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Labor Law—Judicial Enforcement of Labor Union Fines in State Courts

Two locals of the United Auto Workers, operating under a union security agreement, called economic strikes against the Allis-Chalmers Manufacturing Company after authorization by two thirds of the membership. Several union members refused to participate in the strikes and returned to work. Following settlement of the strikes, the union tried these members before the proper union tribunal on charges of conduct unbecoming a union member and imposed fines ranging from twenty to one hundred dollars. Upon the refusal of several members to pay, the union successfully sued in the state court to enforce the fine. Allis-Chalmers then filed charges with the National Labor Relations Board alleging that the union's action was an unfair labor practice under section 8(b)(1)(A) of the Labor-Management Relation Act in that it restrained or coerced the members in the exercise of their section 7 right to "refrain" from concerted activities. On appeal the Supreme Court held that section 8(b)(1)(A) prohibits neither the imposition of reasonable fines on full union members nor the judicial enforcement of such fines.

The Court, relying heavily upon legislative history, found that section 8(b)(1)(A) was aimed mainly at organizational tactics of unions and that it was not intended to apply to internal union affairs.

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1 The Board dismissed the complaint. 149 N.L.R.B. 67 (1964). A three judge panel of the Seventh Circuit unanimously affirmed the dismissal, 34 U.S.L. Week 2157 (1965) (the decision has been withdrawn and will not appear in the official reports). The Seventh Circuit on rehearing en banc reversed (4 to 3), 358 F.2d 656 (7th Cir. 1966). The Supreme Court reversed the Seventh Circuit in a 5 to 4 decision, 388 U.S. 175 (1967).

2 § 8(b)(1)(A) states "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 157 (§ 7) of this title." The section then adds a proviso, "That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." Labor Management Relations Act § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1964), [hereinafter cited as Taft-Hartley].

3 § 7 states "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 of such activities. . . ." Taft-Hartley § 7, 29 U.S.C. § 157 (1964).

This construction avoided the essential and perplexing problem inherent in all union disciplinary cases—the conflict between the section 8(b)(1)(A) proviso and the member’s section 7 rights.6 The reliability of the legislative history of the section is, at best, limited. Reliance must be placed exclusively upon the Senate debates,6 a notably inferior source of legislative history, due to the fact that section 8(b)(1)(A) was not included in the original Senate bill as it emerged from the Committee on Labor and Public Welfare,7 but was added as an amendment; and since the conference committee adopted the Senate’s version without change.8 The available history is, at most, evidence of the intent of one half of Congress, and that intent is unclear as evidenced by the conflicts in testimony of the various senators regarding the scope of section 8(b)(1)(A). Remarks of Senators Taft9 and Pepper10 indicate a basis from which a reasonable argument can be made establishing that a secondary purpose of section 8(b)(1)(A) was to protect union members from their leaders.11

In light of the brevity and internal conflict of the legislative history argument, the majority sought to bolster its decision by reliance on the section 8(b)(1)(A) proviso12 and pure policy.13

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6 The union’s right to make rules in relation to the acquisition or retention of membership (the § 8(b)(1)(A) proviso) versus the employee’s right to participate in or refrain from concerted activity (§ 7 Rights).
6 P. MISHKIN & C. MORRIS, ON LAW IN COURTS, 404-5 (1965).
8 The report of the committee was unrevealing.
9 “If there is anything clear in the development of labor union history in the past 10 years it is that more and more labor union employees have come to be subject to the orders of labor union leaders. The bill provides for the right of protest against arbitrary powers which have been exercised by some of the labor union leaders.” 93 Cong. Rec. 4023 (1947), cited in 2 Leg. Hist. 1028.
10 “This amendment is an effort to protect the workers against their own leaders, chosen by them under their own constitution and by-laws.” 93 Cong. Rec. 4023 (1947), in 2 Leg. Hist. 1029.
13 “...[S]uch a distinction [between court enforcement and expulsion] would visit upon the member of a strong union a potentially more severe punishment than court enforcement of fines, while impairing the bargaining facility of the weak union by requiring it either to condone misconduct or to deplete its ranks.” N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 192 (1967).
14 “Where the union is weak, and membership therefore of little value, the union faced with further depletion of its ranks may have no real choice except to condone the member’s disobedience. Yet it is just such weak unions
Each of these approaches is open to attacks of varying merit. The Court's argument based on the proviso to section 8(b)(1)(A), which guarantees to unions the right to "prescribe its own rules with respect to the acquisition or retention of membership therein. . ." is valid only when asserted against an attempt to proscribe all fines, rather than only those judicially enforced. Simply stated, the Court's argument is that since Congress allowed a greater coercive means (expulsion), it could not have intended to prohibit a lesser one (fines). The rationale is sound when limited to fines backed by expulsion since they are always less coercive than expulsion due to the fact that the member may opt out rather than pay. But it fails completely when viewed in the context of a weak union judicially enforcing a fine. Obviously the fine is more coercive than expulsion, otherwise the union would not find it necessary to employ the courts to enforce it.

The Court's argument based on public policy—that weak unions, if deprived of the power to judicially enforce fines, will either have to condone wrongdoing or deplete their ranks—is by far its strongest. Either of the above would greatly hamper the union in its statutory obligation to bargain collectively and, as the Court determined, effectively. However, although it may be beneficial to nourish sickly unions at the expense of their members, is not this a policy determination better left to Congress? In fact, a contrary intent may be glossed from the Act in its allowance of free elections, resignation of members, decertification petitions, and prohibition of compulsory membership, absent a collective bargaining agreement to the contrary.

Justice White, who concurred with the Court's decision, implicitly rejected the Court's interpretation of the legislative history of section 8(b)(1)(A) and employed the proviso to reach his

for which the power to execute union decisions taken for the benefit of all employees is most critical to effective discharge of its statutory function."  
Id. at 183-84.

15 Employees have the right to refrain from union 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. Taft-Hartley § 7, 29 U.S.C. § 157 (1964).
18 Mr. Justice White joins the dissenters in their belief that § 8(b)(1)(A) is broader than merely organizational tactics and therefore applies to union discipline.
result. Consequently, a majority of five justices rejected the interpretation of 8(b)(1)(A) which formed the foundation for the Court's decision. Justice White and the four dissenters read 8(b)(1)(A) as extending beyond organizational tactics onto the sphere of internal union discipline. His opinion tenuously accepts the majority’s "greater-lesser" proposition "[that] there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of section 7 rights, nevertheless intended to bar enforcement by another method which may be far less coercive."21

Justice White appears to err along with the majority in crystalizing the issue as one of allowance or prohibition of all fines, thereby making the proviso argument viable. As noted above, this argument fails when applied to judicially enforced fines since they may often be more coercive than expulsion. Justice White's rationale, though faulty, is more conceptually consistent with the balance of the Act than the Court's approach which, carried to its logical conclusion, would allow violence and coercion as long as they were employed in internal affairs of the union rather than in organizational drives. His approach does not foreclose the applicability of 8(b)(1)(A) to non-organizational areas, but merely limits its application in internal union affairs by way of the proviso.

II

In light of the lack of precedent in the area of union discipline and the dirth of legislative background, Allis-Chalmers presented the Court with an opportunity to adopt the "result-orientated"22

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19 Hence, a union may expel to enforce its own internal rules, even though a particular rule limits the § 7 rights of its members and even though expulsion to enforce it would be a clear and serious brand of "coercion" imposed in derogation of those § 7 rights. Such restraint and coercion Congress permitted by adding the proviso to § 8(b)(1)(A).

20 "But the Court seems unanimous in upholding the rule against crossing picket lines during a strike and its enforceability by expulsion from membership. On this premise I think the opinion written for the Court is the more persuasive and sensible construction of the statute and I therefore join it, although I am doubtful about the implications of some of its generalized statements."

21 Id. at 199. (concurring opinion).

ENFORCEMENT OF UNION FINES

approach which has recently gained favor with the Board\textsuperscript{23} and to replace its traditional "means" test. The "result" approach is simply a balancing of all the interests involved and is akin to the nexus or balance of interests approach often applied to constitutional problems. It appears that this approach is the only avenue to a conceptually sound, workable body of labor law.\textsuperscript{24}

Concededly the "nexus" approach is more difficult to administer than the traditional means test but the results should be infinitely more satisfying from both a practical and conceptual viewpoint. It takes into consideration five variables: (1) the permissible objective of the union as related to the furtherance of union goals; (2) the source of union power; (3) the means used to achieve the permissible objective; (4) the degree of invasion upon the member's rights; and (5) the right of the member to be protected from coercion.

The initial inquiry is whether the union's objective is permissible, and if permissible, how closely is it related to the furtherance of work-related collective employee goals.\textsuperscript{25} The source of union power is the next important variable in ascertaining the degree of invasion of members' rights permissible in a given situation. The manner of acquisition of members determines the rights acquired by the union, i.e., the union should accede to a greater number of rights when membership is voluntary rather than forced. An open shop situation exemplifies voluntary surrender while a union security shop may embody both voluntary surrender and forced grant.

The "means" must be viewed from dual perspectives: their effectiveness and exclusiveness in achieving the desired union goal and their effect upon the rights of members—the degree of invasion. The following commonly employed means are scaled in descending order according to degrees of invasion: violence, court enforced fines, expulsion, suspension, and fines enforceable by expulsion. Violence, probably the most effective method of achieving union goals, is always proscribed. The right to be protected is the final variable and will usually be the employee's right to engage in or

\textsuperscript{23} See Id. at 590.

\textsuperscript{24} This is the approach taken by the Labor Board in Local 138, Int'l Union of Operating Engineers, 148 N.L.R.B. 679 (1964), where it protected the right of a union member to file charges against his union with impunity from internal union fines.

\textsuperscript{25} The closeness of the relationship or the necessity determines the value of the permissible objective.
refrain from some concerted activity. Some difficulty arises in attempting to evaluate this right in different contexts. At present, it appears that a member's greatest right is his access to the board, while the right to file a decertification petition is of little value.

**Permissible Objective and Member's Right to be Protected**

The *Allis-Chalmers* problem is perplexing because both the permissible objective and the member's right are of great value. Solidarity (the permissible objective) is crucial during a strike period, but then so is the worker's right to make decisions which have a marked incidence upon his individual well-being: the striker loses his wages and possibly his job. This standoff in interests demands that the means employed be formulated with precision to satisfy best both interests—the greatest effectiveness with the least invasion. A deeper probing of the three remaining variables is necessary to a "result" approach to *Allis-Chalmers.*

**Source of Union Power**

The basic inquiry at this point is the voluntariness of the member's association with the union in a security shop situation. If a man voluntarily joins the union, he is subject to its discipline. But if his membership is a product of the security agreement, the union may not impose its will upon him since a security agreement may not be used for any purpose other than the collection of dues and fees. Theoretically at least, voluntariness will also be a vital factor in the litigation to collect the fines since the union's cause of action has been traditionally based upon the contract theory.

Several aspects of the present security shop situation negate voluntariness. The typical agreement states that membership is required, as does the Taft-Hartley Act. The average worker, not being an avid reader of the federal reporters, will not know that membership has been whittled down to its "financial core." Even if the "financial core" option is spelled out in the contract, most

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32 N.L.R.B. v. General Motors Corp., 373 U.S. 734 (1963), held that the Taft-Hartley union security clause did not permit any more than the collection of union dues and fees.
employees will not be cognizant of this fact. Assuming that the worker has the requisite knowledge, is his decision to accept full membership voluntary in the absence of a valid alternative? The majority of unions assess the same dues and fees upon both the "financial core" and the full member who enjoys all the attendant union benefits. In effect the unions are saying to prospective members, "You must pay X dollars to us every month or lose your job. You may choose limited membership and receive nothing for your money, or full membership and receive a voice and a vote in union decisions, plus any internal union benefits financed out of dues and fees." It would be an extreme test of the elasticity of logic to term the selection of full membership under these conditions a voluntary choice. Board member Leedom captured the essence of the situation in one pithy sentence: "Who can say as a verity that a man forced to buy a cake will not eat it?"

Union constitutional restrictions limiting resignation also taint the voluntariness of the continuing association between union and members. The First Circuit has upheld a United Auto Workers constitutional provision requiring that all resignations be submitted by registered mail to the financial secretary of the member's local within ten days of the end of the fiscal year. Membership can not be genuinely voluntary unless the union offers dissident members a continuing, realistic choice to opt out of the union. The right to refrain from union activities becomes illusory if unions can judicially force obligations upon dissidents thus frozen into membership.

The Court in Allis-Chalmers concerned itself solely with the member's present status—was he a "full member?" Motivation for the membership was considered irrelevant. This approach allows the coercive security agreement to be used for a purpose other than to compel payment of union dues and fees—a clear violation of the section 8(A)(3) proviso. If judicial enforcement is to be

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33 General Motors Corp., 133 N.L.R.B. 451, 463 (1961) (dissenting opinion).
33 Provided further, That no employer shall justify any discrimination against an employee for non-membership 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
permitted, the courts must offer some protection against the misuse of the security clause. The union should bear the burden of proving that the prospective member knew of his choice between financial core and full membership and voluntarily made it. Also the choice should be realistic—financial core members charged only their fair share of the bargaining costs, or charged equal dues with all other members but also receiving equal benefits which could not be divested. The only difference between the two types of membership in the latter situation would be the franchise. The courts should also limit resignation restrictions to the barest minimum reasonable in order to insure the continuing voluntariness of the association.

Degree of Invasion

"Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a reasonable fine." The above statement is a truism but obfuscates the real issue—whether fines should be judicially enforceable. There has been no attempt to require unions to expel rather than fine delinquent members. This choice is, and should be, left to the unions. A fine backed by expulsion can not be more coercive than one enforced by court action. The individual member is in the best possible position to balance, on a personal basis, the benefits of union membership against the amount of the fine, and to choose the less coercive path, be it expulsion or payment of the fine.

Allowing judicial enforcement will force the member into costly and time consuming litigation. Many employee rights will fall by default simply because the cost of litigation is greater than the amount of the fine. Also, the uncertainty of litigation will induce periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . . Taft-Hartley § 8(a)(3) 29 U.S.C. § 158(a)(3) (1964). 37

37 Requiring membership under the security clause and then using that membership to impose court enforced fines upon those who are unwilling to participate in union activities constitutes subversion of § 8(A)(3).

38 The choice between the alternative types of financial core memberships should be left to the unions since they will face the resultant bookkeeping problems.


40 "The very fact that so few cases involve individuals unsupported by factional groups suggests that the lone member's rights go by default, and many lawyers frankly admitted that they would not take a case unless it was backed by a substantial group." Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L.J. 175, 222 (1960).
many members to forego their statutory protections since there is no chance of a double loss—attorney's fees plus fine—if the member accedes and pays the fine.

Since the majority of state courts base their consideration of these fines on the contract theory, their main inquiry is whether the member's action was proscribed in the union constitution or bylaws, and whether there is substantial evidence to support the fine. This appellate approach taken by state courts certainly deprives the disciplined member of the protection he deserves on the fact finding level of the litigation. There is seldom an inquiry into whether the membership (hence the contract) was coercive. This should be a controlling factor in the litigation. Also, judicial enforcement would arm the unions with a great auxiliary power, the power to force a member into submission by the threat of a large fine. How many members whose names appear on the union rolls will be willing to ignore the threat in the hope that they will later be able to convince the Board or the state court that they were not full members or that the fines were unreasonable?

The Necessity of the Means

The rationale behind section 8(A)(3) is that the union should be allowed to contract with the employer to force non-union employees, who are deriving benefits from union representation, to pay their share of the bargaining costs. If unions are limited to enforcement by expulsion, the rationale behind section 8(A)(3) will be frustrated since the expelled employee will no longer have to pay dues and the union will be powerless to affect his job status, while still retaining the duty to represent him equally. Expulsion in the security shop situation puts the disciplined member in a better position than his financial core brethren in that he enjoys all the benefits of a non-full member, i.e., equal representation, with none of the burdens, i.e., payment of his share of the bargaining costs. The effect of this “discipline” upon union solidarity during the

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43 Under §§ 8(A)(3) and 8(b)(2), if a union operating under a union security agreement expels a member for any reason other than failure to pay dues, e.g., failure to pay a disciplinary fine, the union forfeits its right to require that he pay dues as a condition of employment. Taft-Hartley §§ 8(A)(3), 8(b)(2), 29 U.S.C. §§ 158(A)(3), 158(b)(2) (1964).
44 Syres v. Oil Workers Int'l Union, 223 F.2d 739 (5th Cir.), rev’d per curiam, 250 U.S. 892 (1955).
crucial strike period could be catastrophic, especially in the case of a weak union. The proscription of judicial enforcement of union fines would also present a loophole for workers intent upon avoiding their financial obligation to the union. A worker might join the union and then intentionally violate union discipline in order to escape the single obligation the section 8(A)(3) proviso meant to impose upon him: financial support of his bargaining representatives. The union would be forced to tolerate his misbehavior, which very likely would be detrimental to solidarity, or to expel him. Undoubtedly, a member could force expulsion by a continuing calculated course of misconduct.

The evils created by the proscription of judicial enforcement in the security shop situation are not insoluble. They may be neutralized by allowing unions to suspend delinquent members without forfeiting their right to collect dues, or by permitting unions to demote or "expel" delinquent members to financial core status—obligated to pay their share of the bargaining costs. Title I of the Landrum-Griffin Act provides adequate safeguards against arbitrary use of these powers by the unions.

Conclusion

The means of intra-union discipline sanctioned by Allis-Chalmers, especially in the context of a security shop agreement, allow too great a margin for an impermissible degree of invasion of members' rights. The adoption of the proposed judicial safeguards would make it a much closer case—to be determined by the feasibility of the alternative methods of enforcement. The relative strength of unions and members negates the necessity of the addition of this new weapon to the union arsenal which already includes the proviso-secured expulsion sanction along with potent diverse modes of informal ostracism. Proscription of judicial enforcement obviates to a great extent the necessity of inquiry as to the voluntariness of the association since the member may opt out of the union

46 Members of a strong well-established union with good internal benefits would be more likely to pay their fines than expose themselves to loss of those benefits. But a member of a weak union with little or no internal benefits would likely opt for expulsion to avoid the expense of both the fine and future dues. Therefore the weak union would have to either condone wrong doing or suffer the loss of revenue by depleting its ranks.


at no dollar cost to himself. Also, limiting the ultimate union discipline to expulsion provides an internal restraint upon unions to impose only reasonable fines, while at the same time providing them with a real incentive to make themselves more desirable so that members will opt to pay the fines rather than be expelled.

William J. Dockery

Sales—Products Liability—Sales Warranties of the Uniform Commercial Code

The Uniform Commercial Code sales warranties have caused several practical and theoretical problems in determining the appropriate basis of manufacturer liability in defective product cases. The growth of non-fault liability, either in tort or on the sales contract, has been characterized by increasing permissiveness toward consumer recovery against remote manufacturers. This note is addressed to the relation between the Code scheme of recovery and common law non-fault remedies.

The basic Code money-damages remedy for a purchaser of a defective product is an action on the sales contract for breach of the seller's warranty, express or implied. The Code sales warranties correspond roughly to those developed at common law. Section

1 See Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960) [Hereinafter cited as Prosser].
2 See UNIFORM COMMERCIAL CODE § 2-711 for buyer's remedies in general. All citations are made to the 1962 official text of the Uniform Commercial Code. The Code has been adopted in forty-eight states and the District of Columbia.
3 Prosser termed the sales warranty "a freak hybrid born of illicit intercourse of tort and contract." The action for breach of warranty was originally on the case, a tort action, and resembled the action for deceit. Prosser states that it was not until 1778 that an action on a contract for breach of warranty was held to lie at all. However, once the action on the contract was permitted, the defenses to breach of contract, principally lack of privity and limitation of consequential damages, became entrenched in the law.

The warranty concept evolved, first through the food cases, to the point where implied warranties were imposed by operation of the law regardless of the seller's contractual undertaking. Liability was non-fault and in effect tort duties were imposed on sellers. Since MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), removed the privity barrier only with respect to negligence liability, courts invented a variety of devices, such as fictitious agency or warranties running with the product, to circumvent the privity rules. See Prosser at 1124. However, the defense of lack of privity to the breach of warranty action remains viable in many jurisdictions, and, further, the warranty has retained elements of both tort and