PROBLEMS OF PREEMPTION AND PRIMARY JURISDICTION

A problem which is inherent in the context of judicial expansion of section 8 (b) (1) (A) to cover union fining is that of assigning this development a proper niche within the scheme of national labor regulation. In *San Diego Bldg. Trades Council v. Garmon*<sup>110</sup> the Supreme Court held that

when an activity is arguably subject to § 7 or § 8 of the [Taft-Hartley] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.<sup>111</sup>

However, the *Garmon* Court also recognized that a state could regulate an activity that was a merely "peripheral concern" of the Taft-Hartley Act.<sup>112</sup> The source of this "peripheral concern" exception was *International Ass'n of Machinists v. Gonzales*,<sup>113</sup> where the Court had allowed a state court to reinstate an expelled member even though "wooden logic" would have required preemption under Taft-Hartley.<sup>114</sup> The Court had reasoned in *Gonzales* that since the proviso to section 8 (b) (1) (A) *precluded* a remedy through federal law,<sup>115</sup> the union member would be without a remedy if the state court were precluded from acting.<sup>116</sup> The potential conflict with Taft-Hartley was thus considered to be too contingent and too remote to justify preemption.<sup>117</sup>

In 1959, union internal affairs were specifically regulated for the first time by title I of the Landrum-Griffin Act.<sup>118</sup> This regu-

---

<sup>110</sup> 359 U.S. 236 (1959). The Court held that a state court was precluded by preemption from awarding damages to employers under a state law for injuries resulting from a picketing of their plant by a minority union.

<sup>111</sup> *Id.* at 245.

<sup>112</sup> *Id.* at 243.

<sup>113</sup> 356 U.S. 617 (1958).

<sup>114</sup> *Id.* at 619.

<sup>115</sup> *Id.* at 620. The Court cited no cases supporting this proposition, stating that "the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied." *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> *Id.* at 621.

<sup>118</sup> At the time of the passage of the Landrum-Griffin Act, Congress apparently

lation consisted of guaranteeing a narrow spectrum of rights closely approximating the constitutional rights of free speech, equal protection and due process.<sup>119</sup> The *primary* duty to enforce these provisions was given to the federal district courts<sup>120</sup> while at the same time, to avoid possible preemption problems,<sup>121</sup> the states were guaranteed concurrent jurisdiction.<sup>122</sup>

The recent decision to review fines under section 8(b)(1)(A) raises both the problem of preemption under the *Garmon* rule and the possibility of substantive overlap with the Landrum-Griffin provisions. Arguably, under the strict *Garmon* rule, once fining has been raised to the status of a "primary concern" all fining cases must be reviewed in the first instance by the Board.<sup>123</sup> At the same time, the pervasive regulation of internal union affairs possible under an expanded version of section 8(b)(1)(A) could include within the Taft-Hartley Act's protection all of the Landrum-Griffin title I

---

thought that the Taft-Hartley Act could not deal with internal union disputes. See 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1667 (1959) containing statements of Representative McCormack that the National Labor Relations Act (Taft-Hartley) did not purport to deal with internal union disputes. The courts agreed. See, e.g., *Parks v. International Bhd. of Electrical Workers*, 314 F.2d 886, 915 n.49 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963) (holding that the Board has no power over intra-union relationships under § 7); *Robertson v. Banana Handlers Union*, 183 F. Supp. 423, 426 (E.D. La. 1960) (statement that title I of the Landrum-Griffin Act was the first federal law to protect workers against improper disciplinary actions of unions). *But see* 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1108 (1959), where Senator Kennedy argued against title I on the grounds that the rights were more satisfactorily provided under state law and the existing Taft-Hartley provisions.

<sup>119</sup> See notes 22-24 *supra* and accompanying text.

<sup>120</sup> See note 27 *supra* and accompanying text.

<sup>121</sup> Senator Kennedy had raised the problem of preemption of state laws as a major argument against title I. 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1108 (1959).

<sup>122</sup> Section 103 provides: "Nothing in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization." 73 Stat. 523 (1959), 29 U.S.C. § 413 (1964).

<sup>123</sup> Many state courts relied on the "peripheral concern" exception as a basis for asserting independent jurisdiction. See, e.g., *Retail Clerks v. Christiansen*, 67 Wash. 2d 29, 406 P.2d 327 (1965) (per curiam); *Division 1478, Amalgamated Ass'n of Street Employees v. Ross*, 2 LAB. REL. REP. (61 L.R.R.M.) 2687 (March 8, 1966). *But see* *Local 248, UAW v. Wisconsin Employment Relations Bd.*, 11 Wis. 2d 277, 105 N.W.2d 271 (1960), *cert. denied*, 365 U.S. 878 (1961); *Wisconsin Employment Relations Bd. v. Lodge 78, Int'l Ass'n of Machinists*, 11 Wis. 2d 292, 105 N.W.2d 278 (1960), *cert. denied*, 365 U.S. 878 (1961). Both of the latter cases were decided on the basis that *Allen Bradley* indicated that union fining might not be within the peripheral concern exception to preemption.

rights.<sup>124</sup> This result impedes the effectiveness of the jurisdictional grant under the Landrum-Griffin Act.

At least in regard to those cases specifically covered by the Landrum-Griffin provisions it seems reasonable to conclude that Congress expressly precluded application of the preemption doctrine. Thus a suit alleging a violation of any right accorded under the Landrum-Griffin Act is within the jurisdiction of both the federal district courts and the state courts even though it might also overlap with a section 8 (b) (1) (A) proceeding before the NLRB.<sup>125</sup> But where a union fine does not give rise to a cause of action under the Landrum-Griffin Act the *Garmon* rule would seem to demand that both the state courts and the federal district courts yield to the primary jurisdiction of the Board. Under this approach a union fine for drunkenness at a meeting, for political activity, or for other off-the-job activities regulated by Landrum-Griffin<sup>126</sup> would be under the concurrent jurisdiction of the NLRB, the federal courts and the state courts, the latter of which already have expertise in the area. Union fines which impinge on working conditions such as production quotas, fines for non-picketing, non-striking, or other situations which could be called "terms and conditions of employment"<sup>127</sup> constitute areas which could proximately affect collective

---

<sup>124</sup> Thus the effect is to come full circle in the protection of member's rights. At the time of the passage of the Landrum-Griffin Act the Board decision in *Minneapolis Star & Tribune Co.*, 109 N.L.R.B. 727 (1954), seemed to indicate that Taft-Hartley could not be used to protect workers thus necessitating the passage of specific regulations.

However, as pointed out in note 27 *supra*, Landrum-Griffin has been criticized because a plaintiff must provide his own counsel. The availability of a remedy under the familiar Board procedures would redress the problem.

<sup>125</sup> *Cf. Rekant v. Shochtay-Gasos Union Local 446, Amalgamated Meat Cutters*, 320 F.2d 271 (3d Cir. 1963). The court broadly stated that Landrum-Griffin was an "explicit Congressional declaration . . . establish[ing] that the district court is competent to retain jurisdiction of a Section 101 (a) (5) suit even when elements of the case are arguably subject to the Board's jurisdiction." *Id.* at 275. The facts of the case may limit the statement to dicta, however, for the plaintiff had unsuccessfully filed charges with the Board prior to going to the district court. *Id.* at 273. Thus, if the court had stated it was preempted, the member would have been remediless. In fact, the court held that § 101 (a) (5) did not cover the plaintiff's disciplinary situation.

<sup>126</sup> See notes 22-24 *supra* indicating the rights protected under the Landrum-Griffin Act. The distinction between Landrum-Griffin and Taft-Hartley rights is dependent upon the interpretation given to Landrum-Griffin by the courts. At present the emerging case law indicates that the protection granted to members under title I has been narrowly construed. See, *e.g.*, *Calhoun v. Harvey*, 379 U.S. 134 (1964); Comment, 13 U.C.L.A.L. REV. 335 (1966).

<sup>127</sup> In effect, although the terminology "terms and conditions of employment" is

bargaining peace and thus should be subject to uniformity of scrutiny and decision. Such fines should thus fall within the exclusive domain of the Board.

### *Conclusion*

The cases illustrate that the Taft-Hartley Act has expanded its area of concern into the problem of union discipline. Spurred by the passage of the Landrum-Griffin Act, the Board and the reviewing courts have discovered that the effectuation of national labor policies make requisite that union members be afforded greater protection against arbitrary action. The courts and to a lesser extent the Board have evinced an increasing unwillingness to bestow *carte blanche* powers of discipline upon the unions, reasoning that a union-member relationship should rest upon consent rather than coercion. Whereas coercion was previously defined to include only the most blatant cases of violence and coerced employer discrimination, there seems to be a discernable progression toward limiting the lesser forms of discipline such as fining.

It appears that section 8 (b) (1) (A) may be wielded as an especially effective tool in the regulation of union fining if its permissive proviso, which has previously shielded fines which were in accordance with union bylaws, is given a narrow interpretation. Once immunity under the proviso is vitiated in a given situation, the best approach to the resolution of fining issues appears to be a case-by-case assessment of peculiarly relevant factors, avoiding broad policy decisions until more expertise in the area of fining is gained.

---

borrowed from *Associated Home Builders of Greater East Bay, Inc. v. NLRB*, 352 F.2d 745, 750 (9th Cir. 1965), where it was applied in a § 8 (b) (1) (A) sense, the test would approximate that already in existence in the preemption field under *Local 100, United Ass'n of Journeymen v. Borden*, 373 U.S. 690, 697 (1963); *Local 207, Int'l Ass'n of Bridge Workers Union v. Perko*, 373 U.S. 701 (1963). The ruling on that case was to the effect that Taft-Hartley preemption should apply when the "crux" of the suit involved the worker's employment relations. For a recent application of this test by a state court, see *Directors Guild of America, Inc. v. Superior Ct.*, 48 Cal. Rptr. 710, 409 P.2d 934 (1966), where the state court ruled that it was without jurisdiction to hear a similar case.