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error in view of the great amount of circumstantial evidence supporting the conviction.[37] For this reason the court may not have given much thought to the question. If this case had turned on the opinion evidence, and if the court had not misconstrued two cases it thought to be good precedent, it is possible that the court would have reached a contrary result. But until the issue is reconsidered in a future case, what remains is the rule that in North Carolina an ordinary layman is qualified to give his opinion as to whether a person is under the influence of narcotics just as he has always been able to do with regard to alcohol.

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Labor Law—Expulsion From a Union as an Unfair Labor Practice

The question whether a labor union has the power to expel a member for filing an unfair labor practice charge with the National Labor Relations Board, without first exhausting internal union processes, was considered in *NLRB v. Industrial Union of Marine & Shipbuilding Workers.*[1] The United States Supreme Court, in effect, said that expulsion of a member for filing a charge with the Board, even where his job status was not affected by the expulsion, may be itself an unfair labor practice. Such conduct by a union, because it is considered to restrain and coerce union members, is prohibited by section 8(b)(1)(A) of the National Labor Relations Act, which provides:

> 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 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .[2]

Although the Act generally permits a union to control its internal matters, the Court concluded that "where a union penalizes a member for filing an unfair labor practice charge with the Board, other considerations of

[37] Circumstantial evidence has been held in many cases to support a charge of possession of narcotics. *See* Carroll v. State, 90 Ariz. 411, 368 P.2d 649 (1962); People v. Anitista, 129 Cal. App. 2d 47, 276 P.2d 177 (1954); People v. Robinson, 14 Ill. 2d 325, 153 N.E.2d 65 (1958); State v. Worley, 375 S.W.2d 44 (Mo. 1964).

[1] 391 U.S. 418 (1968).

[2] 29 U.S.C. § 158(b)(1)(A) (1964).

public policy come into play."[3] By filing a charge with the Board, a member steps beyond internal union affairs into the public domain.[4] The Court also reasoned that the language of section 101(a)(4) of the Landrum-Griffin Act[5] does not grant unions the authority to police more firmly their own membership. Rather it is a mere statement of policy that the public tribunals whose aid is invoked, at their discretion, may refuse to hear a case until the four month period has elapsed, and thus require a member to seek his remedy within the union.[6] In this decision the Court continues recent trends encouraging resort to the Board by individual union members with legitimate grievances against their union.

The facts of the case are straightforward. Edwin Holder, a member of Local 22 of the International Union of Marine and Shipbuilding Workers of America, AFL-CIO, lodged a complaint with Local 22 that its president had violated the constitution of the international. The local decided against Holder, and he did not pursue the internal union appeals procedure available to him. Instead, he filed an unfair labor practice charge with the Board based on the same alleged violations by the president he had presented to the local. Section 5 of the constitution of the international requires that any member "aggrieved by any action of . . . a local . . . shall exhaust all remedies and appeals within the Union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union." Consequently, while Holder's charge was pending before the Board, Local 22 brought proceedings against Holder alleging that he had violated this section of the international's constitution. After a hearing before Local 22, Holder was expelled from the union. The general executive board of the international upheld the local's action. Holder then filed a second charge with the Board claiming that his expulsion for filing the first charge was a violation of section 8(b)(1)(A). The Board ordered the union to reinstate Holder without any loss of status.[7] Reversing the court of

[3] 391 U.S. at 424.

[4] Roberts v. NLRB, 350 F.2d 427, 429 (D.C. Cir. 1965).

[5] 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 . . . *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. . . .

Labor-Management Reporting and Disclosure Act of 1959 § 101(a)(4), 29 U.S.C. § 411(a)(4) (1964).

[6] 391 U.S. at 428.

[7] Local 22, Marine & Shipbldg. Workers, 159 N.L.R.B. 1065 (1966).

appeals[8] and reinstating the Board's order, the Supreme Court ruled that certain issues "within the public domain" demand unimpeded access to the Board.[9]

Significantly, the Court applied the same restrictions to unions that hinder access to the Board as had previously been applied solely to employers, and stated that interpreting Congressional intent requires that attention be given to the overall scheme rather than the literal terms of a statute.[10] Though section 8(a)(4) of the Act makes it an unfair labor practice for *an employer* "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act," a similar paragraph restricting unions was deleted from the Act in conference.[11] However, the restrictions placed on unions have been compared to those placed on employers.

> Just as an employer violates the Act by resorting to restraint and coercion to restrict the rights of an employee to file a charge, so too, does a labor organization infringe the rights of employees under this law by resorting to unlawful means to prevent or restrict employees from filing charges. As such conduct by an employer violates Section 8(a)(1),[12] so does a labor organization's use of restraint or coercion violate Section 8(b)(1)(A).[13]

Furthermore, the Court has stated that it was "the intent of Congress to impose upon unions the same restrictions which the Wagner Act (the predecessor of the NLRA) imposed on employers with respect to violations of employee rights."[14] Because similar wording and legislative history indicated that sections 8(b)(1)(A) and 8(a)(1) are parallel provisions,[15] the Court construed 8(b)(1)(A) to prohibit *a union* from

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[8] Industrial Union of Marine & Shipbldg. Workers v. NLRB, 379 F.2d 702 (3d Cir. 1967).

[9] 391 U.S. at 424.

[10] See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

[11] The deleted paragraph would have made it an unfair labor practice for a union:

> to fine or discriminate against any member, or to subject him to any . . . penalty on account of his having . . . made charges or instituted proceedings against the organization or any of its officers. . . .

H.R. 3020, 80th Cong., 1st Sess. (1947). For a general discussion of the legislative history of the Act, see NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

[12] "(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 157. . . ." 29 U.S.C. § 158(a)(1) (1964) (footnote added).

[13] Local 138, Operating Eng'rs, 148 N.L.R.B. 679, 681-82 (1964).

[14] 366 U.S. 738 (1961).

[15] International Ladies' Garment Workers' Union v. NLRB, 280 F.2d 616, 620-21 & n.8 (D.C. Cir. 1960).

disciplining a member for filing a charge with the Board. One observer has stated that "[a]n individual worker gains no human rights by substituting an autocratic union officialdom for tyranny of the boss."[16]

The Board has interpreted this legislation and decided which actions constitute coercion. First, it is well settled that a fine is coercive,[17] and "the imposition of a fine by a labor organization upon a member who files charges with the Board does restrain and coerce that member in the exercise of his right to file charges."[18] Moreover, the Board has found coercion and a violation of section 8(b)(1)(A) when a union official merely warned a member that he could be fined if he complained to the Board.[19] If a fine is coercive, so is expulsion:[20]

> The ultimate penalty associated with the imposition of a fine is loss of membership in the union which may be avoided by payment of the fine. Explusion from membership leaves no room for grace. The ultimate penalty, with the loss of benefits inherent in union membership including a voice in the democratic decisions of the organization materially affecting the welfare of members, is immediate and final.[21]

Nor is the coercive nature of union expulsion limited to job retention.

> Even though a member may keep his job when expelled, his explusion causes him to suffer a detriment the apprehension of which would no doubt have a coercive effect on the membership. First of all, it is not clear what his rights would be if he quit his job to seek another. . . . Also, he has a financial stake in the strike fund, perhaps a pension fund, and other funds to which he has contributed. Further, he is denied the right to participate in the union "government." Although the union is required by law to represent him impartially . . . he has no voice in how that representation is to be conducted. In addition, there are frequently social ramifications for a non-member working among members that cannot be overlooked.[22]

Though fines and expulsion had been ruled coercive, a union was still considered protected by the proviso since these actions were believed to be matters confined to internal union affairs,[23] unless the member's status as an employee was affected:

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[16] Cox, *The Role in Preserving Union Democracy*, 72 HARV. L. REV. 609, 610 (1959).

[17] Local 113, International Ass'n of Machinists, 111 N.L.R.B. 853, 857 (1955).

[18] Local 138, Operating Eng'rs, 148 N.L.R.B. 679, 682 (1964).

[19] Local 1510, Millwright & Mach. Erectors, 152 N.L.R.B. 1374, 1377 (1965).

[20] Cannery Workers Union, 159 N.L.R.B. 843, 845 (1966).

[21] Local 22, Marine & Shipbldg. Workers, 159 N.L.R.B. 1065, 1069 (1966).

[22] Mitchell v. International Ass'n of Machinists, 196 Cal. App. 2d 796, 799, 16 Cal. Rptr. 813, 815 (Dist. Ct. App. 1961).

[23] Local 113, International Ass'n of Machinists, 111 N.L.R.B. 853, 857 (1955).

> The Act specifically provides that a labor organization may prescribe its own rules with respect to the acquisition and retention of membership. This limitation on members means, according to the courts and legislative history, that labor organizations may enforce their internal policies upon their membership as they see fit. *It is only to the extent that a labor organization seeks to impair a member's status as an employee that it may not enforce its internal rules governing membership status.*[24]

In *Local 283, UAW (Wisconsin Motors)*,[25] the union was held protected by the proviso when the imposition and collection of a fine did not affect the employment status of the member. However, *Local 138, International Union of Operating Engineers (Charles S. Skura)*[26] held that a union would violate section 8(b)(1)(A) by disciplining a member for violation of a union rule, even when the union does not interfere with the member's status as an employee. The *Skura* decision is considered an exception to the general rule.[27] The *Holder* case was also found to be within this exception, which denied unions the protection of the proviso in view of "the overriding public interest involved,"[28] but required that the member not be engaged in any activities that "attack the very existence of the union,"[29] such as filing a decertification petition with the Board.

The Court also ruled in *Holder* that the "exhaustion of remedies" provision of section 101(a)(4) of the Landrum-Griffin Act does not protect a union that expels a member for filing charges with the Board. Two possible interpretations of this section had been offered earlier.[30] The first was that this provision permits a union to force compliance with provisions in its constitution that require a member to exhaust

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[24] NATIONAL LABOR RELATIONS BOARD, TWENTY-NINTH ANNUAL REPORT 84-85 (1964) (emphasis added).

[25] 145 N.L.R.B. 1097 (1964). *See* Note, *Judicial Enforcement of Labor Union Fines in State Courts*, 46 N.C.L. REV. 441 (1968).

[26] 148 N.L.R.B. 679 (1964). *See* Comment, *Union Fining As an Unfair Labor Practice Under Section 8(b)(1)(A)*, 1966 DUKE L.J. 717; 65 COLUM. L. REV. 1108 (1965).

[27] Local 4028, United Steelworkers, 154 N.L.R.B. 692, 696 (1965); Tawas Tube Prod., Inc., 151 N.L.R.B. 46, 47 (1965). For other cases considered to be within the exception, see Local 307, Philadelphia Moving Picture Mach. Operator's Union, 159 N.L.R.B. 1614 (1966); Local 585, Painters, Decorators & Paperhangers, 159 N.L.R.B. 1362 (1966); Local 22, Marine & Shipbldg. Workers, 159 N.L.R.B. 1065 (1966); Cannery Workers Union, 159 N.L.R.B. 843 (1966); Local 925, Operating Eng'rs, 148 N.L.R.B. 674 (1964).

[28] Cannery Workers, 159 N.L.R.B. 843, 847 (1966).

[29] Tawas Tube Prod., Inc., 151 N.L.R.B. 46, 48 (1965).

[30] Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 839 (1960).

all internal channels before seeking outside help. This was considered to be against public policy. The second interpretation was that courts and administrative agencies have the power to wait until the labor organization has had an opportunity to remedy any injustice that may have occurred within its own system.[31] However, in *Holder* the Court stated that there is no "justification to make the public process wait until the member exhausts internal procedures plainly inadequate."[32] Furthermore, only a disinterested tribunal, such as the Board, can properly balance the adequacy of the union procedures against the public interest. "If the member becomes exhausted, instead of the remedies, the issues of public policy are never reached and the airing of the grievance never had."[33]

The impact of the *Holder* decision extends beyond technical modification in the construction of statutory terms. It represents a shift in the judiciary's attitude toward labor policy. Earlier concepts of unionism were often overly restrictive. For instance, the contract theory of union membership, widely held when section 8(b)(1)(A) was enacted,[34] views membership in a union as a contract between the individual member and the union. The judiciary, always reluctant to interfere with a contractual relationship absent a breach, often refused to consider intra-union matters for this reason. Similarly, courts have hesitated to interfere in the internal affairs of voluntary associations, a reluctance stemming from the frustrating judicial experience of trying to settle disputes within religious and fraternal organizations.[35] While this traditional attitude may remain, labor unions today hardly resemble the voluntary associations of the past. They enjoy exclusive powers granted by government and a high degree of internal organization. Thus with *Holder* there is a further erosion of the traditional philosophy of non-intervention in internal union affairs.

Furthermore, the elimination of an apparently required four month waiting period[36] and the decision that a union cannot restrict access to

[31] *Id.* at 839.
[32] 391 U.S. at 425.
[33] *Id.* at 425.
[34] NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 182-83 (1967).
[35] Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1050-51 (1951).
[36] Benjamin Aaron, Acting Director of the Institute of Industrial Relations at the University of California, stated less than a year after the passage of the Landrum-Griffin Act:

Section 101(a)(4) thus wisely includes a proviso requiring a union mem-

the Board by the expulsion of a member expand the jurisdiction and power of the Board and encourage resort to its aid. The extent of jurisdiction, obviously, often controls the scope of the agency's influence, and thus its effectiveness. The broader the Board's jurisdiction, the easier it can effect its policies; the narrower, the more difficult. In *Holder*, the Court upheld the Board's expansion of jurisdiction, thus accomplishing a principal objective of labor policy—prompt access to administrative agencies.[37]

Because of the expected increase in traffic, resulting from the expansion of jurisdiction, the Board may be able to more firmly regulate those practices of the unions tending to repress the individual rights of the members. This decision should promote a modernization of the internal union proceedures, for if the union machinery is cumbersome and slow to react to the needs of the members, they will by-pass the union and seek a remedy with the Board. To off-set this trend, the unions will have to streamline their internal systems so that there will be no need to resort to the Board.

A third effect may be found in the attitudes of the individual union members. Possibly greater democratization of unions themselves might follow, as open disagreement with union officials without fear of expulsion leads to greater member participation in union decisions on all levels. The Court's decision in this case is one step closer to the attainment of union democracy.

ALEXANDER P. SANDS

Real Property—Disposition of Diffused Surface Waters in North Carolina[1]

INTRODUCTION

Water that is derived from falling rain or melting snow or that rises in springs and is diffused over the surface of the ground is denominated

ber to exhaust his internal union remedies before seeking relief in court or before an administrative body.
Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 869 (1960).

[37] Section 10(b) of the NLRA forbids issuance of a complaint based on conduct occurring more than six months earlier. 29 U.S.C. § 160(b) (1959).

[1] The courts have generally referred to this distinct class of water as "surface water." It is more correctly identified as "diffused surface water" since technically all water on the face of the earth is surface water. 1 R. CLARK, WATERS AND WATER RIGHTS § 52.1, at 302 (1967). In keeping with the terminology employed