

**DETERMINING THE REASONABLENESS OF
FINES IMPOSED ON UNION MEMBERS:
THE ROLE OF NLRB**

In 1947 Congress amended section 7 of the National Labor Relations Act (NLRA)¹ to include the right of employees to refrain from engaging in organizational or concerted activities.² Congress also added section 8(b)(1)(A),³ which prohibits any “restraint or coercion” by a union of employees in the exercise of their section 7 rights. This provision was hedged, however, by a proviso “[t]hat . . . [section 8(b)] shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.”⁴ Thus, a union rule which restricts or forbids conduct protected by section 7 becomes an unfair labor practice *unless* the union can demonstrate that (1) the rule and its enforcement fall within the proviso, or (2) the regulation and the sanction used to enforce the union rule do not “restrain or coerce” the employee in the exercise of his section 7 rights. Since expulsion and fines enforceable by expulsion fall within the proviso, such sanctions usually do not constitute unfair labor practices.⁵ Further, in *NLRB*

1. 29 U.S.C. §§ 151-68 (1970).

2. Section 7 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid 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). . . *Id.* § 157 (emphasis added).

3. Section 8(b)(1)(A) provides:

(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 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.

Id. § 158(b)(1)(A).

4. *Id.*

5. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 198 (1967) (concurring opinion). The NLRB has declared expulsion unlawful in limited circumstances. *See NLRB v. Industrial Union of Marine Workers*, 391 U.S. 418 (1968); *Local 138, Int'l Union of Operating Engineers (Charles Skura)*, 148 N.L.R.B. 679 (1964). For the prerequisites of a lawful fine, see *Scotfield v. NLRB*, 394 U.S. 423, 430-31 (1969).

v. Allis-Chalmers Manufacturing Co.,⁶ the Supreme Court held that fines enforced by court judgments were not within the meaning of "restraint or coercion" covered by section 8(b)(1)(A).⁷

The Court in *Allis-Chalmers* was not presented with the issue of whether a fine imposed pursuant to a valid union rule may nevertheless violate section 8(b)(1)(A) because it is unreasonably large.⁸ The NLRB and two circuit courts of appeals have considered this question, however, and have arrived at opposite conclusions.⁹ Ac-

6. 388 U.S. 175 (1967), noted in 32 ALBANY L. REV. 256 (1967); 20 BAYLOR L. REV. 353 (1968); 9 B.C. IND. & COM. L. REV. 221 (1967); 33 MO. L. REV. 290 (1968); 29 OHIO ST. L.J. 260 (1968); 21 SW. L.J. 703 (1967); 19 SYRACUSE L.J. 177 (1967); 36 U. CIN. L. REV. 709 (1967); 70 W. VA. L. REV. 109 (1967).

For more extensive discussions of the holding in *Allis-Chalmers* and its implications for union discipline, see Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067; Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 GEO. WASH. L. REV. 187 (1969); Note, *Labor Policy: Judicial Enforcement of Fines After Allis-Chalmers*, 53 CORNELL L. REV. 1094 (1968).

7. 388 U.S. at 186-92. The Court recognized that the union rule against strike-breaking did deter members from exercising their section 7 right to refrain from concerted activity. However, because effective use of labor's "cherished strike weapon," *id.* at 183, is so essential to balancing the strengths of management and labor, five members of the Court were able to agree that such a fine was not the type of "restraint or coercion" prohibited by section 8(b)(1)(A). *Id.* at 186-92. To reach this conclusion the Court observed that where a union is strong and membership therein valuable, expulsion constitutes a greater sanction than a reasonable fine. *Id.* at 192. However, a union should not, during the stressful period of a strike, be made to choose between toleration of conduct inimical to its interests or depletion of its ranks to enforce its rule. Thus, "there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of § 7 rights, nevertheless intended to bar enforcement by another method which may be far less coercive." *Id.* at 198 (concurring opinion). Since literal application of the "imprecise words 'restrain or coerce'" would dictate an opposite and "extraordinary" result, *id.* at 184, the Court concluded that resort to the legislative history to determine the meaning of the language of section 8(b)(1)(A) was not foreclosed. From that history it was clear to the Court that the prohibition was aimed at coercive union tactics employed in the course of organizational campaigns and did not purport to regulate the internal affairs of *already organized unions*. *Id.* at 186-91.

8. 388 U.S. at 193 n.30. *Accord*, *Scofield v. NLRB*, 394 U.S. 423, 430 (1969). Although the NLRB's General Counsel argued this issue before the trial examiner, the issue was not passed on by the Board or the court of appeals, and was not argued before the Court in *NLRB v. Granite State Joint Bd., Local 1029*, — U.S. —, — n.8 (1972) (Blackmun, J., dissenting).

9. *Local 504, Machinists (Arrow Development Co.)*, 185 N.L.R.B. No. 22, 75 L.R.R.M. 1008 (1970), *rev'd sub nom. O'Reilly v. NLRB*, 472 F.2d 426 (9th Cir. 1972); *Morton Salt Co.*, 190 N.L.R.B. No. 32, 77 L.R.R.M. 1100 (1971), *rev'd*, 472 F.2d 416 (9th Cir. 1972); *Booster Lodge No. 405, Machinists*, — N.L.R.B. —,

ording to the NLRB, the *amount* of the fine is irrelevant to whether its imposition constitutes an unfair labor practice. The only function of the NLRB is to determine whether a fine is permissible in the context of the unfair labor practice proceeding, and the task of deciding whether the amount of the particular fine is reasonable should be left to the state courts.¹⁰ In *Booster Lodge No. 405, Machinists v. NLRB*,¹¹ the Court of Appeals for the District of Columbia Circuit rejected the NLRB's argument and directed the Board to determine the reasonableness of the fine. The Supreme Court has granted certiorari to consider this question.¹²

The NLRB's argument on the irrelevancy of the amount of the fine was best stated in *Local 504, Machinists (Arrow Development Co.)*.¹³ The Board pointed out that the Court in *Allis-Chalmers* was unable to find any evidence that Congress was concerned with the excessiveness of union fines in drafting section 8(b)(1)(A)¹⁴ and that the Court had concluded fines simply were not the type of coercion prohibited by section 8(b)(1)(A).¹⁵ Given the holding that Congress did not undertake to regulate union fines imposed on members who failed to honor a picket line, the Board reasoned that Congress could not have intended for the Board to regulate the severity of the fines or establish standards with respect to their enforceability.¹⁶ Further, the NLRB noted that, since the legal enforce-

— L.R.R.M. —, *rev'd*, 459 F.2d 1143 (D.C. Cir.), *cert. granted*, 41 U.S.L.W. 3346 (U.S. Dec. 18, 1972).

10. *Local 504, Machinists (Arrow Development Co.)*, 185 N.L.R.B. No. 22, 75 L.R.R.M. 1008, 1010-11 (1970), *rev'd sub. nom.*, *O'Reilly v. NLRB*, — F.2d — (9th Cir. 1972).

11. 459 F.2d 1143 (D.C. Cir. 1972).

12. 41 U.S.L.W. 3346 (U.S., Dec. 18, 1972).

13. 185 N.L.R.B. No. 22, 75 L.R.R.M. 1008 (1970), *rev'd sub nom.*, *O'Reilly v. NLRB*, 472 F.2d 426 (9th Cir. 1972). *See also* *Morton Salt Co. v. NLRB*, 472 F.2d 416, 423 (9th Cir. 1972) (dissenting opinion of Browning, J.).

14. 185 N.L.R.B. No. 22, 75 L.R.R.M. at 1010, *citing* *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 192-93 (1967).

15. 185 N.L.R.B. No. 22, 75 L.R.R.M. at 1010.

16. *Id.* The Board also noted that

Where Congress desires that the Board make this type of determination, it has said so. Thus, Section 8(b)(5) of the Act authorizes the Board to decide whether or not initiation fees charged of employees required to join a labor organization under a union-security clause are excessive and discriminatory.

Id. at 1010 n.19.

Judge Browning, dissenting in *Morton Salt Co. v. NLRB*, 472 F.2d 416, 423 (9th Cir. 1972), advanced a similar argument. He noted that when Congress passed the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 401-

ability of fines was “grounded in contract theory,”¹⁷ the logical tribunals for assessing the reasonableness of fines were the local courts.¹⁸ The Board claimed support for its position in the Supreme Court’s judicial notice of the fact that “the state courts in reviewing the imposition of union discipline find ways to strike down ‘discipline [which] involves a severe hardship.’”¹⁹ Thus, the repeated references to *reasonable* fines in *Allis-Chalmers* and succeeding Supreme Court cases should be regarded merely as directions to the state courts to make an independent determination of the reasonableness of the particular fine sought to be enforced.²⁰

The *Booster Lodge* court interpreted these references to reasonableness differently. Stating that the Board’s position was based upon “a clear misconception of the law and the Supreme Court’s relevant decisions,”²¹ the *Booster Lodge* opinion laid heavy emphasis on the frequency with which the term “reasonable” modified “fine” in *Allis-Chalmers* and in the more recent decision of *Scofield v. NLRB*.²² The court of appeals viewed the reference in *Allis-Chalmers* to a fine being a lesser penalty than expulsion as a clear implication that a fine’s legitimacy depended on its status as a *milder* reme-

531 (1970), regulating internal union discipline, it vested enforcing authority in the Department of Labor and the federal courts (preserving state remedies), but not in the Board. 472 F.2d at 426 n.4. See LMRDA §§ 103, 603(a), *id.* §§ 413, 523(a).

17. 185 N.L.R.B. No. 22, 75 L.R.R.M. at 1010. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191-92 (1967) (commenting on the enactment of NLRA): “Congress was operating within the context of the ‘contract theory’ of the union-member relationship which widely prevailed at that time.” See also *Scofield v. NLRB*, 394 U.S. 423, 426 n.3 (1969) (“[R]egulation of the relationship between union and employee is a contractual matter governed by local law”); Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1007-08 (1930).

18. 185 N.L.R.B. No. 22, 75 L.R.R.M. at 1010.

19. *Id.*, citing *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193 n.32 (1967) (the Supreme Court had cited *Summers, Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1078 (1951)).

20. 185 N.L.R.B. No. 22, 75 L.R.R.M. at 1010.

21. 459 F.2d at 1156.

22. 394 U.S. 423 (1969). The word “reasonable” is frequently used in both the *Scofield* and *Allis-Chalmers* opinions. See *id.* at 423, 428, 430, 436; 388 U.S. at 175, 180, 181, 183, 192. However, the references could refer to the procedures for imposing the fines and the purposes for which the fines are imposed, as opposed to the *amount* of the fine. See Schlossberg & Lubin, *Union Fines and Union Discipline Under the National Labor Relations Act*, 23 N.Y.U. CONF. ON LABOR 207, 216-18 (1971). It is interesting to note that in *NLRB v. Granite State Joint Bd.*, Local 1029, — U.S. — (1972), the most recent Supreme Court case dealing with the enforceability of union fines, the majority and concurring opinions do not speak of reasonable fines at all. The longer dissent barely mentions reasonableness. *Id.* at —.

dy.²³ Thus a harsh fine, which is *more* severe than expulsion, would be an unfair labor practice.²⁴ Since according to *Booster Lodge* an excessive fine violates sections 8(b)(1)(A), the Board's duty to examine the reasonableness of fines was clear;²⁵ the fact that "state courts have been adjudicating internal union disputes for more than 60 years"²⁶ did not relieve the Board of its duty to adjudicate and remedy unfair labor practices.

The *Booster Lodge* opinion buttressed its legal arguments with a discussion of policy reasons that favor NLRB review of the reasonableness of union fines. Requiring the NLRB to adjudicate the reasonableness of fines would promote promulgation of uniform national labor standards.²⁷ Further, because the expenses of litigation before the Board are borne by the agency, a union member is less likely to be dissuaded from the exercise of his rights by the costs of litigation in the state courts.²⁸ The D.C. Circuit indicated that the Board's experience in the related area of determining reasonableness of initiation fees would be helpful in making similar decisions with respect to fines.²⁹ The Board's assertion, that to require it to deter-

23. 459 F.2d at 1156, citing *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191-92 (1967).

24. *Id.*

25. Section 10(a) of the NLRA provides:

The Board is empowered, . . . to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise 29 U.S.C. § 160(a) (1970).

This section is, of course, only a grant of power, not a command. However, the Supreme Court has held that, with some exceptions, the NLRB's jurisdiction to decide issues involving sections 7 or 8 is plenary. See, e.g., *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). See notes 31-33 *infra* and accompanying text.

26. 459 F.2d at 1157, quoting Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960).

27. 459 F.2d at 1158. The NLRB, of course, has some possible policy arguments as well. Potential responsibility for examining the reasonableness of all fines is a frightening prospect to a Board which is already worried about its work load. See Fanning, *Can We Make the NLRB Work More Effectively?*, 23 N.Y.U. CONF. ON LABOR 101 (1971). The Board may also be concerned lest it appear to unions to be a hostile policeman rather than a trustworthy and neutral arbiter. See Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 GEO. WASH. L. REV. 187, 197-98 (1969).

28. 459 F.2d at 1158, citing Summers, *supra* note 26, at 220.

29. 459 F.2d at 1158. Section 8(b)(5) directs the NLRB in determining the reasonableness of initiation fees, to

consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected 29 U.S.C. § 158(b)(5) (1970).

mine the reasonableness of fines might result in conflicts between the NLRB and state courts, was brushed aside as not detracting from the Board's statutory obligations.³⁰

It is unlikely that this last point will receive so abrupt a treatment in the Supreme Court, since a decision upholding the appellate court in *Booster Lodge* would raise significant preemption problems.³¹ In *San Diego Building Trades Council v. Garmon*,³² the Supreme Court held that labor controversies involving conduct *arguably* protected by section 7 or prohibited by section 8 of the NLRA were within the exclusive jurisdiction of the NLRB.³³ Thus, if a fine can become an unfair labor practice because of its size, the fine is *arguably* prohibited by section 8 of the Act pending an adjudication of its reasonableness by the NLRB. Absent such a determination by the Board, the state courts would have no jurisdiction to grant or deny enforcement.³⁴ Moreover, since there is no procedure whereby unions can get advisory opinions on possible section 8 violations,³⁵

For an example of such determinations, see *Local 1419, Int'l Longshoremen Ass'n*, 186 N.L.R.B. No. 94, 75 L.R.R.M. 1411 (1970). Cf. *NLRB v. Engineers Local 1212*, 364 U.S. 573 (1961).

30. 459 F.2d at 1157.

31. For a discussion of preemption as it relates to the issue before the Court in *Booster Lodge*, see Gould, *Some Limitations*, *supra* note 6, at 1132-36. For discussions of preemption in the field of labor-management relations, see VI THE DEVELOPING LABOR LAW 785-94 (C. Morris ed. 1971); Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassary Union Activity*, 83 HARV. L. REV. 552 (1970); Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 VA. L. REV. 1435 (1970); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972); Gould, *The Garmon Case: The Decline and Threshold of "Litigating Elucidation"*, 39 U. DET. L.J. 539 (1962); Isaacson, *Federal Pre-emption Under the Taft-Hartley Act*, 11 IND. & LAB. REL. REV. 391 (1958); Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469 (1972); Michelman, *State Power To Govern Concerted Employee Activities*, 74 HARV. L. REV. 641 (1961).

32. 359 U.S. 236 (1959).

33. *Id.* at 244.

34. Gould, *Some Limitations*, *supra* note 6, at 1135.

35. Although the NLRB does not currently issue declaratory orders in unfair labor practice proceedings, it appears to have power to do so. The NLRA provides that the Board shall have "authority . . . to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions" of the NLRA. NLRA § 6, 29 U.S.C. § 156 (1970). The APA permits agencies to issue declaratory orders to "terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e) (1970). The Board already issues such orders in jurisdictional disputes. 29 C.F.R. §§ 102.105-.110 (1972). See generally Hickey, *Declaratory Orders and the National Labor Relations Board*, 45 NOTRE DAME LAWYER 89 (1969); Note, *State Regulation of Unprotected Union Activity: Bypassing the "Arguably Subject" Test with NLRB*

the state courts could not get jurisdiction to enforce a fine unless the employee or his employer previously had challenged its legality before the Board.³⁶ But there would be little reason for a disciplined union member so to cooperate with the union in its efforts to collect the fine. Therefore, unless the Supreme Court reconsiders or makes exceptions to the *Garmon* doctrine, a decision affirming *Booster Lodge* could have the practical effect of nullifying the decision in *Allis-Chalmers*.

The alternatives open to the Court in reviewing *Booster Lodge* are clear. It could, of course, agree with the Board that reasonableness of amount is irrelevant to the question of whether a particular fine violates section 8(b)(1)(A).³⁷ But the chief arguments of the NLRB—lack of a specific congressional directive, and a narrow reading of *Allis-Chalmers*³⁸—seem weak compared to the array of legal and policy reasons advanced by *Booster Lodge* for NLRB review of reasonableness.³⁹ On the other hand, a decision which could leave unions without a remedy sanctioned by a previous Supreme Court decision is clearly unacceptable.⁴⁰ Some of the Court's prior preemption decisions have drawn fire from legislators,⁴¹ commentators⁴² and four members of the present Court,⁴³ and the Court could

Advisory Opinions, 70 YALE L.J. 441 (1961). The use of such orders has the apparent support of at least two members of the present Court. See *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 328 n.6 (1971) (dissenting opinion of Burger, C.J., & White, J.).

36. See Gould, *Some Limitations*, *supra* note 6, at 1135. Compare *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274 (1971), where the failure of the member to file an unfair labor practice charge with the Board barred him from relief in the state courts by a strict interpretation of *Garmon*.

37. See text accompanying notes 13-20 *supra*.

38. See text accompanying notes 13-20 *supra*.

39. See text accompanying notes 21-30 *supra*.

40. This assertion is particularly true where, as here, the party is denied even a forum in which to present his case. See also *Bell v. Burson*, 402 U.S. 535 (1971); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

41. For example, the decision in *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957) (requiring preemption where the Board has declined to exercise jurisdiction but has not ceded jurisdiction to a state agency) was accused of creating "a no man's land, in which there are grievous wrongs and no remedy under American jurisprudence as of this time." 105 CONG. REC. 6413 (1959) (remarks of Senator McClellan). *Guss* was further characterized as "a stench in the nostrils of justice." *Id.* at 6544 (remarks of Senator Ervin).

Congress moved swiftly to fill the "chasm created by *Guss*," *id.* at 6430 (remarks by Senator Goldwater), by enacting section 14(c) to the NLRA, requiring the NLRB to exercise jurisdiction over all labor disputes which met jurisdictional standards prevailing on August 1, 1959. 29 U.S.C. § 164(c)(1) (1970).

42. See Come, *supra* note 31, at 1437-40; Cox, *supra* note 31, at 1359-68;

use the *Booster Lodge* case as an opportunity to reassess the doctrine.⁴⁴ Alternatively, the Court could attempt to fit the concurrent right of state courts to determine reasonableness into one of the many exceptions which, according to one Justice, have left “the ‘rule’ of uniformity . . . a tattered one.”⁴⁵ A goal of both *Booster Lodge* and the preemption cases is the furtherance of a coherent national labor policy.⁴⁶ An equally important objective is that of affording unions a realistic remedy for the rights granted by *Allis-Chalmers*.

Gould, *The Garmon Case*, *supra* note 31, at 558-69; Isaacson, *supra* note 31, at 396-97; Michelman, *supra* note 31, at 645-48.

43. Both Justices Douglas and White dissented on the preemption issue in *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 318 (1972). Chief Justice Burger joined in Justice White's dissent. *Id.* at 319. Justice Blackmun agreed with both dissents. *Id.* at 332. Two members of the majority in *Lockridge*, Justices Harlan and Black, are deceased. Significantly, all four dissenting justices agreed that the preemption doctrine should not be allowed to leave a party to a labor dispute without an effective remedy. *Id.* at 303-05, 327-32. The *Lockridge* dissenters also agreed that the doctrine of preemption should not apply to member-union controversies. *Id.* at 305, 320-25.

44. A strict application of the preemption doctrine also works mischief in cases where an employer seeks to enjoin peaceful picketing. If the picketing does not violate section 8, he cannot bring an unfair labor practice charge against the union. But since the picketing may be protected activity under section 7, a state court has no jurisdiction to hear a trespass case. Thus, the employer's only remedy is to expel the pickets and risk being charged with an unfair labor practice. For a discussion of other problems with preemption, see Come, *supra* note 31. The Court could handle the preemption issue in *Booster Lodge* simply by holding that controversies between unions and their members are not within the preemption doctrine. See *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958). See also note 43 *supra*. A better course would be to fill all the lacunae created by *Garmon* by holding that preemption is inapplicable in all cases where it would deny a party an effective remedy.

45. *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 318 (1971) (dissenting opinion of White, J.). For the argument that enforcement of union fines may be excepted from a strict reading of *Garmon* because of the strong local interest and tradition of state court jurisdiction, see Gould, *supra* note 6, at 1133-34. For examples of other exceptions to the preemption doctrine, see Justice White's dissent in *Lockridge*, 403 U.S. at 310-19.

46. See *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 285-89 (1971); *Booster Lodge No. 405, Machinists v. NLRB*, 459 F.2d 1143, 1158 (1972).